UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 22-639 (DRC) OPPOSITION TO MOTION TO CERTIFY

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY QUESTION TO EN BANC COURT OF APPEALS

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INTRODUCTION

Plaintiffs' motion to certify a constitutional question to the *en banc* Court of Appeals is premature and should be denied. Applicable precedent makes clear that such certification would be appropriate only after the development of a factual record sufficient for an appellate response through a reasonable discovery period, and then a determination by this Court that any proposed question merits certification through the special judicial review procedure plaintiffs invoke.

More than two decades ago, the Supreme Court upheld the limits that Congress placed on expenditures political parties may make in coordination with each of their federal candidates, under the provision now set forth in 52 U.S.C. § 30116. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). The *Colorado II* Court reaffirmed that the longstanding distinction established in *Buckley v. Valeo*, 424 U.S. 1 (1974), between coordinated and independent expenditures applied to spending by political parties. *See Colorado II*, 533 U.S. at 464. The Court then upheld the party coordinated expenditure limits on their face, explaining that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," *id*., and that removing such limits would pose a danger of corruption or its appearance, *id*. at 464-65.

Despite this established precedent, plaintiffs seek to have these longstanding limits stricken from the Federal Election Campaign Act ("FECA"), and if necessary, to have *Colorado II* itself overruled. They have challenged the constitutionality of the provisions on their face, and in the alternative as applied to a subset of expenditures known as party coordinated communications, as defined in an FEC regulation, 11 C.F.R. § 109.37. Invoking FECA's special judicial review provision at 52 U.S.C. § 30110, plaintiffs now seek to "immediately" certify a question as to whether these limits are constitutional to the *en banc* Court of Appeals. (*See*

generally Pls' Mem. of Law in Supp. of Mot. to Certify Question to En Banc Court of Appeals (Docket No. 21, PageID## 218-262) ("Pls.' Mem.").)

Contrary to plaintiffs' claims, however, certification of any question at this time would be premature. As explained below, such certification would be inappropriate in the absence of any discovery, a factual record developed by this Court that is sufficient for appellate consideration of plaintiffs' constitutional claims, and briefing on the appropriateness of plaintiffs' proposed question in light of a complete record. It is well established that section 30110 imposes three essential duties on a district court: (1) the court must develop a factual record by making findings of fact, (2) the district court must determine whether the constitutional challenges are frivolous or insubstantial, and (3), upon completing the first two functions, the court should certify any nonfrivolous questions along with that record to the *en banc* court of appeals. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981).

Currently, even though plaintiffs' request for certification relies to a significant extent on factual assertions, the only evidence supporting it is the handful of self-serving declarations and limited other material they have submitted, which defendant Federal Election Commission ("FEC" or "Commission") has had no opportunity to test. Nor has the Commission had the opportunity to take crucial discovery on plaintiffs' allegations, or otherwise develop a record to support its position that the challenged restrictions — which actually permit political parties to make coordinated expenditures well above otherwise applicable contribution limits — impose no undue burden, but do serve to deter corruption and its appearance. As such, the Court simply does not at this time have a complete basis to determine what findings of fact should be made, let alone whether any question is appropriate for certification to the *en banc* Court of Appeals. That reasonable discovery take place prior to any certification is even more important where, as here,

the Supreme Court has already upheld the challenged provisions on their face and plaintiffs explicitly seek to have that authority overruled.

The Commission therefore suggests that the parties should be permitted to submit a joint scheduling report with their positions regarding a discovery period, to be followed by the submission of proposed findings of fact and briefing to assist the Court in determining what question, if any, should be certified to the Sixth Circuit Court of Appeals sitting *en banc*. Plaintiffs' request for immediate certification is premature and should be denied without prejudice.

