UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	
Plaintiff,	Civ. No. 11-562 (RLW)
v.	
FEDERAL ELECTION COMMISSION,	REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND
Defendant.	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO ALTER OR AMEND THE JUDGMENT

Anthony Herman
General Counsel

Lisa J. Stevenson
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Harry J. Summers
Assistant General Counsel

Holly J. Baker
Kevin P. Hancock
Attorneys

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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Having correctly upheld the constitutionality of a contribution limit of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57, as applied to bequests, the Court erroneously certified a question under 2 U.S.C. § 437h as to the application of that limit to a single bequeathed contribution. Contrary to the Court's ruling, contributors or recipients may not (and should not be allowed to) seek exemptions from FECA's contribution limits for an individual contribution (in this case made through a bequest) based on an after-the-fact analysis of whether the contribution resulted in actual or apparent corruption. To our knowledge, this Court's ruling is the only one ever to reach that conclusion. Certification here was clear error, and defendant Federal Election Commission's ("Commission" or "FEC") motion to alter of amend the Court's judgment under Federal Rule of Civil Procedure 59(e) should be granted.

In response to the Commission's opening brief, plaintiff Libertarian National Committee, Inc. ("LNC") points to no case where another court has held that a contributor can receive an after-the-fact, individualized exception from a contribution limit. The least-restrictive-alternative tailoring in which the Court engaged is a feature of strict scrutiny, not the applicable closely drawn standard, which the LNC concedes applies to contribution limits like the one at issue. The LNC points out that only thirteen other section 437h claims have ever been certified to the *en banc* Courts of Appeals, but that number underlines how *limited* review under section 437h is. The prevalence of section 437h cases could increase greatly, however, should district courts adopt this Court's rationale.

The Commission respectfully requests that the Court alter or amend the judgment.

ARGUMENT

I. THE COMMISSION HAS SATISFIED RULE 59(e) BY PRESENTING CLEAR ERRORS OF LAW IN THIS COURT'S PRIOR RULING

Under Rule 59(e), this Court may alter or amend its judgment if the Commission "'can present new facts or clear errors of law that compel a change in the court's prior ruling,'" as the LNC's opposition brief recognizes. (LNC Opp'n to Def.'s Mot. to Alter or Amend ("LNC Opp'n") at 2 (quoting *Amoco Prod. Co. v. Fry*, 908 F. Supp. 991, 993 (D.D.C. 1995) (emphasis omitted) (Docket No. 51).) The Commission has satisfied this standard by pointing out clear errors of law demonstrating that the LNC failed to present any substantial constitutional question. (*See* Mem. of Points and Authorities in Supp't of FEC's Mot. to Alter or Amend the J. ("FEC Mem.") at 8-13 (Docket No. 48).)

As an initial matter, contrary to the LNC's claim, the Commission does not face a "greater" burden in meeting the Rule 59(e) standard because section 437h allegedly presents a "low bar" for certification. (LNC Opp'n at 2.) Section 437h is interpreted narrowly to limit certification to the *en banc* Courts of Appeals, as this Court noted (*see* Mem. Op. at 12 (Docket No. 41)), but regardless of whether the certification standard is strict or lenient, Rule 59(e) is satisfied here because the legal errors in finding that standard satisfied were "clear." The Commission need not prove more.

Nor is the Commission required to present "alternative rationales" or "new legal theories" to show clear legal error, as the LNC contends. (LNC Opp'n at 2-3.) In fact, under Rule 59(e), a party may *not* present a new legal theory that was available prior to the judgment. *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012). The Commission need only point out that the Court made a clear error of law on the basis of the legal arguments already put forth, as the Commission has here.

