UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA HOLMES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 14-1243 (RMC) PLAINTIFFS' OBJECTIONS TO DEFENDANT'S FACTS SUBMITTED FOR CERTIFICATION

PLAINTIFFS' RESPONSES AND OBJECTIONS TO DEFENDANT FEDERAL ELECTION COMMISSION'S PROPOSED FINDINGS OF FACT/STATEMENT OF MATERIAL FACTS AND CONSTITUTIONAL QUESTIONS

Plaintiffs submit these responses and objections to the proposed facts and constitutional questions submitted by Defendant Federal Election Commission ("FEC" or the "Commission") on March 13th, 2015. FEC Proposed Facts (Dkt. 27) at 1. In its submission, the Commission maintains that its proposed facts are "necessary" for the full "merits review of plaintiffs' constitutional questions." [1] *Id.* The FEC also has filed several exhibits in support of its 88 Proposed Facts.

[1] The FEC maintains that this case is unworthy of certification, and therefore indicates that its proposed facts may be treated as "the Commission's statement of material facts as to which there is no genuine dispute" under this Court's Rule 7(h)(i). As explained in their accompanying brief, Plaintiffs do not believe this case merits dismissal, nor—under the procedures forth in Section 30110—that this Court has jurisdiction to enter summary judgment in favor of either party.

This Court "must develop a record for appellate review by making findings of fact." *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013). But the scope of that record should be modest—this Court ought only "make findings of fact that will allow the Court of Appeals to answer the constitutional questions [it] certif[ies]." *SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 at 2 (D.D.C. Sept. 28, 2009), *certified question answered*, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*); *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (*en banc*) (under § 30110, district court must merely "[t]ake whatever may be *necessary* in the form of evidence") (emphasis supplied).

Furthermore, proposed finding of fact must be supported by admissible evidence. *See, e.g. Evans v. Williams*, 2006 U.S. Dist. LEXIS 61329 at 8 (D.D.C. Aug. 30, 2006) (when considering objections to proposed findings of fact, "[t]he crucial question is whether each proposed finding of fact is based on admissible evidence"); *see also Mariani v. United States*, 80 F. Supp. 2d 352, 356 (M.D. Pa. 1999) (applying federal rules of evidence to proposed findings of fact in the § 30110 context).[2] These findings may be "over and above submissions that may

[2] The FEC claims that "Plaintiffs have not verified the factual allegations in their complaint, technically not even for one paragraph for which they responded to an interrogatory asking them to do so[,] because they failed to manually sign those verifications." FEC Proposed Facts at 2, n. 2. This is untrue—Plaintiffs did manually sign affidavits attesting to the relevant factual allegations in their complaint. (Dkt. 6-2, 6-3, Affidavits of Laura Holmes and Paul Jost). Moreover, as to their response to the FEC's interrogatories seeking to "[v]erify the statements

suitably be handled through judicial notice," but only "to the extent [submissions are] not controverted in material and substantial degree." *Id*. Nevertheless, this Court need not certify facts other than those "needed to answer the question" or which 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*, 2009 U.S. Dist. LEXIS 89011 at 3.

General Objections

Plaintiffs' objections are detailed below, but largely relate to the relevance of the Commission's substantial proposed record.[3]

Plaintiffs' case, as discussed in the brief accompanying this filing and in Plaintiffs' previous briefing, is a narrow challenge to the bifurcation of the federal limits on contributions from individuals to candidates in the circumstances faced by Plaintiffs. In particular, both wished to contribute $5,200 to candidates *after* the

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about YOU in paragraph 8 of the complaint," statements Plaintiffs had already manually verified under penalty of perjury, Plaintiffs signed their interrogatories electronically through counsel. Under this Court's scheduling order, the Commission had five days to object to this practice and did not do so. However, while unnecessary, Plaintiffs nevertheless attach, as Exhibits 1 and 2 to their Reply Brief, affidavits verifying their intention to contribute to candidates in general elections going forward.

[3] Without conceding any of the objections listed *infra*, Plaintiffs also note that the FEC seeks findings of fact containing conclusory and argumentative phrases that are both irrelevant and inappropriate for certification. Plaintiffs object to these findings of "fact."

primary election concluded, and in races where no runoff or special election was scheduled to occur. Nevertheless, the FEC seeks to introduce hundreds of pages of irrelevant documents relating to special elections, run-off elections, and campaigns that collected contributions for the general election but did not survive a primary. Plaintiffs object to this effort to expand the scope of Plaintiffs' case to account for types of contributions not at issue here.

Similarly, the FEC notes other contributions Plaintiffs have made in the past. These are irrelevant to Plaintiffs' claims and will provide no benefit to the Court of Appeals when it considers this matter. That Defendant offers these contributions as mere illustrations, while appearing to concede that they differ from the conduct at issue in this case, merely underscores their lack of utility. *E.g.* FEC Br. Opposing Certification at 24 (discussing contributions Plaintiffs made to Marshall Sanford's Congressional campaigns).

I. THE PARTIES

1. Plaintiffs Laura Holmes and Paul Jost are a married couple, residing in Miami, Florida. Certification Order, 2014 WL 6190937, at *2; Compl. ¶ 8; Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 8); *id.* Exh. 2 (Jost Interrog. Resp. ¶ 8); *id*. Exh. 2 (Jost Interrog. Resp. ¶ 8).

Response: Uncontested.

2. Defendant FEC is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-57), and other statutes. The Commission is empowered to formulate policy with respect to FECA, *id.* § 30106(b)(1) (§ 437c(b)(1)); to make, amend, and repeal such rules and regulations necessary to carry out FECA, *id.* §§ 30107(a)(8), 30111(a)(8), 30111(d) (§§ 437d(a)(8), 438(a)(8), 438(d)); and to civilly enforce FECA and the Commission's regulations, *id.* §§ 30106(b)(1), 30109(a)(6) (§§ 437c(b)(1), 437g(a)(6)).

Response: Contested. Defendant's claim that it has "exclusive jurisdiction over the…interpretation" of the Federal Election Campaign Act ("FECA") may be read as denying the judicial branch's similar authority. Plaintiffs do not otherwise object.

