

EN BANC ARGUMENT SCHEDULED FOR NOVEMBER 30, 2018

No. 18-5227

*In the United States Court of Appeals
for the District of Columbia Circuit*

LIBERTARIAN NATIONAL COMMITTEE, INC.,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Certification of Constitutional Questions by the
United States District Court for the District of Columbia
The Hon. Beryl A. Howell, Chief District Judge
(Dist. Ct. No. 1:16-cv-121-BAH)

PLAINTIFF'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES

Libertarian National Committee, Inc. (“LNC”) was the Plaintiff in the District Court and is the Plaintiff in this en banc proceeding pursuant to 52 U.S.C. § 30110. The Federal Election Commission (“FEC”) was the defendant in the district court and is the defendant in this Court. No party participated as amicus curiae in the District Court. The Institute for Free Speech, and the Goldwater Institute, have indicated that they will appear as amici in support of Plaintiff before this Court.

B. RULINGS UNDER REVIEW

This case is not appellate in nature, as 52 U.S.C. § 30110 assigns resolution of the case’s merits in the first instance to this Court sitting en banc. On June 29, 2018, the United States District Court, per the Hon. Beryl Howell, Chief Judge, made factual findings and certified three questions of law to this Court. Dist. Ct. Docket Nos. 35, 36. That decision is not currently reported, but is available at 2018 U.S. Dist. LEXIS 108891, and is reprinted at Joint Appendix (“JA”) 147-235.

C. RELATED CASES

The District Court previously declined to certify the LNC's challenge to the FEC's practice of applying political contribution limits to testamentary bequests, but certified an as-applied constitutional challenge to the imposition of contribution limits against a particular bequest. *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013) ("*LNC I*") (Wilkins, J.), *reconsideration denied*, 950 F. Supp. 2d 58 (D.D.C. 2013) ("*LNC II*"). This Court summarily affirmed the dismissal of the categorical challenge. *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5094 (D.C. Cir. Feb. 7, 2014) (per curiam). It later held that the certified as-applied challenge had become moot. *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (en banc) (per curiam).

CORPORATE DISCLOSURE STATEMENT

Plaintiff Libertarian National Committee, Inc., is a non-for-profit organization incorporated under the laws of the District of Columbia. It serves as the national committee of the Libertarian Party of the United States.

Plaintiff has no parent companies, and no publicly-traded company has a 10% or greater ownership interest in Plaintiff.

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[https://www.marketplace.org/2014/12/01/economy/
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GLOSSARY

- CROMNIBUS — A Congressional bill that is in part an “omnibus” long-term budget bill, and in part a “continuing resolution” to authorize short-term funding so the government does not run out of money in the immediate future. *See* Cromnibus, Political Dictionary, available at <http://politicaldictionary.com/words/cromnibus/> ; Nancy Marshall-Genzer, Congress’ latest fiscal buzzword: ‘Cromnibus,’ Marketplace, Dec. 1, 2014, available at <https://www.marketplace.org/2014/12/01/economy/congress%E2%80%99-latest-fiscal-buzzword-%E2%80%98cromnibus%E2%80%99>
- FEC — Federal Election Commission
- FECA — Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq*
- JA — Joint Appendix
- DNC — Democratic National Committee
- LNC — Libertarian National Committee
- RNC — Republican National Committee

PLAINTIFF'S OPENING BRIEF
JURISDICTIONAL STATEMENT

The District Court had jurisdiction to make findings of fact and certify constitutional questions to this Court pursuant to 28 U.S.C. § 1331 and 52 U.S.C. § 30110.¹ As a political party's national committee, Plaintiff is entitled to access Section 30110.

The District Court made findings of fact and certified three questions of law. JA 147-48, 181-235. This Court, sitting en banc, has exclusive jurisdiction to hear the certified questions. Section 30110; *Wagner v. FEC*, 717 F.3d 1007, 1014 (D.C. Cir. 2013) ("*Wagner I*").

STATEMENT OF THE ISSUES

The District Court certified three questions:

1. Does imposing annual contribution limits against the bequest of Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?

¹Further statutory references are to Title 52, United States Code unless noted.

2. Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), and 30125(a)(1), on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its contributions above § 30116(a)(1)(B)'s general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?
3. Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), and 30125(a)(1) violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend that portion of the bequest of Joseph Shaber that exceeds § 30116(a)(1)(B)'s general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?

STATUTES AND REGULATIONS

52 U.S.C. §§ 30110; 30116(a)(1)(B), (a)(9), (c) and (d); and 30125(a).

See addendum.

STATEMENT OF THE CASE

This case presents two overlapping issues of first impression.

1. Americans often remember political parties in their wills and other testamentary vehicles. Such donors may have been unknown to the parties while alive, and their at-times surprising instructions might have been drafted long before the political issues, candidates, and platforms in controversy at their times of death could have been foreseen.

The FEC applies contribution limits to all testamentary bequests. As noted in the statement of related cases, this Court affirmed the dismissal of the LNC's categorical challenge to the FEC's practice, and dismissed as moot a certified as-applied challenge involving one of Plaintiff's deceased donors.

