ORAL ARGUMENT SCHEDULED SEPTEMBER 30, 2013, 9:30 AM

No. 13-5162

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

WENDY E. WAGNER, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court

for the District of Columbia

BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS AND CATO INSTITUTE IN SUPPORT OF APPELLANTS AND URGING REVERSAL

ALLEN DICKERSON
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Suite 201
Alexandria, Virginia 22314
(703) 894-6800

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 218-4600

July 10, 2013

Counsel for Amici Curiae

No. 13-5162

CERTIFICATE AS TO PARTIES AND RULINGS

(A) Parties & *Amici*: All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant.

(B) Rulings Under Review: References to the rulings at issue appear in the Brief for Appellant.

(C) Related Cases: This case was before this Court as No. 12-5365. On May 31, 2013, this Court vacated the rulings below and remanded the case for certification under 2 U.S.C. § 437h. JA 243-262, 2013 U.S. App. LEXIS 10963.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Center for Competitive Politics, a nonprofit corporation organized under the laws of Virginia, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

Amicus curiae Cato Institute, a nonprofit corporation organized under the laws of Kansas, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

**Cases and authorities chiefly relied upon are indicated with an asterisk.*

GLOSSARY

BCRA Bipartisan Campaign Reform Act

FEC Federal Election Commission

FECA Federal Election Campaign Act

PAC Political Action Committee

INTEREST OF *AMICI CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley Smith, *amicus curiae* Center for Competitive Politics ("CCP") is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and state and federal litigation. CCP has participated in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*).

Amicus curiae Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. This case is of central concern to Cato because it addresses the further

[1] No person other than *amici* contributed money intended to fund the preparation or submission of this brief, which was authored solely by counsel for *amici*. Pursuant to Rule 29(a) of this Court, all parties have consented to the filing of this brief.

collapse of constitutional protections for political activity, which lies at the very heart of the First Amendment.

SUMMARY OF ARGUMENT

Since the landmark case of *Buckley v. Valeo*, the Supreme Court has recognized that monetary limits on individual contributions implicate fundamental constitutional protections of both association and speech. This case presents a starker constitutional question. Rather than merely limiting contributions, 2 U.S.C. § 441c entirely bans contributions by a class of individual citizens. The standard of review in such a situation is a question of first impression. But in a comparable situation, the Supreme Court invalidated a provision of the Bipartisan Campaign Reform Act ("BCRA") banning political contributions by minors. Consequently, while no decision specifically reaches the question, *amici* submit that strict scrutiny is appropriate in this novel context.

But even if strict scrutiny does not apply, a statute impinging on fundamental rights must be carefully tailored to a sufficiently important governmental interest, which § 441c is not. Indeed, the Supreme Court has never upheld a ban like 2 U.S.C. § 441c. And even when upholding limitations on individual contributions, the Supreme Court has required the government to have established that the law is appropriately tailored. The FEC has failed to do so here.

This lack of tailoring—and the statute's resulting overbreadth—is unsurprising where, as here, Congress did not meaningfully exercise legislative discretion in crafting the contribution ban. Courts are generally reluctant to

override the will of Congress in fixing a perceived problem, but Congress may not choose an unconstitutional remedy to do so, as it has in the case of § 441c.

For the foregoing reasons, this case can and should be decided in favor of Appellants on the basis of familiar First Amendment analysis.

ARGUMENT

I. Strict scrutiny is appropriate in the context of an absolute ban on political contributions by individuals.

This case presents an unusual question. While suits challenging *limits* on political contributions are familiar,[2] the statute at issue here completely prohibits a broad group of private, individual citizens from making *any* contribution. Such sweeping prohibitions are seldom enacted, and courts have rarely assessed their constitutionality. Nevertheless, the limited pronouncements made by the Supreme Court on the subject suggest that strict scrutiny is the appropriate standard of review in this instance.

A. Since *Buckley v. Valeo*, the United States Supreme Court has recognized that limits on individual contributions impinge upon fundamental constitutional rights.