II. REGULATORY FRAMEWORK

A. Statutory Contribution Limits

3. Contribution limits have been one of the principal tools for preventing political corruption in this country for nearly seventy-five years. In 1939, Senator Carl Hatch introduced, and Congress passed, S. 1871, officially titled "An Act to Prevent Pernicious Political Activities" and commonly referred to as the Hatch Act. S. Rep. No. 101-165, at *18 (1939); *U.S. Civil Serv. Comm'n v.*

Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 560 (1973); 84 Cong. Rec. 9597-9600 (1939). Congress established individual contribution limits in the 1940 amendments to the Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940). That legislation prohibited "any person, directly or indirectly" from making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to any candidate for federal office. *Id.* § 13(a), 54 Stat. 770.

Response: Contested. Plaintiffs respectfully submit that Defendant's Third Proposed Fact is not a material fact. Plaintiffs further object as Defendant's Third Proposed Fact is irrelevant, given that Plaintiffs do not challenge the constitutionality of contribution limits as a whole, merely their application in a particular context. Moreover, Defendant provides no foundation for the statement that contribution limits "have been one of the principal tools for preventing political corruption in this country for nearly seventy-five years," a phrase that is, in any event, both argumentative and, to the extent it imports the general anti-corruption interest articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny, including *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), a legal conclusion.

4. By 1971, when Congress began debating the initial enactment of FECA, the Hatch Act's $5,000 per-calendar-year individual contribution limit was

being "routinely circumvented." 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug).

Response: Contested. Plaintiffs respectfully object to Defendant's Fourth Proposed Fact. It is irrelevant; Plaintiffs are not challenging the constitutionality of contribution limits generally, or the Hatch Act specifically. The proposed fact is also derived from inadmissible hearsay or improper expert opinion. Plaintiffs further object as the term "circumvented" is a term of art and the proposed fact consequently states a legal conclusion. In that vein, the Supreme Court has specifically determined that "statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided." *McCutcheon*, 134 S. Ct. at 1146.

5. A 1974 congressional report identified multiple instances of such circumvention. For example, the dairy industry had avoided then-existing reporting requirements by dividing a $2,000,000 contribution to President Nixon among hundreds of committees in different States, "which could then hold the money for the President's reelection campaign." Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. 615 (1974) ("*Final Report*"). Shortly thereafter, President Nixon "circumvented and interfered with" the "legitimate functions of the Agriculture Department" by reversing a

decision unfavorable to the dairy industry, and Attorney General John Mitchell (who was also President Nixon's campaign manager) halted a grand-jury investigation of the milk producers' association. *Id.* at 701, 1184, 1205, 1209; *see* Richard Reeves, *President Nixon: Alone in the White House* 309 (2001) (noting the Secretary of Agriculture's estimate that President Nixon's actions cost the government "about $100 million"). On another occasion, a presidential aide promised an ambassadorship to a particular individual in return for "a $100,000 contribution, which was to be split between 1970 Republican senatorial candidates designated by the White House and [President] Nixon's 1972 campaign." *Final Report* at 492. That arrangement was not unique. *Id.* at 501 (describing a similar arrangement with someone else); *see id.* at 493-94 (listing substantial contributions by ambassadorial appointees); *see also* David W. Adamany & George E. Agree, *Political Money: A Strategy for Campaign Financing in America* 39-41 (1975) (collecting instances of large contributors "giving and getting"); Herbert E. Alexander, *Financing Politics: Money, Elections and Political Reform* 124-26 (1976) (describing contributions that gave the appearance of quid pro quo corruption and may have raised "suspicio[ns] about . . . large campaign gifts").

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifth Proposed Fact is not a material fact. Plaintiffs further object on grounds of relevance. The events recounted have no bearing on this challenge, which involves

"hard money" contributions given at the level Congress has declared noncorrupting; indeed much of what the Commission seeks to introduce here would be illegal under current laws. Furthermore, Plaintiffs object as Defendant's Fifth Proposed Fact relies on inadmissible hearsay and the opinions of a number of unqualified experts. Finally, Plaintiffs note that Defendant's Fifth Proposed Fact is argumentative, and object on that basis.

6. Informed by such findings, the 1974 FECA Amendments enacted shortly after the Watergate scandal included tighter limits on the amounts that individuals, political parties, and political committees could contribute to candidates. In particular, Congress established a $1,000 per-candidate, per-election limit on individual contributions to candidates and their authorized political committees. Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(b)(3), 88 Stat. 1263 (first codified at 18 U.S.C. § 608(b)(3)).

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifth Proposed Fact is not a material fact. Plaintiffs further object to Defendant's characterization of the 1974 FECA amendments as "[i]nformed by such findings"—presumably those listed in previous proposed facts—because it lacks foundation and is immaterial. Moreover, Plaintiffs object to Defendant's Sixth Proposed Fact's reliance on inadmissible hearsay and improper expert opinion.

Plaintiffs do not, however, contest that "the 1974 FECA Amendments… established a $1,000 per-candidate, per-election limit on individual contributions to candidates and their authorized political committees."

7. FECA's contribution limits apply both to direct contributions of money and to in-kind contributions of goods or services. 52 U.S.C. § 30101(8)(A) (2 U.S.C. § 431(8)(A)). The contribution limits apply on a per-candidate, per-election basis, with "election" defined to include each of the following:

(A) a general, special, primary, or runoff election; (B) a convention or caucus of a political party which has authority to nominate a candidate; (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President. 52 U.S.C. § 30101(1) (2 U.S.C. § 431(1)); Certification Order, 2014 WL 6190937, at *2.

Response: Uncontested.

8. The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), amended FECA to raise the individual per-candidate, per-election contribution limit and index it for inflation. *See* BCRA § 307(b), 116 Stat. 102-103 (codified at 52 U.S.C. § 30116(a)(3) (2 U.S.C. § 441a(a)(3)); BCRA

§ 307(d), 116 Stat. 103 (codified at 52 U.S.C. § 30116(c) (2 U.S.C. § 441a(c)(1)).

Response: Uncontested.

