United States District Court
Eastern District of Louisiana
New Orleans Division

Anh "Joseph" Cao, **Republican National Committee**, and **Republican Party of Louisiana**, ***Plaintiffs***, ***v.*** **Federal Election Commission**, ***Defendant***	**Case No. 2:08-cv-4887-HGB-ALC** **Section C, Mag. 5**

Plaintiffs' Memorandum Opposing FEC's Summary Judgment Motion and FEC's Supplemental Response to Certification Motion

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Introduction

The FEC opens with the core of its argument. (FEC's Supp. Mem. 1 (Dkt. 65).)[1] Each assertion is erroneous.

First, the FEC argues that "judgment in [Plaintiffs'] favor *on any claim* would be equivalent to overturning *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), and the relevant portion of *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976)." (FEC's Supp. Mem. 1 (emphasis added).) This is wrong both as to *Colorado II* and *Buckley*.

Regarding *Colorado II*, the error of this "any claim" argument is evident because *Colorado II* expressly left open the as-applied question of whether political parties' own speech may be limited as a contribution.[2] Where the Supreme Court expressly reserves an as-applied question in a facial challenge, it is not credible to argue that the as-applied challenge is foreclosed because it would constitute facial overruling. As a matter of law, a court cannot overturn *Colorado II* by

[1] In their memorandum (Dkt. 19-2) ("Pls.' Mem.") and supplemental memorandum (Dkt. 62) ("Pls.' Supp. Mem.") supporting certification, Plaintiffs provide the central relevant facts, demonstrate standing, and show that the questions to be certified are non-frivolous. This memorandum supplements those memoranda (so all should be read together), and it opposes the FEC's summary judgment motion (Dkt. 64) and supplemental memorandum (Dkt. 65) ("FEC's Supp. Mem."). Additional facts are found in Plaintiffs' proposed findings as well as facts stated in opposing summary judgment.

[2] *See* 533 U.S. at 456 n.17 (majority) ("need not reach in this facial challenge"), 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, J.J., dissenting) ("To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved.").

addressing an as-applied question expressly reserved in *Colorado II*.

Regarding *Buckley*, the FEC's "any claim" argument is flawed because the *Buckley* portion cited upheld the $5,000 limit on contributions from established political parties to candidates, and was only challenged as discriminatory to "ad hoc organizations in favor of established interest groups and [so] impermissibly burden[ing] free association." *Buckley*, 424 U.S. at 35. While that portion of *Buckley* has some relevance to the current challenge to the $5,000 limitation (but is not controlling because the current challenge is based on other grounds), it has no relevance to the reserved, as-applied, own-speech question. So it is untrue that "judgment in [Plaintiffs'] favor on any claim would be equivalent to overturning . . . *Buckley* . . . ." To the contrary, in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), six members of the Court cited *Buckley* itself as leaving the "own speech" issue open. *See id.* at 624 (1996) (Breyer, J., joined by O'Connor & Souter, J.J.); *id.* at 627-30 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part). Thus, resolving the own-speech question left open in reliance on *Buckley* would not reverse *Buckley*: It would simply follow *Buckley*'s reasoning as to what may be limited as a contribution. *See Buckley*, 424 U.S. at 19-23.

Second, the FEC argues that "accepting plaintiffs' sweeping claims would permit circumvention of longstanding contribution limits." (FEC's Supp. Mem. 1.) The FEC is wrong because, if the First Amendment mandates that parties' own speech must be treated as expenditures—required under *Buckley*'s analysis and expressly left open in *Colorado I* and *II*—then the circumvention argument fails, because only contributions may be limited, not expenditures. The

mandates of the First Amendment are neither loopholes nor circumvention. And the own-speech issue was expressly left open *despite Colorado II*'s holding "that a party's coordinated expenditures . . . may be restricted to minimize circumvention," *Colorado II*, 533 U.S. at 465. Thus, the possibility of circumvention did not foreclose the open, as-applied, own-speech question. On the merits, not properly reached here, *see infra* (summary judgment motion improper), Plaintiffs do not engage in the "tallying" identified as problematic in *Colorado II*, *id.* at 459. (*See* RNC 30(b)(6) Dep. at 42:11-43:1, Pls. Exh. 1 (Dkt. 62-2).) Moreover, the *Colorado II* dissent articulates strong arguments against any circumvention interest, *id.* at 474-480, and in favor of narrowly-tailored approaches if corruption were proven, *id.* at 581-82, which arguments will likely prevail in the closer, as-applied context of treating a party's own speech as a contribution.

Third, the FEC asserts that the certification standard (under 2 U.S.C. § 437h) is whether a proposed question is "'insubstantial []or settled.'" (FEC's Supp. Mem. 1 (citation omitted).) But the controlling *Fifth Circuit* standard is whether the issue is frivolous. *See infra* at Part I. Regardless, the unsettled questions presented *are* substantial and not settled.

Finally, the FEC asserts that it should be granted summary judgment and that Plaintiffs may attempt a regular appeal. (FEC's Supp. Mem. 1.) The notion that there is an alternate litigation route is erroneous. *See infra* at Part I.

In sum, the FEC's core argument is flawed.

I. This Court Should Certify Non-Frivolous Questions, And Summary Judgment Should Be Denied.

As set out in Plaintiffs' supplemental memorandum (Dkt. 62), the Fifth Circuit certification standard under 2 U.S.C. § 437h is whether an issue is non-frivolous, i.e., whether it raises "'colorable constitutional issues,'" *Khachaturian v. FEC*, 980 F.2d 330, 332 (5th Cir. 1992) (en banc) (citation omitted). (Pls.' Supp. Mem. 2-4.) The FEC cites several decisions (some non-binding) in an effort to raise the bar. (FEC's Supp. Mem. 9-11.) All but one[3] were decided *before Khachaturian*. Thus, *Khachaturian* is the binding Circuit authority for the certification standard, and its standard supersedes standards used by other courts. The FEC's failed effort to raise the bar is irrelevant anyway because Plaintiffs' questions are substantial and not settled.

The FEC filed a summary judgment motion. The FEC claims that "[d]ismissing [P]laintiffs' case, rather than certifying their questions, would not deny them the opportunity to overturn *Colorado II* and *Buckley* on the relevant issues" (FEC's Supp. Mem. 11), because those issues would then be subject to summary judgment in this Court (FEC's Supp. Mem. 49-50). (As set out in their introduction, *supra*, Plaintiffs make no effort to "overturn *Colorado II* and *Buckley*," but rather seek to apply the analyses of these cases to questions they left open.) The FEC offers no authority for the notion that summary judgment is available in this context, and Plaintiffs can discover no authority for it. Rather, under 2 U.S.C. § 437h, this Court has only two options as to

[3] That nonbinding decision, *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) (en banc), is cited for the noncontroversial statement that "not every sophistic twist that arguably presents a 'new' question should be certified," *id.* at 769 (citation omitted). Plaintiffs offer no sophistry.

each proffered question: (1) certify or (2) dismiss.[4] If a question is non-frivolous, it must be certified. If frivolous, it must be dismissed. That is the plain language of the statute and the practice of the courts. *See California Med. Ass'n v. FEC*, 453 U.S. 182, 193-94 n. 14 (1981); *Judd v. FEC*, 304 Fed. Appx. 874 (D.C. Cir. 2008) (circuit court affirmed district court's dismissal as proper under § 437h when questions are frivolous and cannot be certified). *Khachaturian* is clear and controlling: "If no colorable constitutional claims are presented on the facts as found by the district court, it should *dismiss the complaint*," 980 F.2d at 332 (emphasis added).

Under § 437h, the district court's frivolousness determination resembles a Federal Rule of Civil Procedure 12(b)(6) determination. *See Goland v. U.S.*, 903 F.2d 1247, 1256-1258 (9th Cir. 1990). The district court must certify all questions unless there is a fatal jurisdictional flaw, such as lack of standing or failure to state a claim. *Id*. *See also*, *International Assn. of Machinists v. FEC*, 678 F.2d 1092, 1095 n. 3 (D.C. Cir. 1982) (describing the certification of constitutional questions as a form of original jurisdiction, as the district court does not pass upon the question or make any dispositive order), *Whitmore v. FEC*, 68 F.3d 1212, 1214 (9th Cir. 1995) (claim was properly dismissed as frivolous).

In addition to citing no authority for it, the FEC makes no statement as to *why* it is seeking summary judgment in this context. Based on its arguments, there seem to be three ends. First, the FEC's discussion of summary judgment in the context of the certification standard seems an effort to lower the standard by arguing that Plaintiffs will still get their day in court on their issues

[4] The FEC at one point seems to recognize that certification and dismissal are the only options. (FEC's Supp. Mem. 50 n.27 (*citing Mariani*, 212 F.3d at 769).)

(albeit brief, but subject to an ordinary appeal). (FEC's Supp. Mem. 1, 11.) Second, the FEC's use of summary judgment seems intended as a basis for arguing, and trying to get this Court to decide, the merits. This is improper because § 437h specifies that the court of appeals decides the merits. Third, the FEC's use of summary judgment seems intended as a mechanism to allow it to submit additional evidence that ought not to be admitted and which Plaintiffs have moved to exclude.