BACKGROUND

I. THE FEDERAL ELECTION CAMPAIGN ACT'S ALLOWANCE OF COORDINATED PARTY EXPENDITURES BEYOND THE OTHERWISE APPLICABLE CONTRIBUTION LIMITS

The instant case involves a category of payments commonly known as "coordinated party expenditures." *See Buckley*, 424 U.S. at 36. In *Buckley*, the Supreme Court held that the limitations on political campaign contributions in FECA were generally constitutional, but that the statute's limitations on election expenditures infringed political expression in violation of the First Amendment. *Id.* at 59. FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A). FECA also provides that "expenditures made by any person in cooperation, consultation, or concert, with" a federal candidate or her agents "shall be considered to be a contribution to such candidate," but under a unique provision, the statute permits political parties to engage in such expenditures in excess of their otherwise applicable contribution limits. *Id.* at § 30116(d); 11 C.F.R. § 109.37; *see also Buckley*, 424 U.S. at 46 ("expenditures controlled by or coordinated

with the candidate and his campaign are . . . treated as contributions rather than expenditures under the Act").

Under the current inflation-adjusted limits, political parties may make coordinated expenditures with their general election candidates up to an amount ranging from $55,000 to $109,900 in races for the U.S. House of Representatives, and from $109,900 to $3,348,500 in U.S. Senate races. *Id.*; 11 C.F.R. § 109.33; *see* FEC, Coordinated Party Expenditure Limits, https://bit.ly/3DcUySP (last visited June 6, 2023).

II. THE SUPREME COURT'S DECISION IN *COLORADO II*

In 2001, the Supreme Court upheld the party coordinated expenditure limits in what is now 52 U.S.C. § 30116(d) on their face, explaining that "there is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate." *Colorado II*, 533 U.S. at 464. Before 1996, the Commission had presumed that, due to the close connection between parties and candidates, "all party expenditures should be treated as if they had been coordinated as a matter of law." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 619 (1996) ("*Colorado I*") (opinion of Breyer, J.) (emphasis omitted). In *Colorado I*, however, the Supreme Court held that parties were capable of making independent (*i.e.*, non-coordinated) expenditures and that such expenditures could not constitutionally be limited. *See id*. at 617. The Court remanded the case for further proceedings to consider the constitutionality of FECA's limits on party expenditures that actually are coordinated with candidates. *See id*. at 623- 626 (opinion of Breyer, J.). After the proceedings on remand, the case returned to the Supreme Court in *Colorado II*.

The Court in *Colorado II* rejected the plaintiff's facial challenge to FECA's limits on political parties' coordinated expenditures, explaining that FECA's limits on parties' coordinated

expenditures were not unduly burdensome to parties and the coordinated expenditure limits comported with the First Amendment's free speech and associational guarantees. *Id*. The *Colorado II* Court found that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Id.* at 465. In conducting its review, the Court applied the intermediate scrutiny standard announced in *Buckley*, that is, that the restriction must be closely drawn to match an important government interest. *Id.* at 456. The Court held that Congress could regulate coordinated expenditures as contributions because of the sufficiently important governmental interest in preventing the potential for corruption. *Id.* at 459-60. Specifically, the Court stated:

> There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits. Therefore the choice here is not, as in *Buckley* and *Colorado I,* between a limit on pure contributions and pure expenditures. The choice is between limiting contributions and limiting expenditures whose special value as expenditures is also the source of their power to corrupt. Congress is entitled to its choice.

Id. at 464-65 (footnotes omitted).

Since the decision in *Colorado II*, the Fifth Circuit has upheld FECA's coordinated party expenditure limits against a constitutional challenge, reaffirming the continued vitality of *Colorado II*. *See In re Cao*, 619 F.3d 410, 429 (5th Cir. 2010) (en banc) ("[T]he *Colorado II* Court, as well as the Court's earlier cases, clearly held that coordinated expenditures may be restricted to prevent circumvention and corruption."), *cert. denied*, 562 U.S. 1286 (2011).