In the seminal case of *Buckley v. Valeo*, the Supreme Court reviewed the individual contribution limits imposed by the Federal Election Campaign Act (FECA). The Court noted that "the primary First Amendment problem raised by the Act's contributions limitations…[was the law's] restriction of one aspect of the contributor's freedom of political association." *Buckley*, 424 U.S. 1, 24 (1976). But the Court noted the importance of that right, stating that "the right of association is

[2] *See, e.g., Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating state's contribution limits as impermissibly low)*; Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (upholding state limitations on contributions to state candidates); *Davis v. FEC*, 554 U.S. 724 (2008) (invalidating asymmetrical contribution limits triggered by candidate spending); *Lair v. Bullock*, 697 F.3d 1200 (9th Cir. 2012) (considering constitutionality of state limits on campaign contributions).

a 'basic constitutional freedom,' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'"[3] *Buckley*, 424 U.S. at 25 (citing *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)).

While the *Buckley* Court upheld FECA's imposition of a $1,000-per-individual limit on contributions to candidates, the Court carefully reviewed the contribution limit under heightened scrutiny. *Id.* at 25. The Court demanded that "the State demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment" of the basic constitutional freedom threatened by the law. *Id*. The Court only upheld the individual limits after determining that the threat of corruption, or the appearance of corruption, stemming from large contributions might damage "the integrity of our system of representative democracy" itself, and the limit "focuse[d] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption…[were] identified."[4] *Id.* at 26-27, 28 (emphasis supplied).

[3] The Court also noted that contributions have a speech element. *Buckley v. Valeo*, 424 U.S. at 20-21. While the Court noted that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication," an outright ban on such speech hardly qualifies as "marginal." *Id.*

[4] The remaining limits—from PACs to candidates and an overall, aggregate limit—were upheld because they prevented the evasion of the $1,000 individual limit. *Buckley*, 424 U.S. at 35-36, 38.

This case presents a starker constitutional question than that present in *Buckley*. For § 441c is not simply a limit, but rather a complete ban on individual contributions.

B. This case is novel because while there are judicial decisions discussing limitations on individual contributions, and cases discussing bans on corporate expenditures, decisions that address *bans* on *individual contributions* are rare.

Both individuals and groups, including incorporated entities, have challenged restrictions on the right to make political contributions. The majority of these cases address one of two situations. One line of cases concerns individual contribution limits, such as *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981), which upheld a $5,000 limit on individual contributions to multicandidate committees. Other cases in this vein include *Randall v. Sorrell* which, in invalidating Vermont's individual contribution limits as impermissibly low, recognized "that contribution limits might sometimes work more harm to protected First Amendment interests than their anti-corruption objectives [can] justify." 548 U.S. 230, 247-48 (2006).

Though corporate contributions to candidates have long been illegal, a second species of campaign finance case addresses bans on corporate *expenditures*. Cases considering such bans include *Citizens United v. FEC*, 558 U.S. 310 (2010), which invalidated a ban on corporate independent expenditures, and *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986), which held that—as applied to a nonprofit

advocacy corporation—FECA's ban on independent expenditures was unconstitutional.

The statute at issue here falls outside the bounds of either of these lines of cases. Indeed, § 441c is not a *Buckley*-style limit on the individual right to contribute, it is a wholesale prohibition on the exercise of that right. But most of the precedent addressing bans does not resolve the question here, because those cases are distinguishable on two important grounds: first, they address expenditures, rather than contributions; and second, the entities at issue in those cases were not individual citizens.

In fact, the only Supreme Court case that directly addressed a ban on individual contributions supports *amici*'s contention that strict scrutiny is appropriate for laws that eliminate individual contribution rights.

C. In its only assessment of an absolute ban on individual political contributions, the Supreme Court invalidated the ban and did not foreclose the possibility that strict scrutiny is appropriate in such contexts.

Amici were able to identify just one case where the Supreme Court considered a complete prohibition on political contributions by a large group of individual citizens—*McConnell v. FEC*, 540 U.S. 93 (2003). In that case, the Court invalidated BCRA § 318, which banned political contributions by minors. The *McConnell* Court reiterated what *Buckley* and its progeny had already established—that heightened scrutiny applies to contribution *limits*—noting:

"[l]imitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association. When the Government burdens the right to contribute, we apply heightened scrutiny." *Id*. at 231-232.