9. The limit that applied to contributions made to federal candidates during the 2013-2014 election cycle, including the contributions at issue in this case, was $2,600 per candidate, per election. FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013); Certification Order, 2014 WL 6190937, at *1. The FEC recently raised the limit for the 2015-2016 election cycle to $2,700 per candidate, per election. FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5751 (Feb. 3, 2015).

Response: Uncontested.

10. Because FECA defines "election" to include various types of electoral contests, the total amount that one may contribute to a particular candidate during a particular election cycle depends on how many elections that candidate must participate in to successfully pursue the federal office being sought. This means that an individual who supported a candidate that participated in one primary election and one general election during the 2013-2014 election cycle was

permitted to contribute a total of $5,200 to that candidate — $2,600 for the candidate's primary-election campaign and $2,600 for the candidate's general-election campaign. Certification Order, 2014 WL 6190937, at *2.

Response: Uncontested.

11. In an election cycle in which a candidate competes in one or more runoffs, special elections, or a political party caucus or convention, in addition to a primary and general election, the total amount that an individual may contribute to that candidate is higher. 52 U.S.C. §§ 30101(1), 30116(a)(1)(A) (2 U.S.C. §§ 431(1), 441a(a)(1)(A)); Certification Order, 2014 WL 6190937, at *2.

Response: Contested. Plaintiffs respectfully submit that Defendant's Eleventh Proposed Fact is not a material fact and is irrelevant.

12. Plaintiffs' contributions to Congressman Marshall "Mark" Sanford during the 2013-2014 election cycle illustrate the variability of the number of permitted contributions per election cycle. (*See infra* ¶¶ 13-16 and Exhibits cited therein.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Twelfth Proposed Fact is not a material fact and is irrelevant.

13. In 2013-14, Sanford successfully pursued the congressional seat vacated by Representative Tim Scott, who had served as the United States Representative for the 1st Congressional District of South Carolina until he was appointed to the United States Senate. (Sadio Decl. Exh. 23; Leamon Decl. Exh. 2 at 95-97, 123-24.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Thirteenth Proposed Fact is not a material fact and is irrelevant.

14. Between March and November 2013, plaintiff Laura Holmes contributed the maximum permissible $2,600 to Sanford for each of the following three elections: (1) the special-runoff election against Curtis Bostic for appearance on the ballot of the special-general election to fill the seat vacated by Representative Scott; (2) the special-general election against Elizabeth Colbert Busch to fill the seat vacated by Representative Scott; and (3) Congressman Sanford's 2014 primary election, in which Sanford competed as an unopposed incumbent. (*Id.* Exh. 1 (Holmes Interrog. Resp. ¶ 5); Leamon Decl. Exh. 2 at 95-97, 123-24.

Response: Contested. Plaintiffs respectfully submit that Defendant's Fourteenth Proposed Fact is not a material fact and is irrelevant.

15. Plaintiff Paul Jost contributed the exact same amounts during the same time period to the Sanford campaign committee in connection with each of those three elections. (Sadio Decl. Exh. 2 (Jost Interrog. Resp. ¶ 5).)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifteenth Proposed Fact is not a material fact and is irrelevant.

16. Congressman Sanford was reelected in 2014. No other candidate appeared on the ballot for his primary or general elections. (Sadio Decl. Exh. 14.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Sixteenth Proposed Fact is not a material fact and is irrelevant.

B. FEC Implementing Regulations

17. FEC regulations "encourage[]" contributors to designate in writing the particular election for which an individual contribution is intended. 11 C.F.R. § 110.1(b)(2)(i); Certification Order, 2014 WL 6190937, at *2.

Response: Uncontested.

18. Undesignated contributions count against the donor's contribution limits for the candidate's next election; designated contributions count against the donor's contribution limits for the named election. 11 C.F.R. § 110.1(b)(2)(ii);

Certification Order, 2014 WL 6190937, at *2.

Response: Uncontested.

19. When a candidate has net debts outstanding from a past election — including a primary election — a contributor may designate a contribution in writing for that past election. Such contributions may only be accepted for the purpose of retiring debt and only up to the extent of the debt. 11 C.F.R. §§ 110.1(b)(3)(i), (b)(5)(i)(B); Certification Order, 2014 WL 6190937, at *2.

Response: Uncontested.

20. If a candidate's net outstanding debts from a past election amount to less than the amount of a contribution designated for a previous election, Commission regulations permit the candidate (or his committee) to refund the contribution, redesignate it (with the donor's written authorization) for a subsequent election, or reattribute the contribution as from a different person. 11 C.F.R. §§ 110.1(b)(3)(i)(A) & (C); Certification Order, 2014 WL 6190937, at *2.

Response: Uncontested.

21. A primary contribution that is redesignated for use in a candidate's general election counts against the contributor's general-election limit. 11 C.F.R.

§ 110.1(b)(5)(iii) ("A contribution redesignated for another election shall not exceed the limitations on contributions made with respect to that election.").

Response: Uncontested.

22. If a candidate fails to qualify for the general election, then all general-election contributions received by that candidate must similarly be returned, redesignated, or reattributed. *Id.* § 110.1(b)(3)(i)(C).

Response: Uncontested.

23. Past Commission interpretations illustrate the constraints that are placed on committees with respect to primary- and general-election financing. *See infra* ¶¶ 24-27 and Exhibits cited therein.

Response: Contested. Plaintiffs respectfully submit that Defendant's Twenty-Third Proposed Fact is not a material fact. It lacks foundation, and is irrelevant to a case concerning Plaintiffs' right to give money during the general election period.

