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*Congress shall make no law...*

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## Litigation Backgrounder

# *Holmes v. FEC*

**The Issue in Brief**

Should an incumbent lawmaker be allowed to spend up to twice the money for the November election from a single contributor than his challenger can? It may seem outlandish, but thanks to a quirk in our federal campaign finance laws, such a mismatch is common. A federal lawsuit filed in a case known as *Holmes v. Federal Election Commission* seeks to eliminate this incumbency protection provision.

Most Americans are familiar with primary and general elections. During the primary season, candidates compete against one another to obtain the nomination of a political party. The general election features a campaign between the party nominees, and occasionally, independent candidates.

Our campaign finance system sets contribution limits based on each election. Federal candidates for office are permitted to raise $2,600 per election. That is, a candidate may raise $2,600 from a single contributor for the primary election, and another $2,600 for the general election.

But all too often, incumbent officeholders do not have a serious primary challenger. Eric Cantor's defeat in the Republican primary by challenger David Brat was noteworthy precisely because of how rare it is for an incumbent officeholder to be successfully opposed by a member of his or her own party.

Having no significant primary challenge or even no opponent does not stop incumbents from raising money for the primary election, however. Money raised for the primary may be spent during the general election. Indeed candidates are allowed to raise $5,200 in one contribution, but the amount raised for a general election may only be spent on the general election. The amount contributed for the primary election may be spent on either the primary or the general election. As a practical matter, a candidate without a primary opponent (most often an incumbent) often spends the entire amount to support his general election campaign.

A victorious challenger, on the other hand, will usually have to defeat opponents in the primary election, as well as knock off an incumbent politician in the general election. As a result, challengers often burn through all their primary election contributions in an effort to seek a party's nomination—leaving them with only general election money against an incumbent flush with cash from contributions of up to $5,200 per donor for both the non-existent or non-competitive primary and competitive general elections. Yet

the day after the primary, the challenger is hamstrung to raising just $2,600 from each new donor, making it more difficult to mount an effective challenge in the general election.

**Facts of the Case**

Laura Holmes and Paul Jost believe this is unconstitutional. Mr. Jost and Mrs. Holmes are a married couple from Florida, each of whom wishes to donate the full $5,200 allowed to be contributed to a candidate *after* the primary election.

Mrs. Holmes wishes to support Carl DeMaio, a challenger seeking to unseat Congressman Scott Peters of California. Congressman Peters was unopposed by any member of his party in California's direct primary election. Her husband, Mr. Jost, wishes to contribute to the campaign of Mariannette Miller-Meeks, who is challenging Congressman David Loebsack of Iowa. Congressman Loebsack had no primary opponent on the ballot.

Both Mr. DeMaio and Dr. Miller-Meeks have successfully won nomination to the general election, each winning a spot on the November ballot after a hotly contested primary. Mrs. Holmes and Mr. Jost seek to provide them with the same level of general election financial support that their incumbent opponents have obtained from other contributors.

*The First Amendment and Free Association*

Although most Americans discuss campaign finance laws in the context of "free speech", limits on the amount of money that anyone can contribute to a candidate for office largely impact a different First Amendment right—the freedom of association. The freedom of association protects the right of individuals to get together and pool their resources for a variety of causes: Parent-Teacher Associations, Elks Clubs, and, yes, pooling money together to support a candidate for Congress.

In this year's Supreme Court decision in *McCutcheon v. FEC*, the Supreme Court reiterated its longstanding holdings that the freedom to associate could only be impaired by contribution limits designed to fight either *quid pro quo* arrangements between legislators and contributors, or arrangements which might give rise to the appearance of such untowardness.

But the bifurcation between primary and general elections is entirely artificial. If a candidate can receive a $5,200 donation up to the day of a primary, how could that amount suddenly pose a danger of corruption the day *after* the primary? The contribution limit also varies by state during the year, as states hold primaries between March and September.

Many individuals give to incumbent legislators, such as Scott Peters and David Loebsack, understanding that they have no serious primary challenge. The *McCutcheon* Court recognized as much, noting that "Congress's selection of a $5,200 base limit indicates its

belief that contributions of that amount or less do not create a cognizable risk of corruption."[1]

If associating with a Congressman via $5,200 donation in January—before a primary—does not risk corruption, then it cannot be constitutional to infringe upon that associational freedom if that donor chooses to give in July—after a primary.

*The Fifth Amendment and Equal Protection*

The Fifth Amendment guarantees citizens the equal protection of federal laws. In this case, the Fifth Amendment is being violated, because the bifurcated election scheme provides preferential treatment of incumbent lawmakers.

While the Supreme Court has never issued an opinion dealing with contribution limits and the Fifth Amendment, the Tenth Circuit Court of Appeals recently weighed in on a substantially similar question in *Riddle v. Hickenlooper*.[2] The Tenth Circuit reviewed a Colorado law that allowed candidates to receive money for a primary election and spend it on the general election, or *vice versa*—but did not extend this protection to third party, independent, or write-in candidates for office.

The Tenth Circuit determined that this regime unconstitutionally "create[d] a basic favoritism between candidates vying for the same office….[and these] different contribution limits for candidates running against each other…have little to do with fighting corruption."[3] The Tenth Circuit struck down the law on equal protection grounds.

Functionally, the federal system is the same as Colorado's in *Riddle.* The incumbent candidate can use primary election contributions to run advertisements promoting his campaign or attacking the leading opposition party candidate in the general election. But the opposing party candidate—if he was locked in a primary contest before winning the nomination—enjoys no such luxury and can't go back in time to raise more "primary election" $2,600 donations.

This artificial distinction is made worse by the fact that incumbents may begin raising money for the 2014 election immediately after the November 2012 election—or, in the case of a senate race, immediately after the November 2008 election—well before the time the vast majority of challengers have declared their candidacy for the 2014 election. Thus, contributors to some challengers are permitted to associate over a longer time and to a greater extent than others, denying equal protection of the campaign finance laws.

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[1] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (Roberts, C.J., plurality op.).
[2] 742 F.3d 922, 924 (10th Cir. 2014).
[3] *Riddle*, 742 F.2d at 929-930.

**‘Those Who Govern…’**

Campaign finance laws are, by necessity, written by the same politicians who are regulated by those laws. The possibility that Congress might, wittingly or unwittingly, draft laws which serve their own interests must not be discounted. That appears to be exactly what has happened here. Congress has fashioned a contribution limit that clearly benefits incumbents.

Seven years ago, the U.S. Supreme Court heard a challenge to a different federal contribution law, the so-called “Millionaire’s Amendment.” This provision allowed incumbents challenged by a self-financed opponent to raise money at three times the rate of other candidates. The intent of the law was clear—to protect vulnerable incumbents. Fortunately, in the 2007 case of *Davis v. FEC*, the Supreme Court struck the law down on First Amendment grounds.[4]

As Chief Justice John Roberts observed in his opinion in *McCutcheon*, campaign finance rules inevitably and sometimes “impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern.”[5]

Mr. Jost and Mrs. Holmes wholeheartedly agree.

**About the Center for Competitive Politics**

The Center for Competitive Politics is one of the nation’s premier centers of public interest litigation. It is the only public interest organization with in-house litigation staff solely focused on the defense of First Amendment rights to free political speech, assembly and petition.

CCP was co-counsel in *SpeechNow.org v. Federal Election Commission*, which held that there can be no limits on contributions to independent expenditure committees. This case created what is now known as Super PACs.

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[4] *Davis v. FEC*, 554 U.S. 724 (2008).
[5] *McCutcheon*, 134 S. Ct. at 1441-1442 (emphasis in orginal).