The Court went on to invalidate § 318's ban because, "[m]inors enjoy the protection of the First Amendment…The Government asserts that the provision protects against corruption by conduit; that is, donations by parents through their minor children to circumvent contribution limits applicable to the parents. But the Government offers scant evidence of this form of evasion." *Id.* at 232.[5]

Satisfied that the ban on minor contributions failed the heightened scrutiny applicable to *restrictions* on individual contribution rights, the *McConnell* Court did not reach the question of whether a higher level of scrutiny is appropriate for laws that completely ban these contributions. After finding "scant evidence" supporting the ban, the Court concluded that "[a]bsent a more convincing case of the claimed evil, [the corruption by conduit] interest is simply too attenuated for § 318 to withstand heightened scrutiny." *Id.*

[5] Upon independent review of the relevant legislative history, *amici* located roughly two and a half Congressional Record pages of information entered into the record by Senator John McCain supporting the view that such "corruption by conduit" was taking place. 148 Cong. Rec. S. 2146-2148.

D. Strict scrutiny should apply to laws banning individual contributions.

Despite the lack of a directly applicable judicial pronouncement, prior court decisions indicate that strict scrutiny should be applied in this context. Indeed, the Supreme Court has *never* upheld a complete ban on political contributions by a certain type of individual, law-abiding American citizen.[6] And even when upholding *limits* on the amounts individuals may contribute, the Court has emphasized that such limits must be carefully drawn to protect the safeguards of the First Amendment.

Indeed, in *Buckley*, the Court upheld the individual contribution limits because they were appropriately tailored to prevent actual or apparent corruption, while still affording some level of protection to speech and association rights. 424 U.S. at 28-29. By contrast, FECA's expenditure limitations were not so carefully drawn, and consequently, weighed too heavily against political expression. *Id*. at 39. As a result, the *Buckley* Court was compelled to construe FECA in such a way as to render it consistent with First Amendment protections. *Id*. at 41-42.

[6] The Supreme Court did recently uphold a complete ban on *non-citizen* contributions. *Bluman v. FEC*, 2012 U.S. LEXIS 310 (Jan. 9, 2012); *summarily aff'g Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011). But, as that case noted, while "the First Amendment issues raised by campaign finance laws…[are] the subject of great debates,..[t]his case does not implicate those debates. Rather, this case raises a preliminary and foundational question about the definition of the American political community, and, in particular, the role of foreign citizens in the U.S. electoral process." *Bluman*, 800 F. Supp. 2d at 286.

In this case, *amici* urge this Court to consider both the extraordinary nature of § 441c's wholesale ban on individual contributions, and weigh the severity of that restriction against the sanctity of the First Amendment freedoms that it implicates. *Amici* submit that strict scrutiny is the only way to adequately balance these interests.

II. Regardless of the applicable level of scrutiny, § 441c is not adequately tailored to the asserted governmental interest, and is consequently constitutionally overbroad.

A. The requirement that limitations on First Amendment liberties be carefully tailored applies under both strict scrutiny and less rigorous review, and in both campaign finance and other contexts.

Even if this Court does not apply strict scrutiny to § 441c, no burden on political speech can survive constitutional analysis if it is not tailored to the asserted governmental interest. A valid First Amendment challenge to contribution limits, for example, must raise an "issue about the adequacy of [a]…statute's tailoring to serve its purposes." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 395 (2000). And consistent with this requirement, the *Randall* Court's invalidation of Vermont's contribution limits was based on its finding that the state had "fail[ed] to satisfy the First Amendment's requirement of careful tailoring." 548 U.S. at 237.

This tailoring requirement persists in areas of First Amendment jurisprudence outside the campaign finance context. In *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002), for example, the

Supreme Court invalidated a prohibition on religious leafleting without a permit, noting, "[t]he breadth and unprecedented nature of this regulation does not alone render the ordinance invalid. Also central to our conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests." *See also Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2283 (2012) (reiterating the "requirement that [union] fee-collection procedures be carefully tailored to minimize impingement on First Amendment rights.").