24. In Advisory Opinion 1986-17 (Green), the Commission approved a request to raise individual contributions for the general election prior to the date of the primary election where the requestor had pledged to account separately for such general election contributions and to refund all such contributions if the

candidate lost the primary election and thus would not participate in the general election. (*See* Sadio Decl. Exh. 5.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Twenty-Fourth Proposed Fact is not a material fact. The Commission's regulations on the raising of monies during a primary election are irrelevant to a case about the giving and spending of contributions during a general election. Plaintiffs further respectfully object to the inclusion of a fact that relies upon Commission policy in 1986 and does not reflect the application of recent case law on contribution limits, corruption, and circumvention, such as *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) and *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

25. The Commission explained in Advisory Opinion 1986-17 that FECA permits a committee to spend general-election contributions "prior to the primary election" where such expenditures are "exclusively for the purpose of influencing the prospective general election" and "it is necessary to make advance payments or deposits to vendors for services that will be rendered" after the candidate's general-election candidacy has been established. (*Id.* at 4.) The Commission further explained that all general-election contributions must be refunded if the candidate does not qualify for the general election. (*Id.*)

Response: Contested. Plaintiffs respectfully submit Defendant's Twenty-Fifth

Proposed Fact is not a material fact. The Commission's regulations on the raising of monies during a primary election are irrelevant to a case about the giving and spending of contributions during a general election. Plaintiffs further respectfully object to the inclusion of a fact that relies upon Commission policy in 1986 and does not reflect the application of recent case law on contribution limits, corruption, and circumvention, such as *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) and *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011)).

26. More recently, in Advisory Opinion 2009-15 (Bill White for Texas), the Commission responded to a series of questions regarding the designation, use, reattribution, redesignation, and potential refund of individual contributions made to an authorized committee of a candidate who intended to run for a Senate seat that was expected to be vacant in the next election cycle, but that might become vacant more immediately upon the anticipated resignation of the incumbent. (*See* Sadio Decl. Exh. 6.) Under the circumstances, any midterm vacancy would have been filled by a special election and, if necessary, a special run-off election. (*Id.* at 1-2.)

Response: Contested. Plaintiffs respectfully submit Defendant's Twenty-Fifth Proposed Fact is not a material fact. The Commission's regulations on the raising of monies for future elections are irrelevant to a case about the giving of contributions

during a present general election where all candidates are known. Plaintiffs further respectfully object to the inclusion of a fact that relies upon Commission policy in 2009 and does not reflect the application of recent case law on contribution limits, corruption, and circumvention, such as *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) and *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011)

27. In Advisory Opinion 2009-15, the Commission explained that the committee could accept contributions for the anticipated special election and special runoff election, but "must use an acceptable accounting method to distinguish between the contributions received for each of the two elections, *e.g.*, by designating separate bank accounts for each election or maintaining separate books and records for each election." (*Id.* at 5 (citing 11 C.F.R. § 102.9(e)(1)).) The Commission further advised the committee that it "must not spend funds designated for the runoff election unless [the candidate] participates in the runoff." (*Id.* at 5 n.6 (citing 11 C.F.R. § 102.9(e)(3)).)

Response: Contested. Plaintiffs respectfully submit Defendant's Twenty-Fifth Proposed Fact is not a material fact. The Commission's regulations on the raising of monies for future elections are irrelevant to a case about the giving of contributions during a present general election where all candidates are known. Plaintiffs further respectfully object to the inclusion of a fact that relies upon Commission policy in

2009 and does not reflect the application of recent case law on contribution limits, corruption, and circumvention, such as *McCutcheon v. FEC,* 134 S. Ct. 1434 (2014) and *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

28. The Commission has also pursued enforcement actions in instances where primary-election candidates violated the rules requiring candidates that fail to qualify for a general election to refund (or redesignate or reattribute) any general-election contributions they have received. *See infra* ¶¶ 29-30 and Exhibits cited therein.

Response: Contested. Plaintiffs respectfully submit that Defendant's Twenty-Eighth Proposed Fact is not a material fact. Defendant's enforcement of the law *vis-à-vis* candidate committees that fail to advance to a general election and fail to comply with federal law is irrelevant. This case involves candidates that did advance to the general election.

29. In *In the Matter of Jim Treffinger for Senate, Inc.*, Matter Under Review 5388, for example, the Commission, in April 2006, entered into a conciliation agreement with the Treffinger for Senate committee and its treasurer to resolve their violations of FECA and FEC regulations based on their failure to refund, reattribute, or redesignate nearly all of the candidate's more than $200,000

in general-election contributions despite his loss of the primary election. (Sadio Decl. Exh. 7 at 4.) The committee and treasurer admitted the violations and agreed to pay a civil penalty of $57,000. (*Id.* at 5.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Twenty-Ninth Proposed Fact is not a material fact. Defendant's enforcement of the law *vis-à-vis* candidate committees that fail to advance to a general election and fail to comply with federal law is irrelevant. This case involves candidates that did advance to the general election.

30. Similarly, in *In re Wynn for Congress*, the Commission in 2010 entered into a conciliation agreement with the Wynn for Congress committee and its treasurer to resolve their violations of FECA and FEC regulations based on, *inter alia*, their failure to employ an accounting method to distinguish between primary and general-election contributions and their failure to refund the excessive contributions within sixty days of the candidate's primary-election loss. (Sadio Decl. Exh. 8 at 2-4.) The Committee admitted to the violations and agreed to pay a civil penalty of $8,000.00. (*Id.* at 4.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Thirtieth Proposed Fact is not a material fact. Defendant's enforcement of the law *vis-à-vis* candidate committees that fail to advance to a general election and fail to comply

with federal law is irrelevant. This case involves candidates that did advance to the general election.

31. Commission regulations permit any candidate participating in a general election that has remaining, unused primary contributions to use such unused primary contributions to pay for the candidate's general-election expenses. 11 C.F.R. § 110.3(c)(3).

Response: Uncontested.

32. General-election candidates are also permitted to use general-election contributions to pay outstanding primary-election debts. *Id.* § 110.1(b)(3)(iv). Candidates need not obtain contributor authorization to make such payments from their primary, general, and any other election accounts, and such payments by candidates do not change the per-election contribution limits for individual contributors. *Id.* §§ 110.1(b)(3)(iv), 110.3(c)(3); Sadio Decl. Exh. 3 at 21 (FEC Campaign Guide for Congressional Candidates and Committees).

Response: Uncontested.

33. An individual contribution is considered to have been "made when the contributor relinquishes control over the contribution." 11 C.F.R. §

110.1(b)(6). Generally, a recipient candidate and his or her campaign may spend contributions to the campaign however the campaign chooses. Thus, the money can be spent on the candidate's next election campaign, transferred to another committee (within any applicable contribution limits), or used for any "other lawful purpose unless prohibited." 52 U.S.C. § 30114(a) (2 U.S.C. § 439a(a)).