The LNC does not revive its categorical challenge. But another donor, Joseph Shaber, has since died, remembering the LNC with another bequest whose acceptance the FEC frustrates. The District Court certified this resultant as-applied challenge, which again asks the basic question: under what circumstances may the government limit political contributions from the dead?

2. Months after Shaber's passing, Congress altered the basic structure of FECA's contribution limits to political parties. FECA previously limited individual contributions to political parties without regard to how parties spent their money, once accepted. But in 2014, Congress raised FECA's limit, while restricting the expressive purposes for which a party may spend most of the money a person might donate.

The previous contribution limit now serves as a base amount, which defines how much of a contribution can be spent without restriction. People may also contribute triple the base limit, to be spent exclusively for each of three purposes: presidential nominating conventions, litigation of election contests and other proceedings, and party headquarters buildings. In other words, the government restricts how a political party may express itself with 90% of the money it can accept from an individual. The LNC submits that this scheme imposes an unconstitutional content-based restriction on political speech. It challenges the scheme facially, and as-applied to Shaber's bequest.

1. *The Regulatory Scheme*

“Altogether . . . an individual may contribute \$339,000 per year to accounts established and maintained by national political parties—\$101,700 to each of three specialized purpose accounts, plus \$33,900 for general purposes.” JA 158 (citing Section 30116(a)(1)(B)). Party committees may spend money from the three “separate, segregated account[s]” only on (A) “a presidential nominating convention,” (B) party headquarters buildings, or (C) “election recounts and contests and other legal proceedings,” respectively. Section 30116(a)(9).

A national committee of a political party . . . may not *solicit*, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, *or spend any funds*, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

Section 30125(a)(1) (emphasis added); JA 159.

The FEC interprets “person,” as used in Section 30116(a)(1), to include testamentary estates. JA 45; Certified Fact (“CF”) 85, JA 214-15 (citations omitted).² Testamentary bequests to political parties that exceed contribution limits must be placed in escrow, from which a party

²The LNC generally omits citations when citing to the District Court’s certified facts.

must withdraw funds every year until the funds are exhausted. The funds may earn interest, but parties may not exercise control over such funds, including control over the direction of the funds' investment strategies or strategic choice as to the amount of any withdrawals made in any particular year. *See* FEC Advisory Ops. 2015-05 (Shaber), 2004-02 (Nat'l Comm. for an Effective Congress), 1999-14 (Council for a Livable World); JA 45.

2. *Legislative History*

Congress raised the party contribution limit and imposed the corresponding spending purpose restrictions as part of the 2014 omnibus. Language enacting these provisions appeared as “Subdivision N — Other Matters,” on pages 644-645 of the 701-page Consolidated and Further Continuing Appropriations Act, 2015, 113 Pub. L. 235, 128 Stat. 2130, 2772-73 (Dec. 16, 2014).

These “Other Matters” never faced a committee hearing in either house of Congress, and were not the subject of any congressional report or investigation. *See* Congress.gov, <https://www.congress.gov/bill/113th-congress/house-bill/83> (last visited Aug. 30, 2018) (absence of committee

reports related to the spending purpose restrictions). House Speaker Boehner and Senate Majority Leader Reid offered identical statements of intent describing the modifications effected by the FECA amendments, without discussing how the spending purpose restrictions related to anti-corruption concerns. 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid). The statement offered that the presidential nominating convention provision was enacted “because such conventions may no longer be paid for with public funds.” *Id.*³

Given the context of the provisions’ appearance, debate was scant. The FECA amendments “should have been subject to debate and amendment in an open process by the full Senate,” but “we simply cannot allow a government shutdown.” 160 Cong. Rec. S6812 (daily ed. Dec. 13, 2014) (statement of Sen. Collins). The legislative record thus apparently lacks discussion of links between corruption concerns and political contributions of various sizes restricted to various purposes.

³Congress had redirected public funds from presidential nominating conventions to pediatric cancer research. Gabriella Miller Kids First Research Act, Pub. L. No. 113-94, 128 Stat. 1085 (Apr. 3, 2014); 26 U.S.C. §§ 9008(b), 9008(i).

But some in Congress dismissed the segregated purpose restrictions' relevance to corruption concerns.

A last-minute, nongermane addition . . . changes campaign finance law to allow megadonors to give 10 times the amount currently allowed to political parties for housekeeping, and those of us in the political field know what it means to have the housekeeping accounts: that means it can go for absolutely anything.

160 Cong. Rec. H9068 (daily ed. Dec. 11, 2014) (statement of Rep. Slaughter). The FECA amendments “increas[e] the amount of money wealthy donors can contribute to political parties.” 160 Cong. Rec. S6748 (daily ed. Dec. 12, 2014) (statement of Sen. Leahy).

“[The bill] increases the limits for individual contributions to political parties by 10 times the current limit—10 times.” 160 Cong. Rec. S6812 (daily ed. Dec. 13, 2014) (statement of Sen. Manchin). It “greatly expands donations *to the Republican and Democratic parties* by allowing a tenfold increase in the maximum amount that donors may contribute . . .” 160 Cong. Rec. S6860 (daily ed. Dec. 15, 2014) (statement of Sen. Wyden) (emphasis added). “We shouldn’t use appropriations bills like this one . . . to open the floodgates to campaign donations from

millionaires.” 160 Cong. Rec. S6810 (daily ed. Dec. 13, 2014) (statement of Sen. Levin).