Indeed, proper tailoring is crucial to the protection of First Amendment liberties. Insufficiently tailored legislation may ban too much activity, thereby unconstitutionally chilling speech, or it may burden the right to associate—a particular worry in the political context. *See, e.g.*, *Buckley*, 424 U.S. at 14 ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs…of course includ[ing] discussions of candidates….") (internal citation omitted); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (discussing tailoring of corporate and labor union contribution ban).

B. An overly broad statute necessarily fails this mandatory tailoring analysis.

Regardless of the level of scrutiny that applies, a statute fails this mandatory tailoring analysis if it is overly broad. Indeed, "[t]he overbreadth doctrine prohibits

the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002). The purpose of the overbreadth doctrine is to "strike a balance between competing social costs." *United States v. Williams*, 553 U.S. 285, 292 (2008), and it is premised on the idea that "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech." *Id.*

It is unsurprising, then, that overbreadth analysis has been dispositive in several Supreme Court decisions invalidating campaign finance laws for lack of appropriate tailoring. Indeed, overbreadth was central to the *McConnell* Court's reasoning in striking down BCRA § 318. As the Court put it, "[e]ven assuming, *arguendo*, the Government advances an important interest, the [ban on minor contributions] is overinclusive. The States have adopted a variety of more tailored approaches—*e.g.*, counting contributions by minors against the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children. Without deciding whether any of these alternatives is sufficiently tailored, we hold that the provision here sweeps too broadly." 540 U.S. at 232.

Also engaging in overbreadth analysis, *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("*NCPAC*") invalidated a limit on

political committee expenditures spent to elect candidates who had accepted public financing. The Court reasoned, "[e]ven were we to determine that the large pooling of financial resources by [plaintiff independent political committees] did pose a potential for corruption or the appearance of corruption, [the challenged statute] is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate." The Court went on to distinguish that statute from limitations that could conceivably survive a tailoring analysis: "[w]e are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *Id.* at 501 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

Section 441c suffers from similarly fatal overbreadth. Even assuming that there is a valid anticorruption interest served by limiting the influence of government contractors in campaign finance, § 441c is *in no way limited* or tailored to restrict only the contributions of parties that present such a risk. Instead, like the ban on minor contributions invalidated in *McConnell*, § 441c "sweeps too broadly." 540 U.S. at 232. And this is particularly troubling here, where the challenged statute goes beyond the "wholesale restriction of clearly protected

conduct" invalidated for overbreadth in *NCPAC*, and reaches the level of an absolute *ban* on private, individual expression. *NCPAC*, 470 U.S. at 501.

III. Deference to Congress is inappropriate here, because § 441c was not the result of a meaningful exercise of legislative discretion.

The Supreme Court has forsworn deferring to Congress at the expense of basic constitutional protections. Indeed, "[w]hen Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy." *Citizens United*, 558 U.S. at 361.

This is particularly so where, as here, there is ample reason to believe a challenged law was not the result of an actual exercise of Congressional discretion. The available records lacks *any* indication that § 441c was the result of considered legislative judgment. Where this is the case, deference to Congress is inconsistent with the required rigorous review of a statute impinging upon First Amendment rights.

This is so even if this court applies heightened review falling short of strict scrutiny. In *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 301 (1981), Justice Marshall explained the requirements of heighted scrutiny. In order for a measure to survive, "the record…[must] disclose [] sufficient evidence to justify the conclusion that" contributions in excess of the limits at issue would "undermine[] the confidence of the citizenry in government." (Marshall, J.,

concurring) (internal citations and quotations omitted). *Amici* submit that sufficient evidence is wanting here.

The District Court's Memorandum Opinion relies heavily upon a 1940 corruption scandal that motivated an early iteration of the Hatch Act. Mem. Op. at 11. The District Court also relies heavily on one Second Circuit case, *Green Party of Conn. v. Garfield*, 616 F. 3d 189 (2d Cir. 2010), which found that a state legislature's concern about a highly-publicized, ongoing corruption scandal was sufficient to justify deference to their conclusion that a ban on contractor contributions would combat the appearance of corruption. The District Court considered no evidence of any specific scandal, other than the one apparently contemplated in 1940. Moreover, it considered no evidence that Congress intended to reach individuals like Wendy Wagner with its enactment of § 441c.