Response: Uncontested.

III. PRIMARY AND GENERAL ELECTIONS

34. Primary elections serve the purpose of determining, in accordance with state law, which candidates are "nominated . . . for election to Federal office in a subsequent election." 11 C.F.R. § 100.2(c)(1) (defining "primary election").

Response: Uncontested.

35. General elections are those held to "fill a vacancy in a Federal office (*i.e.*, a special election) and which [are] intended to result in the final selection of [] single individual[s] to the office at stake." 11 C.F.R. § 100.2(b)(2) (defining "general election").

Response: Uncontested.

36. Nearly all fifty states in the Union use some type of primary elections

in their procedures for electing individuals to serve in federal office. Eleven states use "open" primaries, in which any registered voter may vote. Eleven states use "closed" primaries, in which only voters previously registered as members of a political party may participate in the nomination process of their party. Two states use a "top two" primary model. *See infra* ¶ 41 (discussing "top two" systems in California and Washington). And twenty-four states use some "hybrid" primary model, falling somewhere between the "open" and "closed" primary types. (Sadio Decl. Exh. 15; *id.* Exh. 4 at 1-2.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Thirty-Sixth Proposed Fact is not a material fact. The differentiation between forms of primary elections is irrelevant to this case, which concerns contributions made and spent during the general election.

IV. VARIATIONS IN STATE ELECTION PROCEDURES

37. FECA's separate contribution limits for each election within a particular election cycle account for the lack of uniformity in federal electoral contests — including the races within different political parties for the same particular office.

Response: Contested. Plaintiffs respectfully submit that Defendant's Thirty-Seventh Proposed Fact is not a material fact. It is irrelevant, argumentative,

provides a legal conclusion, and fails to provide any support for its claim.

38. Louisiana, for example, currently follows a unique electoral procedure in which no congressional primary election is held at all. (Sadio Decl. Exh. 4 at 2 n.8.) Only where a candidate fails to win a majority of the vote does the state hold a second election, termed a "runoff," in December of the same year. (*Id.*; *see* Leamon Decl. Exh. 1 at 31 (identifying results of Louisiana congressional electoral contests featuring only a November election and others featuring a second election in December of the same year).)

Response: Contested. Plaintiffs respectfully submit that Defendant's Thirty-Eighth Proposed Fact is not a material fact. Plaintiffs object that Defendant's Thirty-Eighth Proposed Fact is irrelevant, in that the conduct of Louisiana elections, and especially that state's decision to forego a primary election, is immaterial to a constitutional challenge dealing with general election contributions given after a primary.

39. In 2014, for example, the first election for candidates seeking federal office was the general election held on November 4, 2014. Because no candidate won a majority of the vote in Louisiana's November 2014 election for U.S. Senate, the state held a second election on December 6, 2014. (Sadio Decl. Exhs. 18-19.)

In the December election, incumbent Democrat Senator Mary Landrieu lost her seat to a challenger, Republican and former Representative Bill Cassidy. (Sadio Decl. Exh. 19.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Thirty-Ninth Proposed Fact is not a material fact. Plaintiffs object that Defendant's Thirty-Ninth Proposed Fact is irrelevant, in that the conduct of Louisiana elections is immaterial to a constitutional challenge dealing with general election giving following a primary. Moreover, to the extent Louisiana calls its elections by different names than those used in other states, which appears to be the only relevant distinction, the proposed fact is immaterial.

40. Between 2008 and 2010, Louisiana followed a different procedure that included regular primary and general elections, as well as runoff elections in instances where no candidate received a majority of the vote in the primary or general contest. (*See, e.g.*, Leamon Decl. Exh 1 at 55, 71.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fortieth Proposed Fact is not a material fact. Plaintiffs object that Defendant's Fortieth Proposed Fact is irrelevant, in that the conduct of Louisiana elections in 2008 and 2010, under a procedure that is not longer in place, has no bearing on this case.

41. California — the state in which plaintiff Paul Jost's preferred candidate sought election — and Washington each hold "top two" primary elections in which all candidates, regardless of their party, compete against one another. In both California and Washington, a candidate who lacks an intraparty primary challenger may still fail to proceed to the general election because all candidates for a particular office are listed on the same primary ballot and the two candidates that receive the most votes, *regardless of party preference*, proceed to compete in the general election. Sadio Decl. Exhs. 9, 17; *see* Certification Order, 2014 WL 6190937, at *2 (describing top two system in California).

Response: Contested. Plaintiff notes that California lists candidates by party affiliation. Sadio Decl., Exh. 9. Plaintiff further objects to Defendant's argumentative use of italics to emphasize the phrase "regardless of party preference."

42. Ten states — Alabama, Arkansas, Georgia, Iowa, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, and Texas — currently provide for post-primary runoff elections or conventions in federal electoral contests under varying circumstances. (Sadio Decl. Exh. 4 at 1-2.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Second Proposed Fact is not a material fact and is irrelevant.

43. In the event of post-primary runoff elections or conventions, candidates may receive additional contributions, up to the applicable per-election limit, for their runoff election campaigns. 52 U.S.C. § 30101(1) (2 U.S.C. § 431(1)).

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Third Proposed Fact is not a material fact and is irrelevant.

44. Over the course of the last six election cycles, from the 2003-2004 cycle through the 2013-2014 cycle, 95 congressional races have included a primary runoff contest in at least one of the party primaries, averaging more than fifteen primary runoff elections per cycle. *See infra* ¶¶ 45-52 and Exhibits cited therein.

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Fourth Proposed Fact is not a material fact and is irrelevant.

45. During the 2013-2014 election cycle, fifteen congressional races in seven states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 1-24.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Fifth Proposed Fact is not a material fact and is irrelevant.