3. *The FEC’s Asserted Relationships Between the Spending Purpose Restrictions and Regulatory Interests*

“Unrestricted *funds* are more valuable to national party committees and their candidates than *funds* that may only be used for particular categories of expenses.” CF 50, JA 197 (emphasis added).

Contributions are another matter. “Every dollar received through the separate, segregated accounts provided for in [Section 30116(a)(9)] potentially frees up another dollar in the recipient’s general account for unrestricted spending.” CF 38, JA 192. Thus, parties “may in some circumstances value a contribution with use restrictions more highly than a smaller contribution without such restrictions.” CF 39, *id.*

A political party may value a higher contribution with use restrictions . . . such as in the case of a contribution that the party may use to defray expenses for which it knows it must pay and for which it would otherwise have trouble raising funds. The party may value that contribution more than a smaller contribution that comes with no use restrictions but is easier to replicate through other fundraising efforts.

CF 40, *id.*⁴

⁴The FEC objected to certification of various facts extracted from its discovery responses by arguing that, if certified, its “full response[s]

The FEC thus admitted that a lawful, \$101,700 restricted contribution “may create the same or greater appearance of corruption as an unrestricted [\$33,901] contribution,” which would be unlawful by one dollar, “by that individual to the same national committee of a political party.” CF 41, JA 193-94.

Qualifying its answer, the FEC denied that its admission “is true as a general matter,” conceding it may be true “in some circumstances.” *Id.* The FEC explained that “larger contributions *are generally more likely* to lead to actual or apparent *quid pro quo* arrangements and can do so regardless of how the funds are ultimately used.” *Id.* (emphasis added); *see also* CF 35; JA 190-91. Yet the FEC asserted that “political parties will generally value [unrestricted contributions] higher,” allegedly because they can be used to “maximally benefit federal candidates;” accordingly, “such contributions pose a relatively more acute danger of

should in fairness be included. *See* Fed. R. Evid. 106.” *See, e.g.*, CF 40 n.21, JA 193. Rule 106 is inapposite, as the LNC indeed introduced the “full responses” into the record below. The FEC has always been free to assert the relevance of any part of its writings. In certifying some facts, the District Court quoted the FEC at greater length than Plaintiff believes relevant, but did not always include the FEC’s “full response.” The LNC designated the “full responses” at-issue at JA 53-55, 57-64.

quid pro quo corruption.” CF 41, JA 193. As the FEC also admitted, “[a]ll contributions to political parties can create the risk of corruption or its appearance regardless of the way that money is ultimately spent,” adding that

Congress could have permissibly concluded that contributions to a political party that directly benefit a particular candidate or can be spent directly on a particular election contest pose an especially acute risk warranting a lower dollar limit.

CF 36, JA 191.

When the LNC asked the FEC to “describe in detail all evidence” for the proposition that a maximum restricted contribution (\$101,700) is less corrupting than a contribution exceeding the unrestricted base limit by one dollar (\$33,901), the FEC replied that it “cannot respond to this interrogatory because it rejects the premise that a contribution of any particular dollar value is ‘corrupting’ but that lower values are not ‘corrupting.’” CF 34, JA 189-90.

The LNC asked the FEC to describe the likelihood that, and the circumstances under which, a maximum \$101,700 restricted contribution “would create the same or greater appearance of corruption” as would an unrestricted, illegal-by-one-dollar \$33,901 contribution by the same

person to the same committee. CF 43, JA 194-95. The FEC objected on grounds that it should not “opine on matters committed to the discretion of Congress.” JA 60, 62. It then offered that a “within-limit [restricted] contribution could appear as corrupt as or more corrupt than a lower [unrestricted contribution] that exceeds the general-account limit, depending on circumstances,” examples of which include

the identity of the contributor and the receiver, the policy interests of the contributor, the current status of relevant policies, *the financial needs and goals of the receiver including as to the types of spending for which segregated account funds might be used* and the public knowledge of those matters, the receiver’s ability to raise funds for different proposed uses, and whether any relevant policy changes happen close in time to the contribution.

CF 43, JA 195 (emphasis added). The FEC continued by offering that “it is also possible that a particular contribution *below* the general account limit may have an appearance of corruption that exceeds that of a higher contribution to a segregated account.” JA 61-63 (emphasis added).⁵

Notwithstanding its multi-factor corruption test and its reticence to “opine on matters committed to the discretion of Congress,” JA 60, 62, the FEC hypothesizes that “Congress *could have* permissibly concluded”

⁵*See supra* n.4. This part of the FEC’s position is in any event deducible from the certified portion.

that unrestricted donations pose greater corruption risk than restricted donations, as it believes that “unrestricted funds contributed to a political party *may be* used for activities that maximally benefit federal candidates and thus *may* pose a relatively more acute danger of actual and apparent corruption.” CF 37, JA 191-92 (emphasis added).