III. PLAINTIFFS' CHALLENGE TO THE COORDINATED PARTY EXPENDITURE LIMITS

The complaint in this case was filed by plaintiffs National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), James David ("J.D.") Vance, and Steven Joseph Chabot on November 4, 2022, seeking declaratory and injunctive relief pursuant to the First Amendment. (Pls.' Compl. for Declaratory and Injunctive Relief ("Compl.") (ECF No. 1, PageID# 1).) Plaintiffs NRSC and NRCC are "national committee[s]" pursuant to 52 U.S.C. § 30101(14). (Compl. ¶¶ 13-14, PageID## 5-6.) They are located in Washington, DC, and they serve as the Republican Party's campaign committees dedicating to elect candidates to the U.S. Senate and House, respectively. (*Id*.) Plaintiff J.D. Vance was the 2022 Republican nominee for the U.S. Senate in Ohio, and he is currently a U.S. Senator for that state. (*Id*. ¶ 15, PageID# 6.) Plaintiff Steven Joseph Chabot was the 2022 Republican nominee for the U.S. House of Representatives from Ohio's First Congressional District, and he was the sitting U.S. Congressman in that District at that time, although he did not prevail in the general election. (*Id.* ¶ 16, PageID# 6.)

Defendant Federal Election Commission is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-46. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley*, 424 U.S. at 1. The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6),

30107(e), 3019(a)(6).

Plaintiffs challenge the limits on expenditures that political parties may make in coordination with their federal candidates under FECA. (Compl. ¶ 2, PageID# 2.) Plaintiffs do not argue that these limits are unreasonably low, but rather that they are unconstitutional per se because they implicate political parties' First Amendment interests to participate in the electoral process and associate with the candidates of their choice. (*Id*. ¶¶ 90-103, PageID## 24-26.) Plaintiffs challenge the constitutionality of these provisions on their face (*id.* ¶¶ 90-99, PageID## 24-25), and in the alternative as applied to a subset of such expenditures known as party coordinated communications, as defined in an FEC regulation, 11 C.F.R. § 109.37. (Compl. ¶¶ 100-103, PageID# 26.)

Plaintiffs now seek to "immediately" certify a question as to whether the party coordinated expenditure limits are constitutional to the *en banc* Court of Appeals under FECA's special judicial review provision at 52 U.S.C. § 30110. (*See* Pls.' Mem. (Docket No. 21, PageID# 226).) Plaintiffs essentially argue that the limits violate the First Amendment, that *Colorado II* does not control the outcome of their challenge in light of intervening factual and legal developments, and that even if that precedent does control, it should be overruled. (*Id.* at 19-37, PageID## 242-260.)[1]

[1] As explained in this brief, the FEC opposes plaintiffs' motion for certification on the ground that it is premature. The FEC does not concede that the legal or factual arguments or assertions made in support of plaintiffs' motion are correct and reserves the right to dispute any of those claims, and to provide its own legal and factual support on the issues that are before this Court, at the proper time.

ARGUMENT

I. SECTION 30110 PROCEDURE

52 U.S.C. § 30110 is a special judicial review procedure, but precedent makes clear that the creation of an adequate factual record and careful review of proposed constitutional questions by the district court is critical to its operation. The provision was added to FECA in 1974 to provide expedited consideration of anticipated constitutional challenges to the extensive amendments to FECA that year. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1285-1286 (1974). Section 30110 provides that "[t]he [Federal Election] Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act." 52 U.S.C. § 30110. Section 30110 further provides that "[t]he district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." *Id.*

Importantly, however, the Supreme Court has held that use of section 30110 is subject to certain restrictions and should be construed narrowly, in part because it creates "a class of cases that command the immediate attention of . . . the courts of appeals sitting en banc, displacing existing caseloads and calling court of appeals judges away from their normal duties." *Bread Pol. Action Comm. v. FEC*, 455 U.S. 577, 580 (1982).[2] First, of course, a "party seeking to