Moreover, in its new, greatly narrowed form, the question certified by this Court presents only the insubstantial issue of whether the LNC can immediately receive the mere $7,534 that remains of the $217,734 Burrington bequest, or whether it must wait seven months to receive it at the end of the year. (*See* FEC Mem. at 4, 13 n.7.) The LNC responds (LNC Opp'n at 3 n.2) that the certified question will be saved from mootness by the capable-of-repetition-yet-evading-review doctrine, but this incorrect contention misses the point: Even though the certified question will not be moot until the new year, it is — *today* — not factually substantial enough to warrant the attention of the *en banc* Court of Appeals since the LNC has already accepted the vast majority of the bequest.[1]

II. THE COURT'S RULING CONTAINS THREE CLEAR ERRORS OF LAW

The Court's holding that 2 U.S.C. § 441a(a)(1)(B) ("Contribution Limit") could be invalid as applied to just Burrington's bequest — and its certification of a narrowed section 437h question on that basis — was clear legal error. The LNC has failed to demonstrate otherwise.

A. The Court Applied a Test Akin to Strict Scrutiny's Narrow Tailoring Instead of Closely Drawn Scrutiny

This Court's ruling erroneously applied a test akin to strict scrutiny's narrow tailoring requirement, despite first recognizing that the Contribution Limit is subject only to the less rigorous "closely drawn" (i.e., intermediate) scrutiny. (*See* FEC Mem. at 11-12.) The certified question requires the Commission to prove an actual *quid pro quo* arrangement, or special access or benefits that make such an arrangement more likely, to justify applying the Contribution Limit to Burrington's bequest. (Mem. Op. at 27-28.) This ruling, however, is directly contrary to the

[1] The Commission did not explicitly make this point in its pre-judgment briefs, but the LNC obviously had not argued for the narrow certification that the Court ultimately adopted. Given the ruling that neither party had anticipated, the Commission should not be foreclosed from pointing out this aspect of the ruling's error.

Supreme Court's holding in *Buckley* that Congress need not use means that are less restrictive than prophylactic contribution limits, such as bribery laws and disclosure requirements, to address "proven and suspected quid pro quo arrangements." 424 U.S. 1, 27-28 (1976).

The LNC does not deny that this Court applied a less-restrictive-means test in certifying the section 437h question, nor does the LNC dispute that strict scrutiny utilizes least-restrictive-means analysis. (LNC Opp'n at 14.) The LNC does claim that the Court applied proper tailoring because closely drawn scrutiny is allegedly "flexible" and "ambiguous" enough to also allow for a "less" (but not "least") restrictive-alternative analysis. (*Id.*) The LNC makes no effort, however, to explain what means could be more restrictive than this Court's requirement that evidence of actual corruption be produced to justify the Contribution Limit's application to Burrington's one bequest. And in any event, the LNC's attempt to import a less-restrictive-alternative analysis into closely drawn scrutiny is flatly contrary to *Buckley*. *See, e.g.*, *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 641 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("[T]he *Buckley* Court summarily rejected the argument that, because *less restrictive means* of preventing corruption existed — for instance, bribery laws and disclosure requirements — FECA's contribution provisions were invalid." (emphasis added)).

As this Court correctly recognized (Mem. Op. at 14-15), the Supreme Court has been anything but ambiguous in repeatedly distinguishing closely drawn scrutiny from strict scrutiny: "[E]xpenditure limits are subject to strict scrutiny, while contribution limits will be valid as long as they satisfy 'the lesser demand of being closely drawn to match a sufficiently important interest'" — and "[t]he Court has *never* repudiated this distinction." *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 137 (D.D.C. 2012) (three-judge court) (emphasis added) (quoting *McConnell v.*

FEC, 540 U.S. 93, 136 (2003)). To be sure, closely drawn scrutiny is a "heightened" form of scrutiny that requires "careful tailoring," as the LNC stresses. (LNC Opp'n at 10 (quoting *McConnell*, 540 U.S. at 231, and *Randall v. Sorrell*, 548 U.S. 230, 237 (2006)).) But it is not strict scrutiny.