4. *The Segregated Spending Purpose Accounts’ Potential Utility*

Between December 14, 2014, and December 13, 2016, Democratic Party national committees accepted \$41,510,551 in the segregated spending purpose accounts; Republican Party national committees accepted \$88,455,532 in such accounts; and the LNC accepted \$31,508 in such accounts. CF 31; JA 188-89; *see also* CF 44-49, JA 195-97; CF 51-52, JA 197. The FEC did not object to certification of the following fact:

In 2016, the RNC spent \$7,834,889 from its Building Fund, presumably on Building related expenses; \$19,482,219 from its Convention Fund and \$3,625 from its Operating Fund on convention related expenses; and \$5,020,500 from its Recount Fund plus \$26,825 from their Convention Fund presumably on legal related expenses.

JA 79 (citing JA 65-66).⁶

⁶The LNC respectfully submits that the District Court clearly erred in overlooking or declining to certify this undisputed fact.

The parties disputed how much the LNC spends toward the three purposes for which segregated accounts are allowed, largely because the LNC's internal accounting charts are not tailored to FECA's exact language. But the District Court found that in the 2016 presidential election year, the LNC's total spending on all three special purposes approximated \$467,251.58. CF 29, JA 188.

The LNC holds presidential nominating conventions once every four years. CF 26, JA 187. "All, or very nearly all, of the Libertarian Party's [presidential convention expenses] are incurred and paid for in the year in which the convention is held." CF 28, JA 188. Minor presidential convention expenses are occasionally pre-paid in the year preceding the convention year, but no such expenses are incurred in the two years following a presidential convention year. *Id.* While it asserted, without valid support, that cities bid to host the LNC's conventions and that the LNC would accept government funding for its conventions, the FEC did not dispute that "LNC spent \$249,971 to hold the Libertarian Party's 2016 presidential nominating convention." JA 82-83.⁷

⁷*See supra* n.6.

In 2014, the LNC purchased a headquarters building for \$825,000. CF 24, JA 187. The LNC seeks to retire the building's mortgage as quickly as possible, and in any event prior to a 2024 balloon payment. To this end, it budgets at least \$60,000 in odd-numbered years to pay down the principal, and undertakes fundraising efforts directed to that purpose. The LNC expects to meet its 2024 goal, but its goals at times exceed its budget, and its budget targets are sometimes missed. CF 25, *id.* The FEC objected to other statements contained in the fact proposal, but did not object to the fact that “[a]s of August 22, 2017, LNC has an outstanding balance of \$250,860 on its headquarters mortgage.” JA 81.⁸

And notwithstanding the parties' dispute as to the LNC's litigation expenses, the FEC did not dispute that “[o]wing to its smaller share of the vote, the Libertarian Party is unlikely to expend money in the foreseeable future on funding election recounts,” and that “[t]he LNC has never spent money litigating election recounts.” JA 80-81.⁹

⁸*See supra* n.6.

⁹*See supra* n.6.

5. *Joseph Shaber's Testamentary Bequest*

Between 1988 and 2011, Joseph Shaber donated amounts ranging from \$10 to \$300 to the LNC. Between June 2011 and November 2012, he gave the LNC \$100 per month. In May 2012, he donated an additional \$100. CF 109, JA 221. Shaber's 46 donations totaled \$3,315. *Id.*

Without its knowledge, the LNC was made a beneficiary of the Joseph Shaber Revocable Trust under a trust dated February 11, 2010. CF 115, JA 222. The size of Shaber's gift to the LNC was contingent upon a variety of factors, including the value of his property and whether he would have grandchildren at the time of his passing. CF 116, JA 223. Shaber died on August 23, 2014, rendering the trust irrevocable. CF 117, *id.* Shaber's death prevents him from engaging in political expression, association, or support. CF 118, *id.*

The LNC first had access to Shaber's bequest in 2015, and took the maximum then-allowed for unrestricted purposes in February of that year. CF 119, *id.* In September 2015, the LNC's share of the Shaber trust was established at \$235,575.20. CF 121, JA 224. Although the LNC had sent Shaber a fundraising appeal related directly to its headquarters

building, Shaber specified that the LNC should take his bequest “outright.” CF 122, *id.*; CF 123, *id.*

The FEC is unaware of any condition or limitation attached by Shaber to his bequest to the LNC, CF 124, *id.*, nor is the FEC aware of any *quid pro quo* arrangement related to Shaber’s LNC bequest, CF 125, *id.* To the LNC’s knowledge, neither Shaber nor anyone related to him or acting on his behalf has had any relationship with the LNC, its officers, board members, or candidates, apart from Shaber’s contribution history. CF 129, JA 225. The Trustee of Shaber’s Trust could not impose restrictions on Shaber’s bequest that Shaber did not himself place. CF 126, JA 224.

Aside from pursuing its ideological and political mission, the LNC provided nothing of value to Shaber, or to anyone else, in exchange for his bequest to the LNC. CF 133, JA 225. The LNC removed Shaber from its membership rolls upon learning of his bequest. CF 134, JA 226.

The LNC would accept and spend the entirety of Shaber’s bequest for its general expressive purposes, including expression in aid of its federal election efforts. CF 127, JA 224. But the LNC having taken the

maximum allowable unrestricted amount for 2015, the Trust and the LNC agreed to deposit the remaining \$202,175.20 into an FEC-compliant escrow account, subject to this litigation's outcome. CF 128, JA 224-25. The LNC is prohibited from pledging, assigning, or otherwise obligating the anticipated contributions before they are disbursed. CF 132, JA 225.