[2] Part of the Supreme Court's concern in *Bread Pol. Action Comm.* was the requirement in the statute at that time that section 30110 proceedings be expedited. 455 U.S. at 580. Though the expedition provision has since been repealed, Pub. L. No. 100-352, § 6(a), 102 Stat. 662, 663 (1988), section 30110 continues to present the possibility of advancement without review by

invoke [section 30110] must have standing to raise the constitutional claim." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). In addition, even if a plaintiff falls within one of the classes of parties specified in the statute and the legal challenge falls within the scope of the provision, the district court should perform three functions. First, the court *must* develop a record sufficient to support appellate review by making findings of fact. *Cal. Med.*, 453 U.S. at 192 n.14. Second, it *must* determine whether the constitutional challenges are frivolous or insubstantial. *Id.* Only then, after performing these two functions initially, should the district court certify the record and all non-frivolous constitutional questions to the en banc court of appeals. *Cal. Med.,* 453 U.S. at 192 n.14; *Mariani v. United States,* 212 F.3d 761, 769 (3d Cir. 2000) (en banc); *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part and rev'd in part on other grounds*, 424 U.S. 1 (1976); *see* also 52 U.S.C. § 30110.

If the issues presented are frivolous or insubstantial, the court may dismiss the claims or grant summary judgment to the Commission. *See, e.g.*, *Cao*, 619 F.3d at 415, 417-20 (affirming district court's dismissal of certain proposed questions); *Judd v. FEC*, 304 F. App'x 874, 875 (D.C. Cir. 2008) (per curiam) (affirming district court's dismissal because "the constitutional challenge to [FECA] is frivolous"); *Nat'l Comm. of the Reform Party of the U.S. v. Democratic Nat'l Comm*, 168 F.3d 360, 367 (9th Cir. 1999) (affirming district court's decision denying certification of claims that FECA "unconstitutionally preempts common law remedies . . . because plaintiffs had no common law remedies for FECA to preempt"); *Whitmore v. FEC*, 68 F.3d 1212, 1215 (9th Cir. 1996) (affirming denial of certification for frivolousness where "plaintiffs sought an injunction commanding competing congressional candidates not to accept

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district courts and panels of courts of appeals and thus continues to pose a danger of docket disruption.

out-of-state contributions"); *Gifford v. Congress*, 452 F. Supp. 802, 810 (E.D. Cal. 1978) (refusing to certify constitutional questions and dismissing FECA challenge on the "ground that it is frivolous" (cited with approval in *Cal. Med.*, 453 U.S. at 192 n.14), *approved*, *Gifford v. Tiernan*, 670 F.2d 882 (9th Cir. 1982)).

Thus, even where a constitutional challenge may not be foreclosed as a matter of law, the district court undertaking section 30110 review should go beyond the complaint and review the factual record, and only if it concludes that nonfrivolous constitutional issues are raised from the facts should it certify those questions. *See*, *e.g.*, *Cao*, 619 F.3d at 414, 433 & n.32; *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (en banc).

Indeed, failure to complete the functions mandated by section 30110 may result in a remand to the district court for the requisite threshold inquiry. *See, e.g.*, *Holmes v. FEC*, No. 14-5281, slip op. (D.C. Cir. Jan. 30, 2015), accompanying this Opposition as Exhibit ("Exh.") 1 and *available at* http://www.fec.gov/law/litigation/holmes_ac_order.pdf; *Khachaturian*, 980 F.2d at 331; *Buckley*, 519 F.2d at 818.