The LNC effectively confirms that the Court's ruling could only be appropriate under strict scrutiny by principally relying (LNC Opp'n at 6-8) on two cases applying that level of scrutiny. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 476-82 (2007) ("*WRTL*"), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258, 263 (1986) ("*MCFL*"), both involved *spending* limitations. The Supreme Court thus applied strict scrutiny and not the intermediate, closely drawn scrutiny that is applicable to contribution limits like the one in this case. *See WRTL*, 551 U.S. at 476-82; *MCFL*, 479 U.S. at 258, 263-65.

Closely drawn scrutiny provides far more breathing room for prophylactic contribution limits than strict scrutiny does for expenditure limits. The governmental interest supporting a contribution limit need not support every particular application of that limit. For example, the Supreme Court in *FEC v. Beaumont*, applying closely drawn scrutiny, declined to create an *MCFL*-like exception to a contribution limit for certain non-profit advocacy corporations. *See* 539 U.S. 146, 157-63 (2003) (acknowledging the Court's reluctance to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared" (internal quotation marks omitted)). Courts have thus repeatedly rejected as-applied challenges even where the class of contributions at issue posed a somewhat reduced danger of corruption, in contexts such as contributions from family members, contributions for

administrative support rather than influencing elections, and anonymous contributions. (*See* FEC Mem. at 8-9 (citing cases).)[2]

Given the flexibility associated with closely drawn scrutiny, as-applied exceptions to contribution limits are rare. But that does not mean the Commission takes the position that *no* test is applied to ensure that a contribution limit's scope is closely commensurate with its supporting governmental interest, as the LNC erroneously suggests. (LNC Opp'n at 12.) As the LNC itself acknowledges, the Supreme Court in *McConnell*, applying closely drawn scrutiny, invalidated a limit on contributions by minors because the restriction swept too broadly. (LNC Opp'n at 15 (citing *McConnell*, 540 U.S. at 231-232).) Similarly, in *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293-95 (4th Cir. 2008), a contribution limit failed closely drawn scrutiny because the Fourth Circuit determined that the contributions at issue — contributions made to political committees that make only independent expenditures — do *not* threaten corruption *at all*. Thus, the Contribution Limit served no anti-corruption purpose and was not closely drawn. *See id.*

But here, this Court determined that contributions by the deceased to national party committees *do* threaten corruption. (Mem. Op. at 19-21.) And thus, applying closely drawn scrutiny, this Court correctly found that the Contribution Limit furthers its purpose of preventing corruption "the same for bequests as for other contributions." (*Id.* at 21.) The Court departed from closely drawn scrutiny, however, when it went on to suggest that the Contribution Limit might not apply to the Burrington bequest absent evidence of corruption. Requiring specific

[2] The Commission's citation to *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) ("*NCPAC*"), was intended to indicate that the Court in *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982), had rejected an as-applied exemption for nonprofit corporations even though they "might not exhibit all of the evil that contributions by [for profit] corporations exhibit." The holding in *NCPAC* itself involved an expenditure limit subject to strict scrutiny. 470 U.S. at 494-97.

evidence of actual and apparent corruption stemming from a single contribution would lead to a burdensome and amorphous inquiry.[3] And the Court's ruling suggests that the Commission would have to monitor the Burrington bequest for evidence of corruption on an ongoing basis to justify the Limit's application. (Mem. Op. at 28 n.8.) This kind of after-the-fact, individualized, case-by-case analysis subverts the purpose and utility of a bright-line prophylactic rule and is inconsistent with the flexibility that the LNC concedes closely drawn scrutiny provides.

B. The Contribution Limit Prevents Bequests from Posing the Threat or Appearance of Corruption and Validly Applies to Burrington's Bequest as a Matter of Law

Because bequeathed contributions threaten corruption and the appearance of corruption, this Court correctly concluded that the Contribution Limit validly applies, in general, to bequests to national party committees. (Mem. Op. at 19-21.) That ruling means that the Limit is also valid as applied to Burrington's particular bequest. It was therefore error for the Court to find that there was a substantial question as to the Limit's application to that single bequest. (*Id.* at 27-28.) As the Commission noted (FEC Mem. at 7), we are aware of no other case in which a court has ruled that a constitutional contribution limit could be invalid as applied to *one* contribution absent corruption evidence about that particular contribution. And the LNC has identified no such case.