46. In one primary runoff, six-term incumbent Mississippi Senator Thad Cochran failed to receive enough votes in the Mississippi Republican Senate primary election to avoid having to compete in an additional election — an expensive runoff race (Sadio Decl. Exhs. 24, 25) — against his primary opponent, Chris McDaniel, before proceeding to the general election. (Leamon Decl. Exh. 1 at 10, 12.) In the Mississippi Democratic Senate primary, by contrast, Travis Childers won by a sweeping margin and thus avoided having to participate in a runoff. (Leamon Decl. Exh. 1 at 10.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Sixth Proposed Fact is not a material fact. It is irrelevant, as the conduct of a state runoff election is immaterial to this challenge. Moreover, Plaintiffs object as to the proposed fact's reliance on inadmissible hearsay and unqualified expert opinion. Further, Plaintiffs object to the characterization of the Cochran-McDaniel race as "expensive", as Defendant has provided no foundation for that claim, which is irrelevant and constitutes improper opinion.

47. In another example, in the 2014 primary election for Iowa's Third Congressional District, no Republican primary candidate attained the 35 percent of the vote required under Iowa law to win the primary election. (Leamon Decl.

Exh.1 at 8.) The primary election was thus deemed "inconclusive" and the candidates were selected by a political party convention, IA Code § 43.52, for which a separate contribution limit applied, 52 U.S.C. § 30101(1)(B) (2 U.S.C. § 431(1)(B)). (Leamon Decl. Exh. Exh.1 at 7-8; Sadio Decl. Exh. 22.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Seventh Proposed Fact is not a material fact. It is irrelevant, as the conduct of Iowa's party convention process is immaterial to this challenge. Moreover, Plaintiffs object as to the proposed fact's reliance on inadmissible hearsay.

48. During the 2011-2012 election cycle, 21 congressional races in seven states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 25-42.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Eighth Proposed Fact is not a material fact, and is irrelevant.

49. During the 2009-2010 election cycle, 29 congressional races in nine states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 43-66.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Forty-Ninth Proposed Fact is not a material fact and is irrelevant.

50. During the 2007-2008 election cycle, ten congressional races in six states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 67-.75)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fiftieth Proposed Fact is not a material fact and is irrelevant.

51. During the 2005-2006 election cycle, eight congressional races in five states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 76-89.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-First Proposed Fact is not a material fact and is irrelevant.

52. During the 2003-2004 election cycle, twelve congressional races in five states included at least one primary runoff contest after the party primaries. (Leamon Decl. Exh. 1 at 90-102.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Second Proposed Fact is not a material fact and is irrelevant.

53. FECA's separate contribution limits for each election within a

particular election cycle further account for the occurrence of special elections — including special primary elections, special runoff elections, and special general elections — which are held, in accordance with state-specific procedures, in various special circumstances including when necessary to fill a seat vacated by an incumbent who left office before completing the full term that individual was elected to serve.

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Third Proposed Fact is not a material fact and is irrelevant. Moreover, Defendant has failed to provide any foundation for this claim, which is argumentative and draws a legal conclusion concerning the purposes and effects of FECA.

54. Over the course of the last six election cycles, from the 2003-2004 cycle through the 2013-2014 cycle, there have been 126 special elections, averaging more than 21 per cycle. *See infra* ¶¶ 55-61 and Exhibits cited therein.

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Fourth Proposed Fact is not a material fact and is irrelevant.

55. During the 2013-2014 election cycle, twelve states held a total of 33 special elections — including special primary elections, special runoff elections, and special general elections — to fill fourteen separate federal offices in those

states. (Leamon Decl. Exh. 2 at 93-126.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Fifth Proposed Fact is not a material fact and is irrelevant.

56. Plaintiffs have taken advantage of the per-election contribution limits to contribute three of the maximum per-election contributions to a single candidate in one election cycle. *See supra* ¶¶ 12-15 (describing plaintiffs' respective $2,600 contributions in 2013 to then- candidate Mark Sanford in connection with three separate elections during the 2013-2014 election cycle, including the special runoff election and special general election to serve as United States Representative for the 1st Congressional District of South Carolina).

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Sixth Proposed Fact is not a material fact and is irrelevant.

57. During the 2011-2012 election cycle, nine states held a total of seventeen special elections — including special primary elections, special runoff elections, special general elections, and special party caucuses — to fill ten separate federal offices in those states. (Leamon Decl. Exh. 2 at 76-92.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Seventh Proposed Fact is not a material fact and is irrelevant.

58. During the 2009-2010 election cycle, eleven states held a total of 25 special elections — including special primary elections, special runoff elections, and special general elections — to fill sixteen separate federal offices in those states. (Leamon Decl. Exh. 2 at 50- 75.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Eighth Proposed Fact is not a material fact and is irrelevant.

59. During the 2007-2008 election cycle, eleven states held a total of 27 special elections — including special primary elections, special runoff elections, and special general elections — to fill fifteen separate federal offices in those states. (Leamon Decl. Exh. 2 at 23-49.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Fifty-Ninth Proposed Fact is not a material fact and is irrelevant.

60. During the 2005-2006 election cycle, four states held a total of eighteen special elections — including special primary elections, special runoff elections, and special general elections — to fill thirteen separate federal offices in those states. (Leamon Decl. Exh. 2 at 8-22.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Sixtieth

Proposed Fact is not a material fact and is irrelevant.

61. During the 2003-2004 election cycle, five states held a total of six special elections — including special primary elections, special runoff elections, and special general elections — to fill five separate federal offices in those states. (Leamon Decl. Exh. 2 at 1-7.)

Response: Contested. Plaintiffs respectfully submit that Defendant's Sixty-First Proposed Fact is not a material fact and is irrelevant.

62. When candidates do not face an opponent listed on primary or general-election ballots, they are still subject to challenge in most states by potential write-in candidates. *See, e.g.*, Sadio Decl. Exh. 16 (describing varying procedures for write-in candidates).

Response: Contested. Plaintiffs respectfully submit that Defendant's Sixty-Second Proposed Fact is not a material fact and is irrelevant. Moreover, Plaintiffs object insofar as the proposed fact relies upon inadmissible hearsay and unqualified expert opinion.

63. Write-in contenders have won at least seven U.S. Congressional races and two U.S. Senate races. *See, e.g.*, *id.* (describing seven U.S. Congressional

races and Strom Thurmond's U.S. Senate victory); *id.* Exh. 26 (State of Alaska's official results showing plurality of write-in votes); *id.* Exh. 27 (describing Alaska Senator Lisa Murkowski's write-in victory).