The FEC's effort to use summary judgment for *these* purposes should be rejected because summary judgment is improper, however, the Court should construe the FEC's summary judgment motion as applying *only* to the certification proceeding that is properly before this Court. In other words, the summary judgment question should only be whether Plaintiffs' questions should be certified. The summary judgment motion, so construed, should be denied.

II. The Questions Are Non-Frivolous And Should Be Certified.

In their supplemental memorandum (Dkt. 62), Plaintiffs establish that this Court's task now is to apply the Fifth Circuit's non-frivolous standard to Plaintiffs' Questions without going to the merits. (Pls.' Supp. Mem. 4-5.) The supplemental memorandum addresses the "unambiguously campaign related" analysis (Pls.' Supp. Mem. 5-10) and the "own speech" analysis (Pls.' Supp. Mem. 10-21) on the merits (in a limited fashion) because the FEC had argued these issues on the merits. Those two topics are also briefly dealt with here.

A. Whether Government May Regulate First Amendment Activity That Is Not "Unambiguously Campaign Related" Activity Is a Non-Frivolous Issue.

In Part II.A of their supplemental memorandum, Plaintiffs demonstrate that (1) the unambiguously-campaign-related principle is a necessary threshold consideration in *all* campaign-finance law; (2) the recognition in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), that the principle cabins *all* campaign-finance law, makes questions applying that principle non-frivolous as a matter of law; (3) the principle is the exact analysis relied on by Senators McCain and Feingold, the other primary sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and Congress itself in enacting and defending BCRA; and (4) *McConnell v. FEC*, 540 U.S. 93 (2003), adopted and applied the reformers' unambiguously-campaign-related analysis. (Pls.' Supp. Mem. 5-10.)

In its supplemental memorandum (Dkt. 65), the FEC makes no mention of *Leake* (nor of any of the district-court opinions recognizing and applying the unambiguously-campaign-related principle), nor does it take note of the use of that analysis by Senators McCain and Feingold and the other reformers in *McConnell* and of *McConnell*'s recitation and application of the reformers' two controlling "precepts" (i.e., there must be neither (1) vagueness nor (2) overbreadth, in the sense of not being "unambiguously campaign related"). (*See* FEC's Supp. Mem. 22-26.) The FEC's failure to eliminate these affirmations of the unambiguously-campaign-related analysis means that it fails in its effort to demonstrate that Questions 2 and 5, which are based on this principle, are frivolous. Although the FEC fails to eliminate these key elements, which as a matter of law make the questions non-frivolous, and although the FEC erroneously insists on going

to the merits, its arguments are readily answered.

1. *All* Campaign-Finance Regulation Is Subject to Bright Constitutional Lines.

The FEC argues that the unambiguously-campaign-related principle "has no application to coordinated expenditures." (FEC's Supp. Mem. 22.) But *Leake* said that, given that Congress's only constitutional authority here is "to regulate elections," *Leake*, 525 F.3d at 281 (*citing Buckley*, 424 U.S. at 13), the unambiguously-campaign-related principle is necessary to "cabin" *all* campaign-finance regulation because the First Amendment prohibits regulation of core political expression beyond this authority "to regulate elections":

> The *Buckley* Court therefore recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by demarcating a *boundary between regulable election-related activity and constitutionally protected political speech*: after *Buckley*, campaign finance laws may constitutionally regulate *only those actions* that are "unambiguously related to the campaign of a particular . . . candidate." *Id.* at 80.

Leake, 525 F.3d at 281 (emphasis added). Whether *Leake* is right is a merits question having no place in this certification proceeding. But the *existence* of *Leake*'s analysis makes the issue non-frivolous.

Moreover, the FEC has *itself* recognized the necessity of a close connection between regulable activity and the authority to regulate elections—precisely in the coordinated communication context. In its Explanation and Justification ("E&J") on its "Coordinated Communications" rulemaking, 71 Fed. Reg. 33190 (June 8, 2006), the FEC issued revised content standards as a result of *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (*aff'g Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004)). The E&J stated that "the purpose of the content prong is to 'ensure that the

coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election,' and therefore are not 'expenditures' subject to regulation under the Act," 71 Fed. Reg. at 33191 (citation omitted). Regulated activity must not "'*likely* relate[] to purposes other than "influencing" a federal election.'" *Id.* at 33193 (*quoting Shays*, 414 F.3d at 101-02) (emphasis added). The FEC conceded that it could not regulate coordinated expenditures for "activity . . . *unlikely* to be for the purpose of influencing Federal elections . . . ." *Id.* at 33197 (emphasis).[5] The FEC made clear that it was also revising the political party coordinated communication provisions under the same rule to achieve uniformity. *Id.* at 33207. It expressly recognized that expenditures for communications "unrelated to elections," *id.* at 33199, could not be regulated as coordinated communications.

Of course the FEC's standard is derived from *statutory* authority. The "for the purpose of influencing federal elections" language comes from the "expenditure" definition, 2 U.S.C. § 431(9)(A)(i). So the FEC may not regulate as an "expenditure" any First Amendment activity that lacks this purpose. Nor may it regulate as a "contribution" (subject to federal source and amount limitations) any donation that is not clearly "for the purpose of influencing" federal elections because that definition has the same language. 2 U.S.C. § 431(8)(A)(i).[6] Furthermore, since "contributions" and "expenditures" trigger "political committee" status, 2 U.S.C. § 431(4) ("po-

[5] The FEC acknowledged that it could "chill" speech by an "investigation" for First Amendment activity not meeting this standard. *Id.*

[6] The FEC's regulation of mere donations as regulable "contributions" (being "for the purpose of influencing" federal elections) at 11 C.F.R. § 100.57 was recently struck down as beyond statutory authority for regulating activity beyond this very "purpose" requirement. *See EMILY's List v. FEC*, No. 08-5422, 2009 WL 2972412, at *36-37, *44 (D.C. Cir. Sep. 18, 2009).

litical committee" definition), a group cannot be subjected to PAC requirements if it lacks the purpose of influencing federal elections.[7] Consequently, the statutory "for the purpose of influencing" line controls campaign-finance. But the fact that this line controls relevant campaign-finance restrictions is itself a result of Congress's recognition that its only authority in this area is its constitutional authority "to regulate federal elections," *Buckley*, 424 U.S. at 13. Thus, it is no mere statutory line; it is a constitutional barrier.

So the FEC has recognized the statutory line ("for the purpose of influencing" federal elections) that governs relevant campaign-finance law, which is based on congressional recognition of its limited constitutional authority. And the FEC has already interpreted this line as requiring a likely-election-related test in the coordinated-expenditures context, which test is not too different from an unambiguously-campaign-related test.[8] These tests will be compared below, but for now

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[7] Of course, *Buckley* added to this *statutory* line ("for the purpose of influencing" federal elections) the *constitutional* requirement that groups meeting the statutory line could still not be treated as political committees unless they met the "unambiguously campaign related" line, which, as-applied in this context, imposed the major-purpose test:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," [FN105] and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. [FN106] To fulfill the purposes of the Act they need only encompass *organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate*. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*.

Buckley, 424 U.S. at 79 (emphasis added).

[8] The phrase "for the purpose of influencing an election for Federal office" in the "expenditure" definition, 2 U.S.C. § 431(9) cannot be a constitutional test, standing alone, without being construed to mean some *objective* test, such as *Buckley*'s express-advocacy test and

it should be noted that (1) the FEC conceded in its E&J what it evades in its memoranda, i.e., that there *must be* an objective line separating regulable from protected, and (2) the FEC has already conceded a line conceptually close to the unambiguously-campaign-related line of *Buckley* in the relevant context. The FEC cannot evade *some* line, and it should at least be arguing for its already-conceded line, rather than pretending that there is no line demarcating regulable from protected.

Thus, the questions at issue here must be certified as non-frivolous so that the en banc court can determine what *is* the correct line. And it should be further noted that the unambiguously-campaign-related principle is always *implemented* by some bright-line test, such as the express-advocacy test (for regulable expenditures), the major-purpose test (for groups regulable as political committees), and the appeal-to-vote test (for regulable electioneering communications). (*See* Pls.' Mem. 7-8.) The necessary bright-line test must be established in this context.

Regarding the two lines posited above, the FEC's line is flawed because "likely" is weaker than "unambiguously," and being related to "elections" is broader than being "related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80—and that is precisely why *Buckley* construed the statutory line ("for the purpose of influencing" a federal election) to conform to the constitutional line (the unambiguously-campaign-related principle). It did so to prevent regulation of "expenditures" (with their vague and overbroad statutory test) from being "too

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unambiguously-campaign-related principle, *Buckley*, 424 U.S. at 80—or even the FEC's inadequate, but objective, likely-election-related test—because of the problems posed by "for the purpose," which is an intent test. *Buckley* expressly rejected any intent-and-effect test, 424 U.S. at 42-43, which *WRTL-II* expressly confirmed, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 467 (2007) ("*WRTL-II*").

remote" and "impermissibly broad." *Id.* Senator McCain and the other primary sponsors of McCain-Feingold (the Bipartisan Campaign Reform Act of 2002 ("BCRA")) explicitly said that the line on which they and Congress had relied for identifying regulable election-related activity in BCRA was whether the activity was "'unambiguously related to the campaign of a particular federal candidate.'" (*See* Pls.' Supp. Mem. 7 (providing quote of reformers' brief in *McConnell*) (*Buckley* citation omitted).) That is the line that should control this as-applied challenge.