FECA's contribution limits are prophylactic rules. They prevent "the danger" and "the appearance" of *quid pro quo* corruption that is inherent in *all* large contributions. *Buckley*, 424

[3] The LNC argues that it is "not so" that this Court's ruling would require the Commission to justify one application of the Contribution Limit by proving an actual *quid pro quo* or special access or benefits that make a *quid pro quo* arrangement more likely. (LNC Opp'n at 14.) The Court, however, certified the question about Burrington explicitly because "here *there are no facts* to indicate that the LNC solicited a large bequest from Burrington, provided any benefit or special access to Burrington while he was alive, or provides any special benefit or access to Burrington's heirs or representatives now." (Mem. Op. at 27 (emphasis added).)

U.S. at 27-30. As a result, FECA's limits validly apply to all contributions even though "most large contributors do not seek improper influence." *Id.* at 29. This Court's ruling acknowledged these features of the contribution limits. (Mem. Op. at 4-5, 21.)

As with any prophylactic rule, contribution limits are not subject to individualized case-by-case analysis. *See, e.g.*, *Brown v. City of Pittsburgh*, 586 F.3d 263, 273 (3d Cir. 2009) ("In light of the difficulties inherent in making the individualized, case-by-case judgments . . . [a] bright-line prophylactic rule may be the best way to provide protection, and, . . . offer[] clear guidance . . . ." (internal quotation marks omitted)). Indeed, the whole point of prophylactic rules like the Contribution Limit is to avoid such a difficult analysis. *See id.*; *cf.* Mem. Op. at 5-6 ("[B]ecause of the difficulty in determining suspect contributions, 'Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.'" (quoting *Buckley*, 424 U.S. at 30)); *see also* FEC Mem. at 5-11.

Even though contribution limits are not subject to individualized case-by-case analysis, they are subject to as-applied challenges that seek *categorical* exceptions, such as the LNC's as-applied claim in this case as to bequests. The relevant question in these cases has been whether the particular class of contributions at issue (*e.g.*, contributions by corporations, family members, or in this case, the deceased) presents the same dangers of corruption and its appearance that were identified in *Buckley*.[4] (*See* FEC Mem. at 8-9 (citing cases).) If the dangers are present,

[4] In evaluating this question, the Supreme Court has recognized that it would be unrealistic to require evidence of past corruption when the limit under attack has been in place for decades. Thus, to uphold the limit at issue, the Court has required only that "experience under the present law confirm[that] a serious threat of abuse" would result were the type of spending at issue no longer limited. *FEC v. Colo. Republican Federal Campaign Comm.*, 533 U.S. 431, 457 (2001) (rejecting challenge to long-standing limits on spending that a party coordinates with its

courts have upheld the contribution limit under attack because in that as-applied situation the limit continues to serve its constitutionally permissible prophylactic purpose. (*See id.*)

Here, this Court found that application of the Contribution Limit to bequeathed contributions serves the intended purposes of preventing the danger and appearance of corruption. (Mem. Op. at 19-20.) So the Contribution Limit is valid as applied to *all* bequests — regardless of the fact that "most large contributors [of bequests] do not seek improper influence," *Buckley*, 424 U.S. at 29 — and it is not subject to further case-by-case analysis.

The Commission also explained in its motion to alter or amend that the erroneous evidentiary requirement placed on the Commission was compounded by the fact that Burrington's bequeathed contributions were, in fact, *subject to the Contribution Limit* and disbursed accordingly (*see* FEC Mem. at 10-11). The LNC made no response. The lack of evidence of corruption proves, if anything, that the Contribution Limit *worked*, not that it might be unnecessary to serve the anti-corruption purposes here. (Mem. Op. at 27-28.) It was thus clear error to hold this lack of evidence against the validity of the Contribution Limit as applied to Burrington. *See Wagner v. FEC*, No. 11-1841, 2012 WL 5378224, at *7 (D.D.C. Nov. 2, 2012) ("Congress need not roll back its longstanding [contribution limit] and wait for a scandal to arise in order to provide evidence that [the limit] prevents corruption . . . .").