Response: Contested. Plaintiffs respectfully submit that Defendant's Sixty-Second Proposed Fact is not a material fact and is irrelevant.

V. PLAINTIFFS' DESIRED CONTRIBUTIONS AND PROPOSED CONTRIBUTION-LIMIT SCHEME

Plaintiffs object to the Defendant's argumentative characterization of Plaintiffs' claims as constituting a "proposed contribution-limit scheme."

64. In 2014, Ms. Holmes supported Carl DeMaio, a Republican candidate for California's 52nd Congressional District (CA-52).

Response: Uncontested.

65. Ms. Holmes chose not to make any contributions to Mr. DeMaio for the primary election. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 21; Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 2).

Response: Uncontested.

66. Mr. DeMaio finished second in California's June 3, 2014 "top two" congressional primary election behind incumbent Congressman Scott Peters, a Democrat. Certification Order, 2014 WL 6190937, at *3; Compl. ¶¶ 19-20; *see* Sadio Decl. Exh. 10 at 76.

Response: Uncontested.

67. Under California's "top two" primary system, *see supra* ¶ 41, Congressman Peters and Mr. DeMaio opposed each other again in the general election. Sadio Decl. Exhs. 10-11; *see also id.* Exh. 1 (Holmes RFA Resp. ¶ 3).

Response: Contested, to the extend this Proposed Fact relies upon Defendant's previously-contested Forty-First Proposed Fact.

68. Ms. Holmes contributed $2,600 to DeMaio's campaign committee for his general-election campaign on or about July 21, 2015. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 21; Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 1).

Response: Uncontested.

69. Ms. Holmes wanted to contribute an additional $2,600 to Mr. DeMaio for his general-election campaign but did not do so because that contribution would have exceeded the $2,600 per-election contribution limit

established in the Federal Election Campaign Act ("FECA" or "Act") for individual contributions to candidates during the 2013-2014 election cycle. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 21; *see* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

Response: Uncontested.

70. In 2014, plaintiff Jost supported Marianette Miller-Meeks, a Republican candidate for Iowa's Second Congressional District. Certification Order, 2014 WL 6190937, at *3; Compl. ¶¶ 22-24.

Response: Uncontested.

71. Mr. Jost chose not to make any contributions to Dr. Miller-Meeks for the primary election. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 24; Sadio Decl. Exh. 2 (Jost RFA Resp. ¶ 1).

Response: Uncontested.

72. Dr. Miller-Meeks won her primary election on June 3, 2014. So did Congressman Loebsack. Sadio Decl. Exh. 21; Leamon Decl. Exh. 1 at 8; Certification Order, 2014 WL 6190937, at *3.

Response: Uncontested.

73. In the general election, Dr. Miller-Meeks faced incumbent Congressman David Loebsack, who had been the only candidate on the ballot in the June 3, 2014 Democratic Party primary for Iowa's Second Congressional District. Sadio Decl. Exh. 20; Certification Order, 2014 WL 6190937, at *3; Compl. ¶¶ 19-20.

Response: Uncontested.

74. Mr. Jost contributed $2,600 to Dr. Miller-Meeks's campaign committee for her general-election campaign in July 2014. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 24.

Response: Uncontested.

75. Mr. Jost wanted to contribute an additional $2,600 to Dr. Miller-Meeks for her general-election campaign but did not do so because that contribution would have exceeded FECA's $2,600 per-election contribution limit for individual contributions to candidates during the 2013-2014 election cycle. Certification Order, 2014 WL 6190937, at *3; Compl. ¶ 24; *see* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling*

Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

Response: Uncontested.

76. In this case, plaintiffs challenge FECA's contribution restriction limiting the amounts Ms. Holmes and Mr. Jost could lawfully contribute to the general election campaigns of their respective candidates — Mr. DeMaio and Dr. Miller-Meeks — to $2,600. They challenge the Act's $2,600 per-election contribution limit grounds as applied to their desires to have contributed $5,200 (*i.e.*, excess contributions of $2,600) to their respective candidates' 2014 general-election campaigns.

Response: Contested, to the extent Defendant's characterization of Plaintiffs' case ignores the fact that Plaintiffs did not contribute in the relevant primary elections, and do not claim a right to contribute both $2,600 in the primary election and $5,200 in the general election. Plaintiffs do not otherwise object.

77. Plaintiffs' challenge is based on the alleged "asymmetry posed whenever a candidate who faces a primary challenge competes in the general election against a candidate who ran virtually unopposed during the primary." (Sadio Decl. Exh. 1 (Holmes RFA Resp. ¶ 4); *id.* Exh. 2 (Jost RFA Resp. ¶ 3).)

Response: Contested. Plaintiffs respectfully submit that Defendant's Seventy-

Seventh Proposed Fact is not a material fact, insofar as it characterizes Plaintiffs' pleadings, which speak for themselves.

78. Plaintiffs' challenge is "is not based on an incumbent/challenger distinction." (*Id.* Exh. 1 (Holmes RFA Resp. ¶ 4); *id.* Exh. 2 (Jost RFA Resp. ¶ 3).)

Response: Contested. Plaintiffs respectfully submit that Defendant's Seventy-Seventh Proposed Fact is not a material fact, insofar as it characterizes Plaintiffs' pleadings, which speak for themselves.

79. Plaintiffs seek to change FECA's separate $2,600 limits for primary, general, and other elections to a single $5,200 per-election-cycle contribution limit in instances in which the recipient candidate's opponent did not face a "substantial primary opponent." Compl. ¶ 66.

Response: Contested. Plaintiffs respectfully submit that Defendant's Seventy-Ninth Proposed Fact is not a material fact. It is argumentative, and both incorrectly states Plaintiffs' case and conflates their First and Fifth Amendment claims.