So although the FEC now resists the idea that the "*unambiguously* campaign related" standard from *Buckley*, 424 U.S. at 81 (emphasis added), governs regulable election-related speech in the coordinated-expenditure context, it has already conceded that at least a *likely*-election-related standard governs.[9] And it has therefore conceded that there *is* a boundary cabining government power. Whether *Buckley*'s line or the FEC's conceded line is the correct one and what coordinated expenditures are regulable under the correct line are merits questions that should not be

[9] The FEC earlier argued to the Tenth Circuit in *Colorado I* that it could treat as a contribution any coordinated expenditure for a communication containing an "electioneering message." *FEC v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015, 1022-23 (10th Cir.1995), *reversed and vacated on other grounds*, 518 U.S. 604, 626 (1996). The Tenth Circuit agreed, and so the FEC issued voter-guide regulations based on that line, which were struck down in *Clifton v. FEC*, 114 F.3d 1309 (10th Cir. 1997), and the "electioneering message" issue was remanded to the district court, *id.* at 1316-17. The FEC subsequently abandoned the electioneering-message test, with four of the six commissioners finding it "vague because it is not clear when [it] encompasses issue discussion and not candidate advocacy" and "overbroad because, given the nature of campaigning, [it] will inevitably encompass both." Statement of Reason of Vice Chairman Wold and Commissioners Elliott, Mason, and Sandstrom on the Audits of Dole/Kemp and Clinton/Gore at 6 (June 24, 1999). This analysis recognizes *Buckley*'s twin "precepts" on which the reformers and Congress relied in enacting BCRA. (*See* Pls.' Supp. Mem. 6-9.) These precepts still govern and require that coordinated expenditures subject to treatment as contributions be for activity that is "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80.

resolved in a certification proceeding. But the FEC's recognition and employment of its likely-election-related line to determine which coordinated expenditures are regulable indicates that Questions 2 and 5, concerning the unambiguously-campaign-related line, are non-frivolous.

2. Whether Or Not Express Advocacy Is Required, Regulable Coordinated Communications Must Be Unambiguously Campaign Related.

The FEC argues that "express advocacy is not required in the context of coordinated expenditures" for First Amendment activity to be regulable. (FEC's Supp. Mem. 23.) Since *Buckley* construed the "expenditure" definition's "for the purpose of influencing" language to require express advocacy, *see supra*, it may well be that only express advocacy "expenditures" are subject to being considered a "contribution" by reason of coordination,[10] despite the FEC's cited cases disputing this.[11] The Supreme Court has not addressed the issue.

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[10] *McConnell*'s statement that the construction of "expenditure" "was the product of statutory interpretation rather than a constitutional command," 540 U.S. at 192, does not vitiate the express-advocacy line because the same statutory, for-the-purpose-of-influencing definition of "expenditure" that was at issue in *Buckley* is at issue in the coordinated expenditure context. Moreover, the line on which Plaintiffs here rely is the unambiguously-campaign-related line that underlies the express-advocacy construction in *Buckley*, 424 U.S. 80-81, and on which *McConnell* relied in approving regulation of electioneering communications (*see* Pls. Supp. Mem. 8-9). That line was unchanged by *McConnell*. Finally, because BCRA did not include electioneering communications in the "expenditure" definition, "expenditure" remains as construed.

[11] The FEC neglected to mention *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1997), which required actual coordination and express advocacy before expenditures could be deemed "contributions" by reason of coordination: "as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate," *id.* at 500. With *WRTL-II*'s reaffirmation of special protection for issue advocacy, 551 U.S. at 470, *Clifton*'s care in eliminating issue advocacy from permissible regulation as a contribution by reason of coordination gains renewed force.

The FEC's mention of *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) (FEC's Supp. Mem. 23), neglects the FEC's own position in that case—that only express-advocacy communications could be deemed "contributions" by reason of coordination, *id.* at 160—and *Orloski*'s holding that communications may not be coordinated expenditure unless they are first "expenditures":

> [T]he mere fact that corporate donations were made with the consent of the candidate does not mean that a 'contribution' within the meaning of the Act has been made. Under the Act this type of "donation" is *only a "contribution" if it first qualifies as an "expenditure"* and, under the FEC's interpretation, such a donation is *not an expenditure unless someone at the funded event expressly advocates . . . .*"

Id. at 162-63 (emphasis added). *Orloski* indicated that this position was not constitutionally *compelled* by *Buckley*'s express advocacy construction of "expenditure," *id.* at 166-67, but *Orloski*'s holding that all coordinated expenditures must first be "expenditures" means that the unambiguously-campaign-related principle would govern, whether or not the express-advocacy construction controlled.

The FEC argues that *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), held that express advocacy was not required for coordinated expenditures to be treated as contributions. (FEC's Supp. Mem. 23.) But it did not hold that the unambiguously-campaign-related line did not control. And the line it suggested did not go far beyond express advocacy, theorizing that the line might be drawn to reach advertisements so close to the express advocacy line that they "would be every bit as beneficial to the candidate as a cash contribution," such as "gauzy candidate profiles prepared for television broadcast or use at a national political convention" or "coordinated attack advertisements, through which a candidate could spread a negative message about

her opponent." *Christian Coalition*, 52 F. Supp. 2d at 88. So even *Christian Coalition* recognizes that there must be a line and that it must at least be very close to express advocacy.

The FEC cites the *Shays v. FEC* decisions as invalidating coordination regulations for relying too heavily on the express-advocacy standard. (FEC's Supp. Mem. 24.) But the decisions did not reject the unambiguously-campaign-related principle, instead requiring a more "cogent explanation" of why the FEC's rule captured "electorally oriented communications," *Shays*, 414 F.3d at 100. Thus, *Shays* recognized that there must be a constitutional line, stating it as the electorally-oriented communication line. This line is quite close to the "electioneering message" line that the FEC asserted and then abandoned in *Colorado I* as being vague and overbroad. *See supra* at n.9. It is not the Supreme Court's line. *Buckley*'s unambiguously-campaign-related "precept" provides the constitutionally-required line.

But whether express advocacy is required for a coordinated expenditure to be deemed a contribution is not really the question at issue here. Plaintiffs do not argue that only express-advocacy coordinated expenditures are regulable, although they have acknowledged that express-advocacy communications are "unambiguously campaign related" and so regulable. (*See* 2d Am. Comp. ¶ 59.) Rather, they have argued that there must be, and is, a line dividing regulable from non-regulable activities in the coordinated expenditure context and that the Supreme Court has drawn that line using the unambiguously-campaign-related principle with expressly articulated constructions and tests. That is the overarching principle that has been implemented in the express-advocacy test, the major-purpose test, *Buckley*'s construction of "contribution," and *WRTL-II*'s appeal-to-vote test. (*See* Pls.' Mem. 6-9 (Dkt. 19-2).) The FEC has conceded that

there must be a line. Where the dividing line lies is a non-frivolous merits issue.

3. The Supreme Court Has Applied the Unambiguously-Campaign-Related Principle in Contexts Other than Independent Expenditures.

The FEC agues that *Buckley* only applied the unambiguously-campaign-related principle in the context of "independent 'expenditure[s]' . . . by individuals or groups other than political committees." (FEC's Supp. Mem. 25 (emphasis omitted).) This was, of course, the only place where *Buckley* employed the unambiguously-campaign-related *language* to explain what it was doing, but the *principle* is clearly employed in other contexts. (*See* Pls. Mem. 7-9.) The FEC argues that the unambiguously-campaign-related principle could not have been applied in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), and *WRTL-II* because "neither case based its holding on such a requirement, and neither case involved limits on parties' coordinated expenditures." (FEC's Supp. Mem. 25.) But an overarching principle is by definition applicable across cases in the same field of law, such as campaign-finance law here, so the fact that *MCFL* and *WRTL-II* are not about coordinated expenditures is meaningless. In fact, if the principle can be seen at work in cases involving different campaign-finance topics, it proves, not disproves, that it is an overarching first principle of constitutional law.

The fact that *Buckley*'s phrases—"unambiguously related to the campaign of a particular federal candidate," 424 U.S. at 80, or "unambiguously campaign related," *id.* at 81—do not recur is unremarkable because *Buckley* clearly stated that the principle was to prevent regulated activity from being "too remote" or "overbroad." Thus, if *those* concerns are articulated to limit the reach of campaign-finance laws, then the principle is at work, and such concerns are clearly articulated

in *MCFL*, 479 U.S. at 248-49, and *McConnell*, 540 U.S. at 192.