6. *The Spending Purpose Restrictions'
Impact on the LNC*

The Libertarian Party's ability to influence elections is related to its ability to raise and spend money. The LNC needs, and would prefer, to spend its funds directly speaking to the electorate about its ideology and political mission, supporting its candidates, and building its institutional capability, including its capability to regularly qualify for the ballot in various states. CF 89, JA 215-16. The LNC spends the bulk of its resources obtaining ballot access for its candidates, "probably the most important thing the [LNC] does." CF 83; JA 214.

"Absent the [base] annual contribution limit, the LNC would utilize donations exceeding such limit for political expression, including improving the party's access to ballots, promoting awareness of the party and its ideology, and supporting candidates for state and federal office."

CF 91, JA 216.¹⁰ But “potential donors may forego making a contribution to the national committee of a political party, or reduce the amount of their contribution, if the uses of that contribution are restricted.” CF 32, JA 189.

Indeed, the LNC identified donors who gave the maximum unrestricted base contribution in 2017 and would have exceeded that limit but for the segregated spending purpose restrictions. These donors would exceed the unrestricted base limit in future years, but continue to refrain from doing so for the same reason. As it turns out, the LNC’s supporters agree with the LNC that the party should prioritize the spending of its money speaking for purposes outside those privileged by the segregated account scheme. FECA’s spending purpose restrictions cause such donors to reduce the size of their contributions.

The record establishes some manifestations of this injury. Chris Rufer and Michael Chastain regularly donate to the LNC and to Libertarian candidates. CF 140, JA 227; CF 149, JA 229. Rufer donated over

¹⁰This certified fact cites as its basis LNC Chair Nicholas Sarwark’s statement about “the base annual contribution limit (currently \$33,900).” JA 76.

\$900,000 to directly support the election of Libertarian candidates in 2016 alone, CF 140, JA 227; and over \$280,000 directly to the LNC over the years, including the maximum amounts allowed by law for unrestricted purposes in 2012, 2013, 2016 and 2017, CF 143, JA 228. In 2017, Chastain donated the maximum \$33,900 in unrestricted funds, and an additional \$26,410.01 to the building fund. CF 152, JA 230.

Rufer and Chastain trust the LNC to effectively spend funds advancing its mission, which they support. Because they wish to maximize the LNC's unrestrained ability to advocate its message, and further their involvement with the LNC's mission, Rufer and Chastain would donate unrestricted funds in amounts exceeding the unrestricted contribution limits and the party's spending for segregated account purposes were it legal to do so. CF 141, JA 227; CF 146, JA 228-29; CF 147, JA 229; CF 150, JA 229-30; CF 155, JA 231; CF 156, *id.* Neither would donate to the LNC to obtain access to or the gratitude of any candidates or officeholders. Rufer and Chastain would not expect special access to candidates or officeholders were they to give the LNC over

\$33,900 in a year, restricted to a particular purpose or without restriction. CF 142, JA 228; CF 151, JA 230.

Rufer and Chastain understand that the government lets them donate up to \$339,000 to the LNC per year, but refrained from giving the LNC additional money last year because they knew that additional funds would come with government-imposed strings. CF 144, JA 228; CF 153, JA 230. Rufer did not want any part of his 2017 contribution restricted to spending on a headquarters building, fees for election contests and other legal proceedings, and presidential nominating conventions. Beyond his contribution to the LNC's building fund, neither did Chastain. They did not believe that the LNC had much use for those spending purposes in 2017, and any money spent for those purposes may not communicate the same messages that the LNC would otherwise communicate with their donations. CF 145, JA 228; CF 154, JA 230.

FECA's spending restrictions do not only impact the LNC's access to money from living donors; they impact the LNC's access to future testamentary bequests as well. In 2017, Chastain was revising his estate plan, seeking to make the LNC a contingent beneficiary in the amount of

\$500,000- \$1,000,000 to be spent without restriction. Chastain wants no part of his bequest restricted to spending on a headquarters building, fees for election contests and other legal proceedings, and presidential nominating conventions. CF 157, JA 231; CF 158, *id.*

William Redpath's last will and testament provides that his estate would fund a trust charged with furthering ballot access and electoral reform to benefit the Libertarian Party. Last year, that bequest's value would have exceeded \$1.1 million. But Redpath would prefer to leave this seven-figure amount to the LNC without restriction. CF 164, JA 233; CF 165, *id.* He shares the skepticism about the LNC's need for spending on the segregated spending purposes in any given year, which may not communicate the same messages that the LNC would otherwise express with an unrestricted bequest. But for the spending purpose restrictions, Redpath would immediately replace his will's ballot access and reform trust with an unrestricted bequest of the equivalent amount to the LNC. CF 166, JA 233-34.

Neither Chastain nor Redpath would bequeath money to the LNC in an attempt to affiliate with the party after their deaths. CF 159, JA 231;

CF 167, JA 234. They have no idea who the Libertarian candidates for any office might be at the time their estates disburse funds to the LNC, cannot predict the identity of future candidates, and hope and expect to live beyond the time through which the party's candidates and issues may be currently foreseen. CF 160, JA 232; CF 168, JA 234. Neither Chastain nor Redpath have received any sort of benefit for promising to remember the Libertarian Party in their wills should the contribution limits change. CF 161, JA 232; CF 169, JA 234.