II. CERTIFICATION OF ANY QUESTION IS PREMATURE

A. In Section 30110 Cases Like This One, All Parties Should Be Permitted to Participate in Developing a Factual Record Sufficient for Appellate Consideration, Including Through a Reasonable Discovery Period

In section 30110 cases like this one, as in other civil cases, it is well-established that district courts must allow the parties to participate in developing the factual record. *See* Exh. 1, *Holmes*, No. 14-5281, slip op. (D.C. Cir. Jan. 30, 2015), *available at* http://www.fec.gov/law/litigation/holmes_ac_order.pdf (granting motion to remand case to allow parties an opportunity to develop factual record necessary for en banc review of the plaintiffs' constitutional challenge); *Khachaturian*, 980 F.2d at 332 (remanding to take in evidence and suggesting that district court

conduct an evidentiary hearing). And district courts have used the discovery process to develop a factual record that is sufficient for appellate consideration. For example, the Fifth Circuit Court of Appeals relied on deposition testimony to determine that the district court had "abid[ed] by its proper role" in a case brought under section 30110. *Cao*, 619 F.3d at 414, 433 & n.32. The district court's order in that case had set a months-long period for discovery and provided additional time for briefing on proposed findings of fact and certification. *See* Exh. 2, Order, *Cao v. FEC*, Civ. No. 08-4887, Docket No. 41 (E.D. La. Feb. 26, 2009), *available at* https://www.fec.gov/resources/cms-content/documents/usdcedla-order-02-26-2009.pdf. More recently, a different district court denied a motion to certify in a section 30110 case and ordered the parties to conduct discovery prior to the court making a certification determination. *See* Exh. 3, Order, *Stop Hillary PAC v. FEC*, Civ. No. 15-1208, Docket No. 34 (E.D. Va. Dec. 16, 2015), *available at* https://www.fec.gov/resources/legal-resources/litigation/shp_dc_order.pdf.

Indeed, the Supreme Court and lower courts have long emphasized the importance of developing a full factual record in section 30110 cases, notwithstanding its provision for "immediate[]" certification. In *Cal. Med.*, for example, the Supreme Court rejected Justice Stewart's concern that "[s]ection [30110] litigation will often occur . . . without the fully developed record which should characterize all litigation." 453 U.S. at 208 (Stewart, J., dissenting). The majority explained that, "as a practical matter, *immediate* adjudication of constitutional claims through a § [30110] proceeding *would be improper* in cases where the resolution of such questions required a fully developed factual record." *Id.* at 192 n.14 (emphases added).

Even before *Cal. Med.*, courts had recognized the importance of thorough factual records compiled with the assistance of the parties in section 30110 cases. When *Buckley v. Valeo* first

came before that court, it did so without a record. The D.C. Circuit, en banc, remanded the case with instructions to the district court to "[t]ake whatever may be necessary in the form of evidence *over and above* submissions that may suitably be handled through judicial notice." 519 F.2d at 818 (emphases added); *compare id.* at 821 (Bazelon, J. dissenting) (emphasizing section 30110's "use of the word 'immediately'"). Following proceedings in which the parties conducted discovery and proposed factual findings, the case returned with an "augmented" record. *Id.* at 818. More recently, the D.C. Circuit again remanded a section 30110 case that another district court had prematurely certified and ordered the court to provide the parties an opportunity to develop the factual record, including by discovery, and to complete the functions mandated by section 30110 "including the development of a record for appellate review." Exh. 1, *Holmes*, No. 14-5281, slip op. "Because of the great gravity and delicacy of (the courts') function in passing upon the validity of an act of Congress, the need is manifest for a full-bodied record in such adjudication." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 380 (D.C. Cir. 1980) (section 30110 case) (footnotes and internal quotation marks omitted).

Plaintiffs themselves acknowledge that section 30110 "require[s]" district courts to "[m]ake findings of fact" (Pl.'s Mem. at 19, PageID# 242), yet their attempt to proceed directly to certification with the minimal, one-sided evidence accompanying their motion would deny the Commission the use of the discovery process to test plaintiffs' assertions and develop evidence for its own case, both for purposes of determining the appropriateness of certification and for appellate review. Certification under section 30110 cannot occur before this necessary evidence is assembled and the Court has made findings of fact informed by that record-building process.