And *WRTL-II*'s test—whether an "ad susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," 551 U.S. at 479—merely restates *Buckley*'s test of whether a communication is "unambiguously related to the campaign of a particular federal candidate" (read in *Buckley*'s context that it entailed "advocat[ing] the election or defeat of a clearly identified candidate," *Buckley*, 424 U.S. at 80 (footnote omitted)). Clearly, *WRTL-II*'s phrase "no reasonable interpretation other than" parallels *Buckley*'s "unambiguously," and *WRTL-II*'s phrase "appeal to vote for or against a specific candidate" parallels *Buckley*'s phrases "advocating election or defeat of a clearly identified candidate," which is what *Buckley* meant by "related to the campaign of a particular federal candidate," and "campaign related." *See Buckley*, 424 U.S. at 80-81. All that is missing between the two is "express," which is, of course, what *McConnell* permitted Congress to move beyond by relying on the unambiguously-campaign-related principle in approving the reach beyond express advocacy to allow regulation of electioneering communications. But *WRTL-II*'s appeal-to-vote test indicates that the Constitution requires something very close to the express-advocacy test for identifying regulable communications, not some vague, broad, "functional equivalen[ce]" line, as *McConnell* seemed to indicate, 540 U.S. at 206. And the unambiguously-campaign-related principle clearly controls both the express-advocacy line and the appeal-to-vote line.

4. *Colorado II* Nowhere Rejected the Unambiguously-Campaign-Related Principle, And Protected First Amendment Activity Cannot Be "Circumvention."

The FEC argues that "*Colorado II* nowhere suggests that coordination expenditure limits can be applied only to communications containing express advocacy or conduct that is 'unambiguously related" and that "[s]uch a requirement would be completely inconsistent with [*Colorado II*'s] anti-circumvention rationale." (FEC's Supp. Mem. 25.) The FEC points to no place in *Colorado II* where the issue in the present case was raised and decided. The FEC ignores the fact that the present issue goes to the fundamental question of what is properly considered a regulable "expenditure"—which at least must be "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(9), and which *Buckley* held must comply with the unambiguously-campaign-related principle, 424 U.S. at 80—a question not addressed in *Colorado II*. In other words, before an "expenditure" may be considered a "contribution" by reason of coordination, it must first properly be an "expenditure"[12] under an objective, constitutionally-required test interpreting the vague and overbroad statutory definition of "expenditure."

In asserting that allowing the government to regulate as "expenditures" activity that is not unambiguously campaign related would "be completely inconsistent with the anti-circumvention rationale on which [*Colorado II*] based its holding (FEC's Supp. Mem. 25), the FEC again ignores the most fundamental constitutional first principles. Unless a purported "expenditure" is regulable under the government's constitutional authority "to regulate elections," *Buckley* 424

[12] *See*, *e.g.*, *Orloski*, 795 F.2d at 162-63 (coordinated expenditure may be treated as "contribution" only if it first qualifies as "expenditure").

U.S. at 13, then the government has no authority to regulate it because the purported "expenditure" is protected by the First Amendment's prohibition on "abridging . . . speech." This is true whether or not the expenditure is coordinated with a candidate. The FEC concedes as much by requiring both conduct and *content* standards in its party coordinated communication regulation at 11 C.F.R. § 109.37. The conduct standards address what constitutes "coordination." But it is not enough that a communication be coordinated. It must also meet the *content* standards, which distinguish regulated from unregulated coordinated communications. For example, a coordinated public communication that references a presidential candidate prior to 120 days before an election is not regulated as a party coordinated expenditure while one within the 120-day period is so regulated. In its E&J on coordinated communications, the FEC defended this time frame on likely-election-related grounds and the need for a bright-line, non-subjective, test:

> Retaining a longer time frame that is not supported by the record could potentially subject political speech protected under the First Amendment to Commission investigation. Subjecting activity to investigation that the evidence shows is unlikely to be for the purpose of influencing Federal elections could chill legitimate lobbying and legislative activity. As the Supreme Court has emphasized, where First Amendment rights are affected "[p]recision of regulation must be the touchstone," *Edenfield v. Fane*, 507 U.S. 761, 777 (1993).

71 Fed. Reg. at 33197.[13] The E&J proceeded to cite authorities for the necessity of a bright-line test in the First Amendment area as opposed to a subjective totality-of-the-circumstances test. *Id.* For the FEC to argue now that any communication coordinated with a candidate is a regulable coordinated "expenditure" is to ignore what it has already conceded, and what is constitutionally

[13] If the FEC were to alter the *specifics* of the content requirements for coordinated communications in another rulemaking, that would not alter the analysis here, i.e., that the FEC rightly concedes that there *is* a constitutional line beyond which coordinated communications may not be regulated.

required, namely, that there must be some constitutionally (and statutorily) cognizable nexus between a communication and a federal candidate's campaign before the expenditure may be regulated as an "expenditure." And there is no "circumvention" where parties and candidates coordinate in such activities that are not unambiguously campaign related, or (in the FEC's terminology) not likely election related. The FEC's flawed circumvention argument does not make Questions 2 and 5 (which are based on *Buckley*'s unambiguously-campaign-related principle) frivolous.

Despite all of these fatal foundational flaws in the FEC's circumvention argument, the FEC develops this argument further. (*See* FEC's Supp. Mem. 26-30.) The FEC's further arguments are also flawed, ignoring *WRTL-II* among other things. The FEC cites *McConnell* for the proposition that issue "ads were specifically intended to affect election results," which asserted fact supposedly "was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." (FEC's Supp. Mem. 27 (*quoting McConnell*, 540 U.S. at 127).) But the FEC has already lost that argument in *WRTL-II*, which applied the unambiguously-campaign-related principle in creating its appeal-to-vote test (*see supra*), under which what have come to be called *WRTL-II* ads are *not* unambiguously campaign related and so not regulable. In fact, *WRTL-II* reaffirmed the Supreme Court's and the First Amendment's special protection for issue advocacy, 551 U.S. at 470. And *WRTL-II* expressly rejected the notion that ads run within 60 days of an election were necessarily campaign speech. *Id.* at 472 ("intent" irrelevant and mere proximity does not prove functional equivalence to express advocacy). Under *WRTL-II*'s appeal-to-vote test, a properly-worded issue ad about Rep. William Jefferson's "pending trial and alleged corrup-

tion" would not be regulable because it would not contain any language that could only be interpreted "as an appeal to vote for or against a specific candidate," *id.* The FEC's insistence that "[t]here can be no doubt about the electoral nature" of such an ad (FEC's Supp. Mem. 27) is merely an attempt not to be bound by *WRTL-II*. But *WRTL-II* does control the FEC, this Court, and this issue.

The FEC argues that because LA-GOP has stated that it wishes to coordinate grassroots lobbying since "it brings the candidate into the message and gives us a greater chance of electing a candidate," "party 'issue ads' are "'designed to elect of defeat candidates.'" (FEC's Supp. Mem. 28 (citation omitted).) But the FEC has already lost that intent-and-effect argument in both *Buckley* and *WRTL-II*. *Buckley* said that the First Amendment prohibits any intent-and-effect test for determining regulable political speech. 424 U.S. at 43-44. *WRTL-II* said the same thing *four times*. 551 U.S. at 467, 469, 472, 474 n.7. Whether an electioneering communication is unambiguously campaign related must be determined by "focus on the substance of the communication rather than amorphous considerations of intent and effect," *id.* at 469, to determine whether the text of the communication contains the requisite appeal to vote required for regulation, *id.* at 470. And of course, properly-worded grassroots lobbying ads would contain no words of appeal relating to voting for or against a candidate. As *WRTL-II* said, the dissolving-distinction problem is not sufficient to permit regulation of issue advocacy:

> At best, [the FEC] ha[s] shown what we have acknowledged at least since *Buckley*: that the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U.S., at 42. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election.

551 U.S. at 474.

The FEC's expansive interpretation of "circumvention" in its attempt to justify an expansive definition of coordinated "expenditures" to restrict issue advocacy is another argument that it lost in *WRTL-II*:

> Appellants argue that an expansive definition of "functional equivalent" is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions. Cf. *McConnell,* [540 U.S.] at 205 ("[R]ecent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against circumvention of [valid] contribution limits" (internal quotation marks omitted; brackets in original)). But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny. "[T]he desire for a bright-line rule ... hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom."

551 U.S. at 479 (emphasis in original).[14]

The FEC next argues that Plaintiffs' acknowledgment that "targeted" federal election activities would be regulable under the unambiguously-campaign-related principle "is a roadmap for circumvention." (FEC's Supp. Mem. 28.) As discussed above, if the First Amendment protects certain activities from regulation (here, those that are not unambiguously campaign related), the FEC may not regulate them by arguing circumvention. And whether Plaintiffs' "targeted" lines are drawn in the proper places is a merits question not properly considered here. If the Fifth Circuit wishes to draw different "targeted" lines than Plaintiffs have drawn, it will be free to do so. (*See* Pls.' Supp. Mem. 24.) But as noted in Plaintiffs' prior memorandum (*see* Pls.' Supp. Mem.

[14] Strict scrutiny is required in the present case because speech is limited. *See Buckley*, 424 U.S. at 64-65. Moreover, where expressive association is restricted, strict scrutiny is required. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2001).