80. Neither FECA nor the FEC's regulations define or use the phrase "substantial primary opponent."

Response: Contested. Plaintiffs respectfully submit that Defendant's Seventy-Ninth Proposed Fact is not a material fact. It is irrelevant whether or not the FEC currently has defined the phrase "substantial primary opponent—just as it did not define the "functional equivalent of express advocacy" before *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). 72 Fed. Reg. 72899, 72900 (Dec. 26, 2007) ("*WRTL II* limited the reach of the EC funding prohibitions to communications that were the 'functional equivalent of express advocacy' as determined under this newly articulated test").

81. Plaintiffs seek to have the Court promulgate a definition of a "substantial primary opponent" as "[a] candidate for office who is a member of the same political party as his or her opponent, must compete in the same primary election, and is sufficiently likely to succeed that his or her candidacy would materially alter the competitive position of a candidate similarly situated to Scott Peters during the 2014 primary." (Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 2); *id.* Exh. 2 (Jost Interrog. Resp. ¶ 2 (substituting "David Loebsack" for "Scott Peters")).)

Response: Contested. Plaintiffs respectfully submit that Defendant's Seventy-Ninth Proposed Fact is argumentative and therefore not a material fact.

82. Neither FECA nor the FEC's regulations involve any inquiry regarding whether a candidate is "sufficiently likely to succeed" such that "his or her candidacy would materially alter the competitive position" of another candidate, including one "similarly situated" to Congressmen Peters or Loebsack in their 2014 primary elections.

Response: Plaintiffs respectfully submit that Defendant's Seventy-Ninth Proposed Fact is not a material fact. It is irrelevant that Defendant has no regulations as to a certain number of selected phrases from Plaintiffs' discovery response.

83. There is currently no context in which the FEC evaluates the substantiality of congressional candidates (either on the ballots or write-ins) or forecasts their election prospects.

Response: Plaintiffs respectfully submit that Defendant's Seventy-Ninth Proposed Fact is not a material fact. It is argumentative, states a conclusion of law, and irrelevant to this challenge.

84. Plaintiffs identify a class of persons that should be permitted to make "extra" contributions that is defined as follows: "Those able to contribute up to the primary and general election contribution limits to candidates running under competitive circumstances substantially similar to those Scott Peters faced during

the 2014 election cycle." Sadio Decl. Exh. 1 (Holmes Interrog. Resp. ¶ 6); *id*. Exh. 2 (Jost Interrog. Resp. ¶ 6 (substituting "David Loebsack" for "Scott Peters")).)

Response: Contested. The inclusion of the phrase "should be permitted" misrepresents Plaintiffs' discovery responses, which were purely descriptive in nature.

85. Scott Peters competed directly against three candidates in the 2014 California congressional primary election. (Sadio Decl. Exh. 10; *see also id.* Exh. 1 (Holmes RFA Resp.¶ 3).)

Response: Contested, to the extent Defendant suggests that Scott Peters was not the sole Democratic candidate running for Congress in the relevant 2014 primary contest.

86. In November 2014, Scott Peters won reelection of his seat representing California's 52nd Congressional District in the United States House of Representatives. Congressman Peters defeated Carl DeMaio in the general election held on November 4, 2014. (Sadio Decl. Exh. 11 at 8.)

Response: Contested. This proposed fact is immaterial and irrelevant.

87. In 2014, Congressman David Loebsack won reelection of his seat

representing Iowa's 2nd Congressional District in the United States House of Representatives. Congressman Loebsack defeated Marianette Miller-Meeks in the general election held on November 4, 2014. (Sadio Decl. Exh. 20.)

Response: Contested. This proposed fact is immaterial and irrelevant.

88. Plaintiffs do not identify or allege with particularity (a) any candidates in a general election they will support who (b) prevailed over a "substantial primary opponent" and (c) will face a candidate who did not face a "substantial primary opponent."

Response: Contested. Plaintiffs respectfully submit that Defendant's Eighty-Eighth Proposed Fact is not a material fact and is irrelevant. Moreover, to the extent the Court consider this Proposed Fact relevant and material, Plaintiffs request judicial notice of the fact that no 2016 primary election has yet taken place.

Objections to Defendant's Proposed Constitutional Questions

Defendant has proposed alternative questions for this Court's consideration.

1. Does FECA's provision limiting individual contributions to candidates to $2,600 on a per-election basis, 52 U.S.C. § 30101(1)(A) (2 U.S.C. § 431(1)(A)); *id.* § 30116(a)(1)(A) (§ 441a(a)(1)(A)), violate plaintiffs'

First Amendment associational rights, as applied to their desires to have contributed $5,200 (two times the permitted limit) to the 2014 general election campaigns of candidates on the basis that these candidates' general-election opponents had a fundraising advantage because they did not, in plaintiffs' view, face "substantial primary opponents"?

2. Does FECA's provision limiting individual contributions to candidates to $2,600 on a per-election basis, 52 U.S.C. § 30101(1)(A) (2 U.S.C. § 431(1)(A)); *id.* § 30116(a)(1)(A) (§ 441a(a)(1)(A)), deny plaintiffs equal protection of the law under the Fifth Amendment, as applied to their desires to have contributed $5,200 (two times the permitted limit) to the 2014 general election campaigns of candidates on the basis that these candidates' general-election opponents had a fundraising advantage because they did not, in plaintiffs' view, face "substantial primary opponents"?

Plaintiffs object to Defendant's characterization of their case. Plaintiffs do not rely upon the "fundraising advantages" which are afforded to certain candidates, though such advantages certainly exist, but rather on the law's impact upon the associational freedoms of contributors. Moreover, as the Commission has done throughout this litigation, its questions conflate Plaintiffs' First and Fifth Amendment claims. Plaintiffs were unable to fully associate—as others have—up

to an amount which Congress has found, as a matter of law, to not risk *quid pro quo* corruption. This poses First Amendment harms at the general election stage quite aside from the nature of the primary election. But—due to the asymmetry in one's ability to give predicated entirely on whether one chooses to give before or after a primary election—it also works a Fifth Amendment harm.

Accordingly, Plaintiffs prefer the Court's previously certified questions.

Respectfully submitted this 20th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2015, I filed the foregoing Plaintiffs' Responses and Objections to Defendant Federal Election Commission's Proposed Findings of Fact/Statement of Material Facts and Constitutional Questions via this Court's electronic filing system, causing electronic notice to be served on the following:

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