Indeed, such a process is critical particularly here, where plaintiffs seek not only to have a federal statute struck down but also to overturn a Supreme Court precedent that has been in

place for decades. And plaintiffs' efforts to do so are not purely legal in nature. Instead, they rely substantially on factual claims. First, plaintiffs assert that the party coordinated expenditure limits violate the First Amendment because of the burdens they impose on parties and the alleged lack of evidence that such expenditures raise corruption concerns. (Pls.' Mem. at 19-26, PageID## 242-249.) Plaintiffs do claim that their challenge "involves both a different statutory regime and different legal arguments from the ones at issue in *Colorado II*." (*Id*. at 18, PageID# 243; s*ee generally id.* at 13-22, PageID## 236-245.) But alternatively, plaintiffs also argue that "*Colorado II* cannot be sustained" given the "legal and factual developments in the 22 years since it was handed down," and they even seek to undo the basic analytical framework that *Buckley* established, under which contribution limits receive "closely drawn" rather than strict scrutiny. (*Id*. at 18, PageID # 243; *see id.* at 30-31, PageID## 253-254.) To be sure, some of these arguments are legal ones, but some of plaintiffs' core claims depend heavily on factual assertions that must be tested through discovery prior to any certification. The Commission must have an opportunity to develop the factual basis to fully respond to plaintiffs' claims.

More fundamentally, proceeding with plaintiffs' request for certification prior to a discovery process is also contrary to the federal courts' overwhelming recognition of the importance of preparing fulsome records in constitutional challenges to campaign finance restrictions. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 253-56 (2006) (relying on deposition testimony and expert witnesses to analyze statewide effects of legislation at issue); *Colorado II*, 533 U.S. at 457-65 (2001) (sustaining FECA provisions based on district court record containing "substantial evidence [of] how . . . parties test . . . limits . . . and . . . how [those] contribution limits would be eroded if" provisions were struck); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393-94 (2000) (upholding contribution limits on the basis of the lower court record);

Wagner v. FEC, 793 F.3d 1, 17-18 (D.C. Cir. 2015) (en banc) (relying on the "impressive, if dismaying" record that "[t]he FEC has assembled" to determine whether the provision at issue continues to show a risk of quid pro quo corruption and its appearance); *Int'l Ass'n of Machinists and Aerospace Workers v. FEC*, 678 F.2d 1092, 1097 (D.C. Cir.) (en banc) (per curiam), *aff'd*, 459 U.S. 983 (1982) (finding it "undesirable to decide a constitutional issue abstracted from its factual context"); *FEC v. Cent. Long Island Tax Reform Immediately Comm*., 616 F.2d 45, 49 (2d Cir. 1980) (en banc) (relying on "a substantial record . . . including transcripts of testimony, exhibits, and . . . findings of fact" that district court had compiled "[a]fter extensive evidentiary hearings"); *Martin Tractor Co*., 627 F.2d at 380 (noting that the Supreme Court had "emphasized the importance of a detailed factual record upon which a court might limit, frame and perhaps avoid a constitutional decision"); *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 156-57, 166 (D.D.C. 2013) (allowing seven months for discovery in a section 30110 challenge, and then relying upon plaintiff's deposition testimony to deny in part its claim), *aff'd mem. in relevant part*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014); Exh. 3, Order, *Stop Hillary PAC v. FEC*, 1:15-cv-1208 (E.D.V.A. Dec. 16, 2015) (Docket No. 35) (ordering discovery in section 30110 proceeding and explaining that "this Court follows the Supreme Court's affirmation in *Cal. Med*. that 'immediate adjudication of constitutional claims through a [§ 30110] proceeding would be improper in cases where the resolution of such questions required a fully developed factual record'") (quoting *Cal. Med*, 453 U.S. at 192 n.l4).