23-24), the *concept* is a necessary application of the unambiguously-campaign-related principle to the present situation, just as the express-advocacy test was a necessary application of the principle to the term "expenditure" in *Buckley*, 424 U.S. at 80. "Targeted" is a legal construct necessary to distinguish "federal election activity" that complies with the unambiguously-campaign-related principle from such activity that does not. The FEC's quibble with this legal construct is merely its quibble with the unambiguously-campaign-related principle itself. Once the principle is recognized, it is necessary to ask in each application what is the constitutionally-permissible scope of regulation of otherwise-protected First Amendment activity.

Moreover, as to targeting, the gravamen of the FEC's argument is that the "targeted" line may be evaded by not doing "targeted" activities. (*See* FEC's Supp. Mem. 28-29.) But the possibility of evasion of the bright lines required by the First Amendment has long been a necessary corollary of applying the First Amendment. Thus, the FEC's quibble is really with the First Amendment, a quibble it must lose if courts are faithful to the First Amendment.

An example of how the First Amendment requires bright lines that may be evaded comes from *Buckley*. There the Court outlined the dissolving-distinction problem (between protected issue advocacy and regulable campaign speech), 424 U.S. at 41-43, and construed the "expenditure" definition at issue (using the unambiguously-campaign-related principle) to require express advocacy, *id.* at 44. But then it noted the ease of evasion, *id.* at 45. In fact, the Court expressly relied on the ease of evasion as part of the basis for striking down the expenditure limit:

> So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory

> language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. Cf. Mills v. Alabama, 384 U.S. [214,]220 [(1966)].

Id. Although the Court struck the expenditure limitation, it left the same easily evaded express-advocacy expenditure definition in place for purposes of disclosure, *id.* at 80, and the corporate prohibition on contributions and independent expenditures (at 2 U.S.C. § 441b), *MCFL*, 479 U.S. at 248-49. So this *Buckley* quote, *supra*, about the necessity of bright lines to conform to the First Amendment (despite potential for evasion) answers all of the FEC's argument here about circumvention.

Another example can be drawn from *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70. Although *McConnell* agreed with *Buckley* that the express-advocacy test was "easily circumvented," 540 U.S. at 191 n.74, the vague and overbroad "functional equivalen[ce]" test that it employed, *id.* at 206, had to be restricted in *WRTL-II*'s as-applied consideration to conform to the requirements of the First Amendment and the unambiguously-campaign-related principle by use of the narrowed appeal-to-vote test , *WRTL-II*, 551 U.S. at 469-70. The appeal-to-vote test requires that, before a communication may be considered "as an appeal to vote," it must have some *appeal* (i.e., some call to action) and the "appeal" must unambiguously call someone to action concerning *voting*. Consequently, there are numerous *WRTL-II*-ads that may be run criticizing or praising candidates that may

not be regulated. In fact, that sort of "circumvention" was precisely what the FEC and the congressional sponsors of BCRA argued in *WRTL-II*, but they lost that battle. They may not renew it in this First Amendment context. The same principle applies here—since the First Amendment mandates bright, speech-protective lines, there may be a possibility of circumvention, but that possibility must yield to the First Amendment.

As to how to define the meaning of "targeted" and "non-targeted," the FEC erroneously argues that the question is factual, cites various deposition statements, and claims that it does not know what targeting means. (*See* FEC's Supp. Mem. 28-29; FEC's Proposed Findings of Fact 56-59 (Dkt. 69-3).) But what constitutes targeting is a legal question, not a factual question, and so the statements of fact witnesses do not control the meaning of the legal concept. What "targeted" means was set out in RNC's response to an FEC interrogatory asking that question:

> The party has already provided the meaning of "non-targeted" in the *Complaint*: "'Non-targeted' means not targeted at any race in particular or targeted at a specific state race." 2d Am. Comp. ¶ 40. As to whether targeted federal election activity must clearly identify a federal candidate, the activity must first meet the federal-election-activity definition. *See* 2 U.S.C. § 431(20); 11 C.F.R. § 100.24. The only part of that definition requiring such identification involves public communications that PASO an identified federal candidate. So such a targeted PASO communication would clearly identify the federal candidate. Otherwise, targeted federal election activity would not have to clearly identify a candidate. If voter registration, voter identification, or get-out-the-vote activities identified only one federal candidate in a partisan fashion among the relevant voters, that would indicate targeting, but if all federal candidates were identified in some neutral manner, that would not indicate targeting. Generic campaign activity by definition could not promote any candidate, federal or non-federal. As to a candidate for U.S. Representative, targeted federal election activity would be activity targeted at his or her district. However, as to a candidate for U.S. Senate, the fact that the relevant electorate is the whole state means that Federal Election Activity addressing the state would be too general to be considered targeted.

(RNC Disc. Resp. 16-17, FEC Exh. 7 (Dkt. 66-9).)

The FEC argues that Plaintiffs "have no track record" of doing issue advocacy and grassroots lobbying. (FEC's Supp. Mem. 29.) The First Amendment implications of this assertion are startling. The FEC is actually arguing that the First Amendment does not protect core political speech unless a speaker has spoken such speech before. The FEC offers no support for such an outlandish notion. There is none. And the FEC's notion that Plaintiffs have no case because they can do these activities in another way is yet another argument the FEC lost in *WRTL-II*, and is the sort of argument *WRTL-II* pronounced "too glib," 551 U.S. at 477 n.9 (rejecting notions that WRTL should just use it's PAC, avoid broadcast ads, or change the wording of its ads).

The FEC argues "that political parties generally spend money only on election-related activity" because "the primary goal of the major political parties is to win elections." (FEC's Supp. Mem. 30.) This is not really an argument. Of course parties want to win elections. They also have party platforms based on issues that they wish to advance. Increasing majorities furthers that end, but so do issue advocacy and grassroots lobbying.

In sum, the FEC has failed to show that questions based on the unambiguously-campaign-related principle (Questions 2 and 5) are frivolous. The questions should be certified.

B. Whether Government May Treat One's "Own Speech" as a "Contribution" By Reason of Coordination Is a Non-Frivolous Issue.

In Part II.B of their supplemental memorandum (Pls.' Supp. Mem. 10-21), Plaintiffs demonstrate that a political party's "own speech" may not be regulated as a "contribution" (as raised in Questions 3 and 6). And as set out in the introduction to the present memorandum, *Colorado II* expressly left open the as-applied question of whether political parties' own speech may be lim-

ited as a contribution.[15] Where an as-applied question is expressly reserved in a facial challenge, it is not credible to argue that the as-applied challenge is foreclosed because it would constitute facial overruling. As a matter of law, a court cannot overturn *Colorado II* by addressing an as-applied question expressly reserved in *Colorado II*. The same is true as to any notion of overturning *Buckley* on this issue because in *Colorado I*, 518 U.S. 604, six members of the Court cited *Buckley* itself as leaving the "own speech" issue open. *See id.* at 624 (Breyer, J., joined by O'Connor & Souter, J.J.); *id.* at 627-30 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part).

Plaintiffs verified their intent to do certain ads coordinated with Rep. Cao only as to timing. (2d Am. Comp. ¶¶ 43-44, 46-47.) The FEC acknowledges this intention, along with the fact that "a similar issue" was left unresolved in *Colorado II*. (FEC's Supp. Mem. 12 & n.7.) The FEC notes that in *Colorado II* the issue was not addressed because the issue was raised as a First Amendment overbreadth challenge with inadequate data to show the extent of the overbreadth. By noting these facts, the FEC acknowledges that this issue has been (1) noted by the Supreme Court, (2) left undecided, and (3) not dealt with in an as-applied challenge. That necessarily acknowledges the issue to be non-frivolous and requiring certification.

The FEC attempts to evade this necessary conclusion by arguing that the "'own speech'

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[15] *See* 533 U.S. at 456 n.17 (majority) ("need not reach in this facial challenge"), 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, J.J., dissenting) ("To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved.").

claim is so broad that it would swallow the coordinated expenditure rule and, therefore, is essentially a facial challenge." (FEC's Supp. Mem. 12.) As noted above, deciding an as-applied question left open in a facial challenge cannot, as a matter of law, be a facial challenge. Moreover, it is untrue that the rule would be entirely swallowed because there would still be coordinated "expenditures" regulated as "contributions," i.e., those "expenditures" that are in the nature of paying a candidate's bills and do not constitute a political party's "own speech" (the "own speech" principle would only apply where there is speech). But since, by its own swallowing-the-rule argument, the FEC now concedes the facial overbreadth at issue in *Colorado II* (which there precluded facial invalidation on First Amendment overbreadth grounds), then facial invalidation would be appropriate in this case in addition to invalidation as applied to "own speech." But that is a merits issue, not appropriate to a certification proceeding. It is enough for now to note that the FEC's own "swallowing" argument makes this issue more, not less, significant, and so, non-frivolous.

The FEC takes issue with the method for determining what constitutes a party's "own speech." (FEC's Supp. Mem. 12-14.) But as Plaintiffs have already explained, the FEC's own rules require that a disclaimer identify the speaker. (*See* Pls.' Supp. Mem. 14.) And the identification of the speaker as being the entity that pays for the speech is a speech-protective bright line, the very sort of line required where core political speech is involved.