The LNC confuses apples for oranges when it asserts that this Court's certified question is a routine example of a Court granting an exception to a prophylactic rule. (*See* LNC Opp'n at 6-9.) The LNC argues (*id.*) that prophylactic rules may not apply to "entities posing no risk" to a governmental interest and that courts have at times created "workable" exceptions to prophylactic campaign finance statutes in other cases, citing cases where strict scrutiny applies

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candidates) (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes)).

such as *MCFL*. As explained above (*supra* p. 5), those cases are inapposite here. In any event, even if the same standard of scrutiny applied, the LNC's arguments conflate (1) the categorical exception to the Contribution Limit for bequests that the LNC sought from this Court (and which the Court rejected) and (2) the individualized, case-by-case analysis of Burrington's bequest impermissibly certified by the Court. *MCFL* is an example of the former, not the latter. The Supreme Court held there that an expenditure ban could not constitutionally apply to a category of non-profit corporations because such groups "do not pose th[e] danger of corruption." *MCFL*, 479 U.S. at 259.[5] The Court thus crafted what became known as the "*MCFL* exception" — an objective test that identified three features an organization must have to be exempt from the spending limit. *Id.* at 263-65. These guideposts allowed other non-profit advocacy corporations to know *ex ante* whether they would also be exempt from the expenditure limit.

What happened here is very different. This Court *denied* the LNC's bid for an *MCFL*-like exception by rejecting the LNC's argument that the deceased and their estates are "entities posing no risk" of corruption. (Mem. Op. at 19-21.) The Court's ruling then went farther, however, in calling for a *post hoc* evaluation of whether one isolated contribution — that was already limited by FECA — caused corruption. In contrast to a categorical, *MCFL*-like exception that is based on the identity of the spender (*e.g.*, the deceased or estates), the kind of case-by-case corruption analysis envisioned under this Court's ruling would be unworkable for all involved: (1) Contributors would be left to guess *ex ante* whether they can contribute

[5] The LNC also cites *WRTL* (LNC Opp'n at 6-7), but like *MCFL*, *WRTL* carved out a categorical exemption to a FECA spending restriction on the basis of its conclusion that there was no corruption danger. As explained above (*supra* p. 5), because both *MCFL* and *WRTL* involved *spending* limitations, the Supreme Court applied strict scrutiny and not the intermediate, closely drawn scrutiny that applies to contribution limits like the one in this case. Under the less rigorous closely drawn scrutiny, exemptions to contribution limits are far more rare.

amounts above the limits; (2) the Commission would have to engage in discovery relating to each individual contribution challenged to determine if the Contribution Limit validly applies; and (3) the *en banc* Courts of Appeals would have to entertain challenges to the Contribution Limit by every contributor who claims that his or her particular contribution did not result in corruption. (*See also* FEC Mem. at 8 n.4, 12-13.)[6]

This unworkable case-by-case analysis undermines the Court's general ruling upholding the prophylactic limit as applied to bequests — and the LNC appears to recognize this. On April 22, 2013, the LNC moved the Court of Appeals to consolidate both the certified *and non-certified* portions of this Court's ruling before the *en banc* Court of Appeals.[7] (*See* Exhibit A.) The motion would seem to be an effort to circumvent this Court's ruling that the LNC's original proposed section 437h question is insubstantial. In support of its motion, the LNC argues that this Court's certified and non-certified questions "logically should be heard" together because they are "based on the same legal analysis," and thus reviewing the non-certified claim "would require no more work for the en banc court." (*Id.* at 1-2, 9.) Also, the LNC argues that hearing both claims together would "maintain decision uniformity" and avoid "inconsistent rulings" were the two cases decided differently. (*Id.* at 1, 7.) Thus, even the LNC seems to acknowledge implicitly that this Court's general upholding of the Contribution Limit as applied to bequests controls the specific issue of the Limit's validity as applied to Burrington's particular bequest. Because this Court found the broader question too insubstantial for section 437h certification, the