In *Colorado I*, Justice Breyer pointed out the importance of record evidence in reviewing the constitutionality of the limits on political party coordinated expenditures that are at issue here. *See* 518 U.S. at 624-25. On remand to the Court of Appeals, the Tenth Circuit remanded the case to the district court and further explained the need for factual development:

> [T]he issues are too important to be resolved in haste. It seems inevitable that not only this court but the Supreme Court itself will have to address these issues. We will both benefit by the parties fleshing out the record with any evidence they and the district court deem relevant to the issues' resolution and by the district court's resolution of the legal issues in the first instance.

FEC v. Colo. Republican Fed. Campaign Comm., 96 F.3d 471, 473 (10th Cir. 1996). When the case reached the Supreme Court a second time, the Court made ample use of the factual record that had been developed on remand. *See generally Colorado II*, 533 U.S. at 457-60. Given that plaintiffs' complaint here raises similar challenges to the same provisions at issue in the *Colorado* cases, record development permitting the obtaining of similar material is necessary.

B. After Making Findings of Fact Based on a Sufficient Record, the District Court Must Determine Whether Any Constitutional Questions Warrant Certification

As explained above, the Supreme Court has made clear that district courts play an important gatekeeping role in determining whether to certify constitutional questions to the appellate courts, explaining that district courts should only certify questions under section 30110 when the issues presented are not frivolous or insubstantial. *Cal. Med*., 453 U.S. at 192 n.14. Plaintiffs assert that the question they now present for certification "easily qualifies as non-frivolous" (Pls.' Mot. at 18, PageID# 241), and in support they provide several declarations and other material to the court purporting to support their "undisputed" factual assertions. (*See generally* Docket Nos. 19-1 – 19-5, PageID## 173-214.)

Yet the Commission should be permitted to address these threshold certification standards only after developing a record including through discovery. Indeed, plaintiffs' own factual submissions demonstrate the prematurity of their certification motion. Among other things, plaintiffs' declarations make allegations regarding the effect of FECA's coordinated party expenditure limits on plaintiffs' speech, whether contributions have furthered *quid pro quo*

arrangements, the amounts of various expenditures, plaintiffs' desire to exceed the current limits, and the alleged burden the limits place on plaintiffs, which are all issues that are appropriate for discovery. (*See, e.g.*, Decl. of Jason Thielman ("Theilman Decl.") ¶ 20, PageID# 179 ("Creating and maintaining an [independent expenditure ("IE")] unit to avoid any violation of coordination rules and the coordinated party expenditure limits has imposed substantial burdens on the NRSC"); *id.* ¶ 21, PageID# 179 ("The NRSC spent nearly $38 million in total to operate its IE unit, including nearly $1.2 million alone on rent and furnishings, staffing costs, and consultants"); Decl. of James David Vance ("Vance Decl.") ¶ 12, PageID# 196 ("My campaign committee will continue to bear the burdens and costs imposed by the coordinated party expenditure limits").) The Commission has not had the opportunity to seek written discovery or depose plaintiffs' witnesses on these issues, many of which are within plaintiffs' exclusive knowledge. Without this critical process, the Commission cannot be expected to fully respond as to how the challenged provisions actually affect plaintiffs, or to take a position on whether their activities support a certification-worthy claim. It would be equally imprudent for the appellate court to assess the burden and constitutionality of the plaintiffs' challenges without a full factual understanding of plaintiffs' activities.[3]

[3] This includes discovery in several areas related to the Court's jurisdiction. Plaintiff Chabot is reported to have stated out of court that he will not run for federal office in the future. Discovery will assist the Court in determining whether Chabot could suffer any injury from the challenged restrictions that could be redressed by this Court sufficient for standing to pursue his claims and whether his claims are moot. *See Cal. Med.*, 453 U.S. at 192 n.14. In addition, the NRSC and NRCC reported spending less than the maximum amount permitted by FECA in coordinated party expenditures on behalf of the two plaintiff candidates in the 2022 election. (Answer ¶¶ 29, 35, Docket No. 24, PageID## 281-82.) For those two elections that are the focus of plaintiffs' case, discovery will aid in verifying the amount of spending authorizations provided by other party committees, reasons that the maximum amounts of coordinated party expenditures may not have been spent by any party committee, and whether the limits at issue did in fact operate to prevent additional coordinated spending. These areas of inquiry bear on the standing of all plaintiffs. The Commission should be permitted to take discovery on jurisdiction for