As to how to define "own speech," the FEC erroneously argues that it is a factual question, citing various deposition statements and claiming confusion. (*See* FEC's Supp. Mem. 16 n.13; FEC's Proposed Findings of Fact 61-65.) But what constitutes one's own speech is a legal ques-

tion, not a factual question, so the statements of fact witnesses do not control the meaning of the legal concept. What "own speech" means was set out in RNC's response to an FEC interrogatory asking that question:

> RNC responds that the constitutional analysis underpinning Count 2 [regarding "own speech"] is already set out in [the Second Amended Complaint at] ¶¶ 44 ,62, 63, which are incorporated here by reference. *Buckley v. Valeo*, 424 U.S. 1 (1976), decided that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. So if a disbursement funds a communication of "the underlying basis for support," it is the speaker's own speech and may not be treated as a contribution, even if coordinated. *Buckley* said that a contribution limit "involves little direct restraint on . . . political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* One's own speech is, of course, more than symbolic expression of support, even if coordinated. A key part of *Buckley*'s analysis is to identify the speaker: "[T]he transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* But if speech is one's own, it is not the speech of another, even if coordinated, so it may not be treated as a contribution. So while express-advocacy communications and targeted federal election activities "in connection with" a candidate may pass the threshold unambiguously-campaign-related requirement, they are not the functional equivalent of contributions because they are the speaker's own speech and expressive activity. Consequently, they may not be limited because only "contributions" may be limited, not "expenditures."

(RNC Disc. Resp. 14, FEC Exh. 7 (Dkt. 66-9).) What constitutes a political party's "own speech" as a legal matter was also discussed at length in Plaintiffs' second discovery response (*see* RNC 2d Disc. Resp. 4-7, FEC Exh. 10 (Dkt. 66-12)) and in Plaintiffs' supplemental memorandum. (*See* Pls.' Supp. Mem. 12-15.)

The FEC's arguments dodge the relevant constitutional first principles and issue. The "own speech" protection is solidly anchored in *Buckley*'s fundamental distinction between what may be deemed an "expenditure" and what may be deemed a "contribution." (*See* Pls.' Supp. Mem. 12-13.) The reason that contributions may be limited, while expenditures may not be, is that contri-

butions do not involve one's own speech. *See Buckley*, 424 U.S. at 20-23. Consequently, limits may be applied to contributions because a lower standard of review is applied and lesser protection is afforded. *Id.* Until the FEC explains that first principle of constitutional law away,[16] its many words on extraneous points matter not.

The FEC's attempt to prove the "own speech" issue frivolous based on *Colorado II*'s "anti-circumvention" rationale (FEC's Supp. Mem. 16) must fail for the same fundamental reason. It does not deal with the constitutional first principle raised by *Buckley*'s manner of distinguishing "expenditures" and "contributions." And as set out in the introduction, *supra*, if the First Amendment mandates that parties' "own speech" must be treated as "expenditures" then the circumvention argument fails as a matter of law because only "contributions" may be limited, not expenditures. Moreover, the "own speech" issue was expressly left open *despite Colorado II*'s holding "that a party's coordinated expenditures . . . may be restricted to minimize circumvention," 533 U.S. at 465. Thus, potential circumvention did not foreclose the "own speech" question. In any event, Plaintiffs do not engage in the "tallying" identified as problematic in *Colorado II*, *id.* at 459. (*See* RNC 30(b)(6) Dep. at 42:11-43:1, Pls.' Exh. 1 (Dkt. 62-2).) And as previously noted, the *Colorado II* dissenters had strong arguments against any circumvention interest in this context, *id.* at 474-480, and for narrowly-tailored approaches if corruption were proven, *id.* at 581-

[16] The FEC argues that "[t]he line between independent and coordinated expenditures . . . has always depended upon the absence or presence of 'prearrangement and coordination of an expenditure.'" (FEC's Supp. Mem 15 (*quoting Colorado II*, 533 U.S. at 464).) But what the FEC refuses to acknowledge is that there is another, more foundational line between what may be treated as a "contribution" and what must be treated as an "expenditure." And as *Colorado II* indicates, that question hinges on whether one's own speech is involved, and it remains an open question. The FEC cannot cite *Colorado II* to close an issue that *Colorado II* expressly left open.

82. While those arguments did not prevail facially, they have stronger force as the circumvention becomes more attenuated, as has happened here, and they will likely prevail in this closer, as-applied context.

In sum, the FEC has failed to show that questions (Questions 3 and 6) based on *Buckley*'s "own speech" principle, which deal with an as-applied question expressly left open in *Colorado I* and *II*, are frivolous. The questions should be certified.

C. Since "Independent Expenditure" Rules Make "Own Speech" Impossible Without Coordination, Coordinated "Own Speech" Must Be Permitted.

In its supplemental memorandum, Plaintiffs demonstrated that the current "independent expenditure" rules make "own speech" impossible and therefore the First Amendment requires that coordinated "own speech" be permitted. (*See* Pls.' Supp. Mem. 16-21.) Although the FEC conducted the deposition that identified this problem (and thus it was aware of it before filing its supplemental memorandum), the FEC made no effort to show how this problem is anything other than a profound and unconstitutional burden on a political party's ability to engage in its "own speech." For this reason, too, Questions 3 and 6 are non-frivolous and should be certified.

D. Each Question Is Non-Frivolous and Should Be Certified.

Each question is here revisited, showing why it is not frivolous and should be certified.

1. Question 1 Should Be Certified.[17]

In their supplemental memorandum, Plaintiffs explain why Question 1 should be certified.

[17] **Question 1**: "Has each of the plaintiffs alleged sufficient injury to constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power under Article III?"

(Pls.' Supp. Mem. 21-22.) The FEC's supplemental memorandum only discusses standing in a footnote, (FEC's Supp. Mem.10 n.6) asserting nothing that Plaintiffs have not already addressed. This question is non-frivolous and should be certified.

2. Question 2 Should Be Certified.[18]

In their supplemental memorandum, Plaintiffs explain why Question 2 should be certified. (Pls.' Supp. Mem. 23-25.) They have here addressed the FEC's objections to *Buckley*'s unambiguously-campaign-related principle, *supra*. This question is non-frivolous and should be certified.

3. Question 3 Should Be Certified.[19]

In their supplemental memorandum, Plaintiffs explain why Question 3 should be certified. (Pls.' Supp. Mem. 25-26.) They have here addressed the FEC's objections to the "own speech" principle, *supra*. This question is non-frivolous and should be certified.

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[18] **Question 2:** "Do the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(2)-(3) violate the First and Fifth Amendment rights of one or more plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?"

[19] **Question 3:** "Do the expenditure limits at 2 U.S.C. § 441(d)(2)-(3) violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?"

4. Question 4 Should Be Certified.[20]

In their supplemental memorandum, Plaintiffs explain why Question 4 should be certified. (Pls.' Supp. Mem. 26.) In particular, they noted that in prior briefing the FEC had failed to address the key argument from Plaintiffs' initial certification memorandum (Pls.' Mem. 11) based on *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1998) ("*CPLC-PAC*"). *CPLC-PAC* held that where the government employs multiple contribution or coordinated-expenditure limits for the same or similar offices, the government's acknowledgment that the higher limits accommodate its anti-corruption interest means that lower limits do not advance that interest so lower limits are unconstitutional. 989 F. Supp. at 1298.

The FEC now responds. (FEC's Supp. Mem. 35 n.21.) But the FEC erroneously argues that "reliance . . . is misplaced because those limits varied between candidates *running in the same race*." (*Id.* (emphasis in original).) Of course candidates in the same race may not be treated differently, but the FEC is wrong on *CPLC-PAC*'s facts, and the constitutional analysis goes deeper.

Regarding *CPLC-PAC*'s facts, the statute at issue set limits on contributions to candidates at $100 per election for small local races, $250 for legislators and larger area races, and $500 for

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[20] **Question 4:** "Do the limits on coordinated expenditures at 2 U.S.C. § 441(d)(3) violate the First Amendment rights of one or more plaintiffs?

(a) Do all but the highest limits violate such rights because any lower rates are unsupported by the necessary anti-corruption interest?

(b) Is 2 U.S.C. § 441(d)(3) facially unconstitutional because lower rates cannot be severed from higher rates and the voting-age-population formula is substantially overbroad and inherently unconstitutional?

(c) Is the highest limit for expenditures coordinated with Representatives unconstitutionally low?"

statewide races. 989 F. Supp. at 1292. These limits were doubled if candidates accepted defined spending limits. *Id.* Thus, the FEC's notion that the case was about "candidates *running in the same race*" is erroneous. In the same race there might be one candidate with a double limit and another without, but that was not the focus of the case nor the point of the analysis. The analysis was the same if a candidate in one race for local office had a $100 contribution limit and a candidate in *another* race for local office got the doubled limit. Moreover, the FEC's argument that the federal schemes variable limits are justified based on "targeting more voters or across a larger geographic area would be more costly" (FEC's Supp. Mem. 32) fails because the scheme at issue in *CPLC-PAC also* had contribution limits that varied depending on population and geography, *see supra*. And the FEC's arguments about deference to legislative balancing and line drawing also fail because *CPLC-PAC* noted cases urging deference as to line drawing. But there could be no deference, given the core constitutional problem, which is the same problem here.