Between 1988 and 2008, Frank Welch Clinard, Jr., sporadically donated to the LNC, in small amounts totaling \$1,625.30. Only three times did his donations meet or exceed \$100, with the highest donation amounting to \$159. CF 171, JA 234-35. Clinard left the LNC an unrestricted testamentary bequest totaling \$111,863.52. CF 170, JA 234; CF 173, JA 235.

As with Shaber, the LNC is unaware of any relationships between Clinard, his relatives, or agents, and the LNC, its officers, board members or candidates, apart from his contribution history. CF 172, JA 235. It gave Clinard nothing of value, apart from pursuing its mission, in

exchange for the bequest; and would accept and spend the entire bequest for its general expressive purposes, including expression in aid of its federal election efforts. The LNC has established an escrow account toward that end. CF 174, *id.*; CF 175, *id.*; CF 176, *id.* Clinard's death, too, prevents him from engaging in political association, expression or support, and the LNC removed him from its membership rolls on account of his death. CF 177, *id.*; CF 178, *id.*

“The LNC is confident that it could identify and develop additional donors who would give beyond the base annual contribution limit (currently \$33,900), but refrain from doing so because it is illegal to give larger amounts without restriction and they do not perceive sufficient value in donations that carry the government's purpose restrictions.” CF 92, JA 216. “The LNC would also be better able to attract larger testamentary bequests if the donors would know that a larger portion of their bequest would be immediately effective.” *Id.*

7. *Procedural History*

The LNC brought this case in the United States District Court for the District of Columbia, challenging the application of any contribution

limits to Shaber's bequest, facially challenging Sections 30116(a)(1)(B) and 30125 owing to their content-based speech restrictions, and challenging the content-based restrictions' application against the Shaber bequest. JA 7-28. The FEC moved to dismiss the complaint, arguing that the LNC's injury (at least with respect to Shaber's bequest) was self-inflicted, because it could have accepted the entirety of the bequest in various segregated spending purpose accounts. The FEC also claimed that the LNC's injury was one of competitive disadvantage, which is neither caused by FECA nor redressable in court.

The District Court denied the FEC's motion to dismiss. *Libertarian Nat'l Comm. v. FEC*, 228 F. Supp. 3d 19 (D.D.C. 2017) ("*LNC III*"), JA 29-42. "The LNC does not argue" that FECA bars its acceptance of "the entire Shaber bequest in one lump sum," but that it could not "accept the entire bequest for *general expressive purposes* when the bequest became available in 2015." *Id.* at 25, JA 37. "LNC's injury is that it cannot accept money—from Shaber's bequest *and from other donors*—for spending *as it wishes*." *Id.* (internal quotation marks omitted).

Pointing to the fungible nature of money, *see* CF 38, JA 192, the FEC nonetheless argued that the LNC had spent enough money toward the segregated purposes during the 2014 and 2016 “election cycles” such that it could have used Shaber’s bequest to offset other funds. “The FEC’s argument has some surface-level appeal, but does not stand up to scrutiny.” 228 F. Supp. 3d at 26, JA 39. “Since the bequest became available in 2015, the LNC’s 2014 and 2016 expenditures are of no moment.” *Id.* (footnote omitted). And “the LNC’s total spending in a given election cycle is a red herring,” because the contribution limits are annual. *Id.*

“What matters is that in 2015, LNC spent no money on a presidential nominating convention, \$72,827.11 on its headquarters, and \$7,260.61 on legal proceedings, totaling \$80,872.72 in segregated purpose spending.” *Id.*¹¹ The resulting “overage” would have approximated \$168,000 in money the LNC could not spend in 2015. “[A]ccepting the entire bequest would not have freed up the full value of the Shaber

¹¹The LNC later corrected the 2015 presidential nominating convention line, which amounted to a non-material \$340.50. JA 78.

bequest for engaging in federal election activities and resulted in the alleged injury in 2015.” 228 F. Supp. 3d at 26, JA 39.

Rejecting the FEC’s competitive disadvantage theory, the District Court “agree[d] with the LNC that the Commission does not afford the Complaint a fair reading.” *Id.* at 27 (internal quotation marks omitted), JA 41. “[T]he FEC cherry-picks certain phrases from the LNC’s complaint referencing the party’s interest in competing with other parties,” *id.*, JA 40-41, but its competitive-disadvantage arguments “are premised on a mischaracterization of the alleged injury and therefore fail,” *Id.* (footnote omitted), JA 41.

Following discovery, the LNC moved for fact-finding and certification. The FEC moved to dismiss for lack of jurisdiction, asserting the questions were insubstantial. In the alternative, the FEC proposed its own facts and sought to rephrase the questions. On June 29, 2018, the District Court denied the FEC’s motion, made 178 factual findings, certified the LNC’s first question, and certified the LNC’s second and third questions with some modification. JA 147-235.

SUMMARY OF ARGUMENT

This Court should allow the LNC to accept Shaber's bequest as he left it—without restriction. Given this bequest's circumstances, nothing suggests the specter of *quid pro quo* corruption that might justify restricting the LNC's right to accept and spend that money advancing its political mission.