In addition to the party discovery necessary to understand plaintiffs' specific factual claims, the Commission also needs an opportunity to compile a record of broader, more general facts about other parties. *See generally* Advisory Committee Notes to Fed. R. Evid. 201 (quoting 2 Kenneth Davis, Administrative Law Treatise 353 (1958)). Facts that are more "general" than the parties before a court "help the tribunal decide questions of law and policy," like the significant revision to the democratic process in contravention of Congress that plaintiffs seek here. *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) (internal quotation marks and citation omitted); *see also*, *e.g.*, *Langevin v. Chenango Ct., Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) ("questions of law and policy and Discretion") (Friendly, C.J.).

Federal courts have frequently cited facts about parties not before the court in determining the constitutionality of campaign finance laws, and much of the extensive records discussed above constituted such material. (*See supra* p. 11-12.) As plaintiffs acknowledge, this case raises many of the same issues as *Colorado II*, in which the Court concluded:

> Parties are ... necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors. 533 U.S. at 451-52 (footnote omitted).

That conclusion was based on broad evidence, such as political committees' habit of giving to competing parties or candidates in the same election. In discussing these facts, the Court cited, *inter alia*, statements submitted in the lawsuit by a political scientist and a former Senator. *Id*. at 451-52 & nn.12-13. This Court should not certify any proposed constitutional question without providing an opportunity for the development of a factual record that includes similar material.

Chabot's claims, as well as the extent to which the challenged restrictions affect the other plaintiffs.

Indeed, as explained above, plaintiffs themselves support their arguments with assertions that relevant "legal and factual developments" have occurred in the years since *Colorado II*. (Pls.' Mem. at 18, PageID# 241.) And even if political parties' operations have changed little in recent years, general facts to that effect would support the conclusion that the reasoning and holding of *Colorado II* should not be disturbed.

Moreover, certifying the case based only on those facts that plaintiffs have chosen to identify here contravenes the Supreme Court's recognition that no "lawsuit[] can[] be resolved with due process of law unless both parties have had a fair opportunity to present their cases." *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974). It is a fundamental principle of civil litigation that "a party is entitled as a general matter to discovery of any information sought if it appears 'reasonably calculated to lead to the discovery of admissible evidence.'" *Degen v. United States*, 517 U.S. 820, 825-26 (1996) (quoting Fed. R. Civ. P. 26(b)(1)). Bypassing this process would also deprive the Commission of its fundamental due process right to participate in determining and proposing the relevant facts for the Court.[4]

CONCLUSION

Certification to the *en banc* Court of Appeals at this time would be premature. Under section 30110, this Court cannot perform its critical gatekeeper role until an adequate factual record has been established, based on input from both parties following a period of discovery necessary to ascertain what the relevant facts are. Plaintiffs propose to place this matter on a path that the Courts of Appeals previously rejected in *Holmes*, *Khachaturian*, and *Buckley*. Accordingly, this Court should deny

[4] With preliminary motions resolved and an answer having been filed, counsel for the FEC reached out to counsel for plaintiffs this week to schedule a conference of the parties on the possibility of the proposal of a case schedule including a period for discovery. This conferral is scheduled to take place tomorrow.

plaintiffs' motion without prejudice and allow the parties to submit a joint scheduling report addressing a proposed discovery schedule, to be followed by the submission of proposed factual findings and briefing to assist the Court in determining what question, if any, should be certified.

June 7, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2023, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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