CPLC-PAC's analysis goes to the very core reason for *why* there may be contribution limits to begin with—preventing quid pro quo corruption. *See Buckley*, 424 U.S. at 26-27. Absent the corruption interest, there may be no limits because the First Amendment default is "freedom of speech," and "speech" includes "contributions," *id.* at 23 ("contributions" implicate free speech). The principle established in *CPLC-PAC* is that "the adoption of variable limits reflects a conclusion on the part of the voters [here, read "Congress"] that the $200 limit suffices to address the issue of corruption, even if it is not the lowest amount which would do so. That conclusion requires a finding that the lower limit [$100] is not closely drawn." 989 F. Supp. at 1296 (footnote omitted). Consequently, the challenged variable limits in the present case similarly fail for lack of

a justifying interest in limiting corruption in all but the highest rate at which Congress asserted its anti-corruption interest. As Plaintiffs put it in their original certification memorandum, "Congress says that a Louisiana Senator can be 'bought' for a little more than a quarter of a million dollars but that it takes more than two million dollars to 'buy' a California Senator." (Pls.' Mem. 12.) The FEC has failed to show that human nature differs between U.S. Senators from Louisiana and California (nor could it, given the mobility of the U.S. population, as evidenced by Hillary Clinton moving to New York and becoming its Senator). In short, Congress is not "entitled to significant deference in balancing competing interests" (FEC's Supp. Mem. 31) where First Amendment rights are involved. Its *only* basis for contribution limits is preventing corruption, and absent a legitimate anti-corruption rationale it may not impose limits. The FEC's failure to deal with these first principles of campaign-finance law under *Buckley* reveals that it has not succeeded in showing that this question is frivolous.

The FEC's failure to come to grips with this first principle of constitutional law apparently led to its failure to address Plaintiffs' argument that both the higher and lower limits for House races must fall as a unit because they are part of the same scheme and not severable. The FEC, having failed to address this issue, has not proven it frivolous.

Instead, the FEC merely argues that Plaintiffs' claim that the higher House limit is unconstitutionally low is erroneous. (FEC's Supp. Mem. 34.) But that issue would only arise if the severability issue addressed above were decided against Plaintiffs, which is unlikely—especially here since the FEC did not even address it. As Plaintiffs said in their original memorandum: "*If* the higher limit for expenditures coordinated with candidates for Representative is somehow

deemed to have survived the analysis above [severability], *then* it is challenged as unconstitutionally low." (Pls.' Mem. 13 (emphasis added).) In any event, the FEC's argument is that contribution limits must be analyzed from the candidate's perspective, not the contributor's, and that from that perspective the question is whether candidates receive enough to wage an effective campaign. (FEC's Supp. Mem. 34.) The notion that a contribution limit must be viewed only from the candidate's perspective is simply untrue in light of the fact that *Buckley* recognized a contribution as a form of speech protected by the First Amendment. 424 U.S. at 23. *Randall v. Sorrell*, 548 U.S. 230 (2006), reaffirmed that "*Buckley* recognized that contribution limits, like expenditure limits, 'implicate fundamental First Amendment interests,' namely, the freedoms of 'political expression' and 'political association.'" 548 U.S. at 246 (*quoting Buckley*, 424 U.S. at 15, 23). And *Randall* included an analysis of how Vermont's contribution limits would affect *political parties*, not just candidates. *See id.* at 257. Thus, the FEC's effort to substitute a candidate-centered analysis for a First Amendment speaker-centered analysis fails. Whether—applying proper political-party oriented standards and evidence—the higher House contribution limit is too low is a merits question for the en banc panel. It is not a frivolous question.

In sum, all parts of Question 4 are non-frivolous and should be certified.

5. Question 5 Should Be Certified.[21]

In their supplemental memorandum, Plaintiffs explain why Question 5 should be certified. (Pls.' Supp. Mem. 27.) They have here addressed the FEC's objections to *Buckley*'s unambiguously-campaign-related principle, *supra*, which deals with the overbreadth claim. The question also includes an unconstitutional vagueness challenge (*see* 2d Am. Comp. Count 4), which the FEC did not address. Question 5 is non-frivolous and should be certified.

6. Question 6 Should Be Certified.[22]

In their supplemental memorandum, Plaintiffs explain why Question 6 should be certified. Pls.' Supp. Mem. 27.) They have here addressed the FEC's objections to the "own speech" principle, *supra*. This question is non-frivolous and should be certified.

7. Question 7 Should Be Certified.[23]

In their supplemental memorandum, Plaintiffs explain why Question 7 should be certified.

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[21] **Question 5:** "Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and the Coordination-Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as in-kind "contributions") violate the First and Fifth Amendment rights of one or more plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?"

[22] **Question 6:** "Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and the Coordination-Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as "contributions") violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?"

[23] **Question 7:** "Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) violate the First Amendment rights of one or more plaintiffs as applied to a political party's in-kind and direct contributions because it imposes the same limits on parties as on political action committees ('PACs')?"

(Pls.' Supp. Mem. 27-28.) There Plaintiffs cite the argument from their opening memorandum, which noted that *Randall* struck down state contribution limits in part because Vermont's 'insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a politically important political right, the right to associate in a political party.'" (Pls.' Mem. 15 (*quoting Randall*, 548 U.S. at 256 (plurality opinion)).) The FEC's present argument, that there were other bases also considered in striking down the Vermont limits, does not alter the foregoing statement about *Randall*. Certainly, the FEC's argument that there is no constitutional requirement that parties be treated better than political committees, based on the 2001 *Colorado II* decision fails to eliminate *Randall*'s 2006 statement. And as noted below, there are serious concerns about the eroding power of political parties.

Plaintiffs noted the FEC's earlier argument—on which the FEC still primarily relies—that political parties enjoy higher limits overall than political committees, but responded that this would not be true here if other provisions were struck down. (Pls.' Supp. Mem. 28.) The FEC's continued focus on other spending authority than this $5,000 limit completely ignores the context of this litigation. This question is an integral part of the comprehensive challenge brought and may not be left out based on isolated, piecemeal consideration of this provision alone.

Plaintiffs noted that the FEC's previous argument that *Colorado II* addressed this issue failed to show where the present question was addressed and decided. (Pls.' Supp. Mem. 28.) The FEC still has not shown where this issue was considered and decided in *Colorado II*.

The FEC argues that *Buckley* upheld this provision facially. (FEC's Supp. Mem. 37.) But simply going to the portion of *Buckley* cited, 424 U.S. at 35-36, quickly reveals that the challenge

to the limit was only based on the fact that it favored established groups over ad hoc ones, which the Court rejected. That is not the challenge presented here.

The FEC cites George Washington and other Framers for a concern about the "dangers of parties" that might be "instrument[s]" of "some small and narrow special interest." (FEC's Supp. Mem. 39.) While the Framers should certainly be consulted more than they are on constitutional issues, what they actually *put in the Constitution* was that Congress should not abridge free speech (which a contribution limit clearly does). And the Framers' concern about narrowly-focused factions has no application to a broadly based, major, state or national political party, such as LA-GOP or RNC, even if the Framers had decided to place their concern about such factions somewhere in the Constitution. The FEC's argument here in no way vitiates the unique role of political parties that *Randall* noted, 548 U.S. at 256, and which caused to be problematic in that case the imposition of identical limits on parties as on political committees. In fact, as noted below, the entities that might more closely resemble the factions that concerned the Framers are on the political ascendancy at the expense of political parties, which ought to be more favored.

The FEC argues that political parties have non-monetary and other benefits that other political committees lack. (FEC's Supp. Mem. 42.) But the issue here is about a particular statute that places the same contribution limits on political parties as on political committees. The fact that political parties may have other benefits is immaterial to the ability of political parties to receive these monetary contributions. In fact, before the FEC's other-benefits line of argument could be convincing, one would also have to consider benefits that political committees have that political parties do not. For example, political committees can have so-called soft money (not subject to

source and amount restrictions), while political parties cannot, which is a huge advantage. *See*, *e.g.*, *EMILY's List*, 2009 WL 2972412 (recognizing unlimited right of individuals to contribute soft money to political committees making independent expenditures).

This issue of the relative lack of power of political parties versus other entities is a problem that is building, not waning. If the United States Supreme Court overturns *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)—the case permitting the prohibition of corporate contributions and independent expenditures (express-advocacy communications)—as is a real possibility in *Citizens United v. FEC* (No. 08-205) (the case in which the Supreme Court recently heard reargument on that issue), then political parties will also be hugely disadvantaged as to corporations and unions, which will also be free to use soft money. This question of the downgrading of the relative power of political parties is a serious issue, as may be judged from Justice Breyer's question at the *Citizens United* oral argument:

> Suppose we overrule these two cases. Would that leave the country in a situation where corporations and trade unions can spend as much as they want in the last 30 days on television ads, et cetera, of this kind, but political parties couldn't, because political parties can only spend hard money on this kind of expenditure? And therefore, the group that is charged with the responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want?

Tr. Oral Arg. at 22 (available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf.).