FECA's spending restrictions must also yield to First Amendment requirements. Regardless of whether the new, post-cromnibus FECA's party limit may be characterized as a contribution or expenditure limit, FECA now imposes content-based restrictions on the speech of political parties. These restrictions, at once both over- and under-inclusive, cannot survive the strict scrutiny to which they are subject. Nor can FECA's newly-restructured party limit survive the heightened "closely drawn" standards reserved for content-neutral contribution limits, given its pervasive irrationality and the lack of evidence supporting any logical relationship to valid anti-corruption interests.

This Court may remedy the LNC's injury by either enjoining Section 30116(a)(1)(B)'s political party contribution limit on account of its

embedded, defective spending purpose restrictions; or it may take the more-limited option of enjoining just the unconstitutional spending purpose restrictions, leaving the overall limit in place. The first option is the most straightforward. The second option has the advantage of preserving Congress's decision to maintain, if expand, the contribution limits while extending that decision's benefits without unlawful restrictions. Of course, any action might well prompt Congress to revisit the issue, with greater care befitting First Amendment speech rights than could be given in a last-minute omnibus process. But allowing this unconstitutional scheme of content-based speech restrictions to continue hobbling political expression is untenable.

Should this Court nonetheless determine that Shaber's bequest may be subject to contribution limits, and should it leave in place the new content-based restrictions on political parties' spending, it should at least require that the government justify application of these restrictions to Shaber's bequest.

STANDARD OF REVIEW

Per Section 30110, this Court decides the merits in the first instance; no judgment of the District Court is under review. This Court generally reviews findings of fact for clear error. *See, e.g., United States v. Weaver*, 808 F.3d 26, 32 (D.C. Cir. 2015).

ARGUMENT

I. IMPOSING ANNUAL CONTRIBUTION LIMITS AGAINST JOSEPH SHABER'S BEQUEST VIOLATES THE LNC'S FIRST AMENDMENT RIGHTS.

The LNC maintains that applying campaign contribution limits to testamentary bequests is always unconstitutional. But having lost that battle in *LNC I*, *see* Certificate as to Parties, Rulings and Related Cases, *supra* at ii, Plaintiff does not revisit the matter here. It need not do so to prevail on its as-applied challenge respecting Shaber's bequest.

Constitutional litigation is not limited to all-or-nothing propositions.

LNC I properly distinguished an as-applied challenge narrowly focused on one particular bequest, from a categorical challenge to the limitation of all bequests. The court below correctly rejected the FEC's "convoluted and barely comprehensible argument that . . . *LNC I* itself forecloses the LNC's [Shaber] claim." JA 160.

An as-applied challenge contends that a law’s “application to a *particular person* under *particular circumstances* deprived *that person* of a constitutional right.” *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (citations omitted) (emphases added). As Judge Wilkins found, Section 30110’s command “to immediately . . . certify *all* questions of the constitutionality of this Act” includes the certification of as-applied challenges concerning particular donations. *LNC II*, 950 F. Supp. 2d at 60 (internal quotation marks omitted). After all, were the LNC to take Shaber’s full bequest today, it could seek certification of an as-applied challenge in defense of an enforcement action. *Id.* at 60-61. And the Supreme Court has “allowed individualized as-applied First Amendment challenges to expenditure restrictions.” *Id.* at 61; *see Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam); *Mass. Citizens for Life v. FEC*, 479 U.S. 238 (1986).

A. The LNC Has A First Amendment Right to Receive Contributions.

LNC I rejected the notion that decedents or their estates have a right to make contributions, but found that a meaningful question existed as to whether the LNC had a First Amendment right to receive a

contribution. *LNC I*, 930 F. Supp. 2d at 170-71. The Supreme Court long ago implied a First Amendment speech right to receive campaign contributions, by confirming that such contributions are a necessary prerequisite for engaging in political advocacy. “[V]irtually every means of communicating ideas in today’s [1976] mass society requires the expenditure of money.” *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam). Laws limiting a political party’s receipt of printing presses, broadcasting equipment, or internet servers would doubtless be viewed as implicating speech rights.

The Supreme Court may have resolved the issue in *McCutcheon v. FEC*, 572 U.S. 185 (2014), where the RNC prevailed alongside its donor on the argument that it had a First Amendment right “to receive the contributions that [its donors] would like to make” *Id.* at 195. Indeed, *LNC I* might have relied on *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), where the first certified question asked “[w]hether the contribution limits . . . violate the First Amendment by preventing David Keating, SpeechNow.org’s president and treasurer, from accepting contributions to SpeechNow.org in excess of the limits . .

. .” *Id.* at 690. This Court answered that the limits at issue indeed “violate[d] the First Amendment . . . by prohibiting SpeechNow from accepting donations in excess of the limits.” *Id.* at 696.

This Court is not alone in upholding a First Amendment right to accept political contributions. “[B]oth the contributing and the contributed-to party have sufficient injuries-in-fact to challenge campaign finance restrictions.” *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409, 423 (5th Cir. 2014) (citations omitted); *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 537 (5th Cir. 2013) (substantial likelihood of success on claim that law “violates [political committee’s] right to free speech by prohibiting it from accepting funds from corporations”); *see also Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 698-99 (9th Cir. 2010), *abrogated in part on other grounds, Farris v. Seabrook*, 677 F.3d 858, 865 n.6 (9th Cir. 2012); *see also Dean v. Blumenthal*, 577 F.3d 60, 69-70 (2d Cir. 2009) (per curiam).