In an independent review of the relevant legislative history, *amici* located no evidence that Congress even mentioned the possibility that individual government contractors pose a threat of actual or apparent corruption. Indeed, searches of the Senate cloture debate leading up to BCRA's enactment returned no results dealing with contractors or contributions by government employees. And the only

mentions of government employee contributions in the House did not contemplate individual contractors like the appellants here.[7]

Thus, no matter the level of constitutional scrutiny this Court applies, deference to the legislature is inappropriate in this case. Neither the district court nor Congress highlighted any credible evidence that corruption might result from the political contributions appellants wish to make. Nor did the FEC provide evidence supporting the Congress's judgment, or even evidence suggesting that such a judgment was made with regard to individual contractors. On this record, no sufficient scrutiny, whether strict or merely heightened, has been applied.

[7] *Amici* searched the congressional record leading up to the enactment of BCRA for variances of "contractor," "employee," "worker," and "Hatch Act." These searches returned three partially relevant results. Rep. Roger Wicker mentioned in passing—and in fact, erroneously—that active-duty military could not contribute when he served. 148 Cong. Rec. H. 449. Rep. Jo Ann Emerson introduced a failed amendment which would allow Federal employees to raise soft money at state or local events only. 148 Cong. Rec. H. 444. Rep. Christopher Shays explained his preference for simply leaving Federal employees out of the soft money raising process altogether. 148 Cong. Rec. H. 446.

CONCLUSION

This case presents the peculiar question of whether a statute may prohibit private individual citizens from making *any* political contribution. For the foregoing reasons, *amici* Center for Competitive Politics and Cato Institute urge this Court to reverse the district court, and answer this question in the negative.

Respectfully Submitted,

Allen Dickerson
Counsel of Record
(Bar No. 54137)
Center for Competitive Politics
124 S. West St., Ste 201
Alexandria, Virginia 22314
(703) 894-6800

Ilya Shapiro
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 218-4600

Counsel for *Amici Curiae*

Dated: July 10, 2013

No. 13-5162

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 3,603 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 2010 in Times New Roman 14 point font.

/s/ Allen Dickerson
Allen Dickerson
Center for Competitive Politics
124 S. West St., Ste 201
Alexandria, Virginia 22314
(703) 894-6800

Dated: July 10, 2013

No. 13-5162

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2013, I caused the foregoing Brief of *Amici Curiae* Center for Competitive Politics and Cato Institute to be filed electronically using this Court's CM/ECF System and sent via the ECF Electronic notification system to all CM/ECF registered counsel of record:

Counsel for Appellant Wagner, et al.:

Alan B. Morrison
George Washington University
2000 H Street, NW
Washington, DC 20052
(202) 994-7120
abmorrison@law.gmu.edu

Arthur B. Spitzer
ACLU of the National Capital Area
4301 Connecticut Ave. NW, Ste. 434
Washington, DC 20008
(202) 457-0800
artspitzer@gmail.com

Counsel for Appellee Federal Election Commission:

Seth Nesin
Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 694-1528
snesin@fec.gov

Counsel for *Amici Curiae*:

J. Gerald Hebert
Tara Malloy
Paul S. Ryan
Megan McAllen
The Campaign Legal Center
215 E Street, NE
Washington, DC 2002

(202) 736-2200

Courtesy copies of the Brief of *Amici Curiae* Center for Competitive Politics and Cato Institute were sent to the counsel via first class mail to counsel for appellant, counsel for appellee, and counsel for *amici curiae*.

I further certify that I also caused the requisite number of paper copies of the brief to be filed with the Clerk of this Court on the 10th day of July, 2013.

/s/ Allen Dickerson
Allen Dickerson
Center for Competitive Politics
124 S. West St., Ste 201
Alexandria, Virginia 22314
(703) 894-6800