Precisely because of this downgrading of the relative power of political parties, the *EMILY's List* decision noted that the remedy would require raising or eliminating contribution limits to political

parties, which in turn would require a change in Supreme Court precedent.[24] This case presents a constitutionally-sound opportunity to enhance the power of political parties. The issue of the relative power of political parties is a current issue of deep concern and precisely the sort of thing that should be set before the en banc court and likely the Supreme Court after that.

In sum, while the FEC has engaged in merits briefing that is only appropriate for the appellate court, it has not shown Question 7 to be frivolous. It should be certified.

8. Question 8 Should Be Certified.[25]

In their supplemental memorandum, Plaintiffs explain why Question 8 should be certified. (Pls.' Supp. Mem. 28.) Those arguments remain valid and were largely ignored by the FEC.

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[24] As the D.C. Circuit put the matter:

> As some commentators point out, it might seem incongruous to permit non-profits to receive and spend large soft-money donations when political parties and candidates cannot. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform,* 77 TEX. L.REV. 1705, 1715 (1999). But this perceived anomaly has existed to some extent since *Buckley,* which recognized that contribution limitations "alone would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." *Buckley,* 424 U.S. at 26 n. 26. And *McConnell* similarly took note of the fact that, even after that decision upholding regulations on contributions to parties, "[i]nterest groups ... remain free to raise soft money to fund voter registration, GOTV activities, mailings," and advertisements. *McConnell v. FEC,* 540 U.S. 93, 187 (2003).
>
> If eliminating this perceived asymmetry is deemed necessary, the constitutionally permitted legislative solution, as the Court stated in an analogous situation in *Davis* [*v. FEC*, 128 S. Ct. 2759 (2008)], is "to raise or eliminate" limits on contributions to parties or candidates. [*Id.*] at 2774. But it is not permissible, at least under current Supreme Court precedents, to remove the incongruity by placing these limits on spending by or donations to non-profits.

EMILY's List, 2009 WL 2972412, at *12.

[25] **Question 8:** "Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) facially violate the First Amendment rights of one or more plaintiffs?"

Regarding sub-claim (a), about the lack of indexing, the FEC continues to ignore the first-principle constitutional argument based on the lack of corruption interest where there are variable limits. This argument has been developed above, *see supra* at 33-35, and will be applied here. Since limits are based on an anti-corruption interest, if Congress says that its interest is satisfied by a $5,000 limit in the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, then that is the level at which it has established that its interest engages as of 1971 and 1974. To be conservative, we shall consider matters from 1976, when *Buckley* was decided. Using the U.S. Department of Labor's Inflation Calculator (available at http://146.142.4.24/cgi-bin/cpicalc.pl) to calculate the 1990 value of $5,000 in 1976, we find that the level at which Congress asserted its anti-corruption interest in current dollars is $18,966.08. That level, roughly $19,000, is the level at which Congress believes that corruption could occur, i.e., someone could be somehow "bought." But instead of $19,000 (the level justified by the anti-corruption interest), the contribution limit is $5,000. This means, at a minimum, that as-applied to any contribution under $19,000 the limit is unconstitutional because the government has neither asserted (nor proven) any anti-corruption interest to justify. More properly, the limit should be struck as overbroad, and Congress should be required to reenact a proper limit indexed for inflation. Not doing so diminishes a First Amendment liberty more each year (so long as there is inflation, which seems ever present). The FEC continues to concede that "[i]f and when inflation seriously erodes the value of a $5,000 contribution and Congress does not act to increase the limit, plaintiffs might then be able to raise a substantial question . . . ." (FEC's Supp. Mem. 45.) Given this concession that erosion and in-

action would raise a non-frivolous question, the FEC has unwittingly conceded that this question should be certified—because the difference between $5,000 and $19,000 is substantial, not only in the raw amount of $14,000 but also in that the latter is nearly four times the former, and because Congress *has not acted* for over three decades.[26] This sub-claim is non-frivolous.

Regarding sub-claim (b), about variable contribution limits, the FEC continues to argue that Congress has authority to "balance" things that it has no anti-corruption interest in regulating at all because the First Amendment protects all political contributions absent some demonstrated anti-corruption interest. (FEC's Supp. Mem. 46.) As discussed above, if the government says that a high contribution limit meets its anti-corruption interest, then no lower limit does. The only relevant question is at what level the government asserts that there is a concern that candidates may be "bought," and otherwise limits are not justified at all. The FEC's continued resistance to these constitutional first principles dooms its argument that this sub-claim is frivolous.

As to sub-claim (c), that $5,000 is too low for political parties to fulfill their historic mission, the FEC begins by relying on *Buckley*'s upholding of the limit (FEC's Supp. Mem. 47), but the present issue was not at issue in *Buckley*, *see supra* at 38-39, and the limit *Buckley* upheld has been seriously eroded by inflation, *see supra*. The FEC then argues that parties have other spend-

[26] The FEC's reliance on *Randall* and *Ognibene v. Parker*, 599 F. Supp.2d 434 (S.D.N.Y. 2009), concedes that lack of indexing may be a factor in striking down a contribution limit. Neither case stands for the proposition that such an issue is frivolous, which is all that is at issue in this certification proceeding. (FEC's Supp. Mem. 44-45.) And the FEC's argument concerning *Buckley*'s upholding of the limit ignores the fact that it was challenged on other grounds and what was upheld in *Buckley* has languished without change for over three decades. (FEC's Supp. Mem. 46.) The fact that the Act might offer other ways to help candidates is of no avail because this a comprehensive challenge that may leave some of those no longer available. (FEC's Supp. Mem. 46.)

ing power, which is no answer as this limit is challenged in the context of a comprehensive challenge that might result in some other spending authority being removed. The FEC's notion that contribution limits are viewed from a candidate's perspective (FEC's Supp. Mem. 47) has already been refuted, *see supra* at 36 (contribution is form of speech viewed from speaker's perspective), as has the notion that all that matters is whether candidates can mount effective campaigns, *see supra* at 36 (speaker values ability to speak by contribution, not just whether recipient can be effective). That the limit has not prevented parties from supporting candidates (FEC's Supp. Mem. 47) says nothing about the correctness of the limit because a $1 limit would allow them to support candidates, but it would be unconstitutional. As to the FEC's arguments about the historical role of parties (FEC's Supp. Mem. 48), Plaintiffs have already demonstrated that the ability of parties to fulfill their historic function is a very serious question at present, in light of the rising power of political committees, corporations, and unions, *see supra* at 38-41, but this, as with the arguments here is more properly a merits issue for the appellate court.[27] The subclaim is non-frivolous.

In sum, Question 8 is non-frivolous and should be certified.

[27] The FEC's arguments about the effect of changes on incumbents and challengers (FEC's Supp. Mem. 48-49) is a policy argument suitable perhaps for the merits, but it says nothing as to whether the question is frivolous and thus is irrelevant at present.

III. No Broad "Appearance of Corruption" Interest Exists.

Under *Buckley*, a proper rationale for campaign finance regulations is the prevention of corruption or the appearance of corruption. Actual quid pro quo corruption has always been handled by anti-bribery laws, but broad campaign-finance regulation has been based on the unproven assumption that such regulation would eliminate the appearance of corruption and assure the people that their electoral system was honest and fair. Despite consistently arguing that there is a link between the appearance of corruption and campaign-finance regulation, the FEC is unable to provide empirical evidence of such a connection. Yet the FEC continues to argue that these limitations are necessary to prevent the appearance of corruption in government. "Though campaign finance laws are often heralded as the cure for what ails elections in the United States, such optimism must be tempered by statistical reality." (Pls.' Proposed Findings Resp. at ¶ 107.) Interestingly, studies on this subject have found that campaign finance regulations do not positively affect political perception, and may even have a negative effect.

As this is not a brief on the merits of Plaintiffs' constitutional claims, a full analysis of the anti-corruption rationale is untimely. Nevertheless, Plaintiffs provide a broad-stroke overview of why the FEC's anti-corruption rationale is unsupported by evidence.

According to studies conducted by prominent political scientists David Primo and Jeffrey Milyo, "the net effects of campaign finance regulations on political efficacy appear muted or even contrary to expectations." (Pls.' Resp. to FEC's Proposed Findings of Fact at ¶ 103.) Primo and Milyo found that

the effect of campaign finance laws is sometimes perverse, rarely positive, and never more

> than modest. Given the importance placed on public opinion for the development of campaign finance law, it is remarkable that we have found so little evidence that citizens are influenced by the campaign finance laws of their state.

(*Id*.) Interestingly, there is evidence that "campaign advertising (and, therefore, campaign spending) *increases* interest levels, knowledge, and turnout, suggesting that spending may in fact be a net positive for democracy." (*Id*. (emphasis added) (referencing other political scientists John J. Coleman, Paul F Manna, Paul Freedman, Michael Franz, and Kenneth Goldstein).)

Conclusion

For the foregoing reasons, this Court should "immediately . . . certify [the identified] questions of constitutionality . . . to the [Fifth Circuit] . . . [to] hear the matter sitting en banc," 2 U.S.C. § 437h, and deny the FEC's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be delivered through the ECF electronic filing system on the 30th day of September 2009 to the following CM/ECF participants:

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I hereby certify that I caused the foregoing to be delivered through U.S. Mail on the 30th day of September 2009 to the following non-CM/ECF participants:

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