[6] These features also distinguish the inquiry under this Court's decision from the analyses in cases like *WRTL* that focus on the specific text of ads, with limited reference to objective external facts. But a "corruption" analysis would be far more holistic and open-ended, even if based on factors such as whether the bequest at issue was made following little or no contact between the deceased and the party, or whether there was "special benefit or access."

[7] The LNC's motion to consolidate is properly discussed here for the first time in the Commission's reply brief since the LNC filed that motion with the D.C. Circuit on April 22, after the Commission filed its motion to alter or amend with this Court on April 15.

entire case should be before a three-judge panel, not the *en banc* Court of Appeals. Accordingly, the Court's ruling to the contrary was erroneous.

C. Section 437h Cases Before the *En Banc* Courts of Appeals Could Proliferate Due to This Court's Erroneous Ruling

The rationale of this Court's ruling could multiply the number of section 437h cases before the *en banc* Courts of Appeals, contrary to the Supreme Court's command that section 437h be read narrowly to limit such cases. (*See* FEC Mem. at 12-13.) This Court's ruling opens the door for virtually every individual contributor seeking an exemption from the contribution limits to request under section 437h that an *en banc* Court of Appeals perform an individualized case-by-case analysis of whether their contribution would cause actual or apparent corruption. (*See id.*)

The LNC has identified no case besides this Court's ruling that has ever required such a case-by-case corruption analysis, particularly in the context of closely drawn scrutiny. The LNC observes that only thirteen previous cases have been certified to the *en banc* Courts of Appeals under section 437h (LNC Opp'n at 3), but that simply underlines how narrowly the section has been construed in the past. Section 437h cases could increase and burden the Courts of Appeals in the future under the reasoning of this Court's ruling. It is arguably not frivolous under that ruling for one to claim that a particular contribution should be exempt from limitation because it did not result in corruption. (Mem. Op. at 27-28.) As a result, the number of claimants seeking to prove that they are "similarly situated" in the "follow-on litigation" the LNC admits is likely to occur (LNC Opp'n at 5) could be significant, given that "most large contributors do not seek improper influence," Mem. Op. at 5; *see Buckley*, 424 U.S. at 29.

Nor would other limits on the use of section 437h prevent follow-on cases from proliferating, as the LNC claims. (LNC Opp'n at 4.) The statute permits "any individual eligible

to vote" in a Presidential election to bring a section 437h claim. 2 U.S.C. § 437h. The LNC relies on *Bread PAC v. FEC* as a limit on the scope of section 437h review, but that case held only that *trade associations* and *political committees* cannot use section 437h, *see* 455 U.S. 577, 578, 584-85 (1982). Furthermore, under the rationale of this Court's ruling, the restrictions on section 437h that are described in *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981), and *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990) (*see* LNC Opp'n at 4) — including the requirement of standing, and the bars on hypothetical, insubstantial, and settled claims — would *not* limit similar follow-on litigation, just as they did not limit the certified question here. Accordingly, the Court's ruling could lead to a substantial increase in the number of section 437h cases before the *en banc* Courts of Appeals.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court alter or amend its judgment to hold that the LNC has failed to present any substantial constitutional question under 2 U.S.C. § 437h for review by the *en banc* Court of Appeals.

Respectfully submitted,

Anthony Herman (D.C. Bar No. 424643)
General Counsel
aherman@fec.gov

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Holly J. Baker
Attorney
hbaker@fec.gov

/s/ Kevin P. Hancock
Kevin P. Hancock
Attorney
khancock@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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