B. Testamentary Contributions Implicate Speech,
Not Associational Rights.

“When an individual contributes money to a candidate, he exercises both [rights of political expression and political association]: The contribution ‘serves as a general expression of support for the candidate and his views’ and ‘serves to affiliate a person with a candidate.’” *McCutcheon*, 572 U.S. at 203 (quoting *Buckley*, 424 U.S. at 21-22). But testamentary bequests are fundamentally different. As the District Court found, Shaber’s death ended his expression and association; the LNC, which does not associate with the dead, removed Shaber from its membership rolls. CF 118, JA 223; CF 134, JA 226.

None of this suggests that the LNC would lack standing to assert the expressive aspects of Shaber’s bequest. “For obvious reasons, it has long been recognized that the surviving claims of a decedent must be pursued by a third party.” *Hodel v. Irving*, 481 U.S. 704, 711 (1987). The LNC would respectfully disagree with *LNC I*’s determination, 930 F. Supp. 2d at 169-70, that a deceased donor’s last will and *testament* lacks First Amendment protection for its expressive aspect. *See, e.g.*, David Horton, *Testation and Speech*, 101 Geo. L. J. 61 (2012).

But while ordinarily, “contribution limits may bear more heavily on the associational right than on freedom to speak,” *McConnell v. FEC*, 540 U.S. 93, 135 (2003) (internal quotation marks omitted), they do not implicate associational rights *at all* when applied against testamentary bequests. “[I]n the literal sense, the FECA restriction (as enforced by the FEC) on [testamentary bequests] is not a ‘contribution limit involving significant interference with associational rights [that] must be closely drawn to serve a sufficiently important interest.’” *LNC I*, 930 F. Supp. 2d at 169 (quoting *Speechnow.org*, 599 F.3d at 692). This case concerns primarily the LNC’s *speech* rights with respect to the Shaber bequest, triggering a higher standard of review.

C. The FEC Cannot Meet Its Burden in Restricting the LNC’s Access to Shaber’s Bequest, Because Shaber’s Bequest Raises No Corruption Concerns.

The LNC does not revisit *LNC I*’s holding that testamentary bequests may theoretically raise corruption concerns, thus generally warranting their subjection to FECA’s contribution limits. But this as-applied challenge asks whether Shaber’s bequest, specifically, warrants government limitation. The FEC bears the burden of showing it does.

That the government bears the burden under any form of heightened scrutiny is by now axiomatic. And so it is in the campaign finance field. Even in cases of living donors, where contribution limits are said to primarily implicate associational rather than speech rights, limits “may be sustained *if the State demonstrates* a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.” *Buckley*, 424 U.S. at 25 (emphasis added); JA 162 n.10.

The LNC submits that with respect to political contributions, as in other ways, the dead differ materially from the living, and thus raise different indicia of potential corruption and a different level of concern. As the court below found, “*LNC I*’s recognition of the mere ‘possib[ility]’ that a bequest may ‘raise valid anti-corruption concerns,’ suggests if anything that most bequests do *not* raise valid corruption concerns, and that bequests only rarely raise the corruption concerns necessary to justify the contribution limits’ application.” JA 162 (quoting *LNC I*, 930 F. Supp. 2d at 166).

In evaluating a testamentary bequest, the corruption inquiry is wholly retrospective. And barring supernatural intervention, the potential for *quid pro quo* activity is rather more limited than in the case of a living donor, as are prospects for its enforcement. Regardless of what the LNC might do for Shaber now, he will give it nothing more or less than his bequest. The FEC could only look back on Shaber's now-terminated relationship with the LNC, in an attempt to identify some meaningfully suspicious connection between his bequest and the LNC's conduct.

The FEC indeed availed itself of the fair opportunity to conduct discovery of Shaber's estate, the LNC, and even a federal campaign to which Shaber donated. Its fishing expedition turned up nothing. Shaber was just an ordinary Libertarian donor who could afford to be more generous to his party when he no longer had use for money. His "\$3,315 donated over 24 years is a drop in the bucket relative to current law's annual limit of \$33,900 for [unrestricted purposes], and an even smaller drop relative to the limit of \$339,000 that individuals may contribute for either general or specialized purposes." JA 166-67 (citations omitted).

The LNC knew nothing of Shaber's bequest before he died. JA 165; CF 115, JA 222. Apart from his modest donations, "neither Mr. Shaber nor any of his associates and loved ones had any known relationship to the LNC or its board members, officers, or candidates." JA 165-66; CF 129, JA 225. "[T]he LNC has given nothing tangible of value to Mr. Shaber or his associates and loved ones." JA 166; CF 133, JA 225. Nothing suggests that Shaber timed his highly-contingent gift (largely, a share of property itself contingent on the prospect of grandchildren), CF 116, JA 223; CF 120, *id.*, as part of some quid pro quo arrangement. Even had Shaber's bequest ingratiated him to the LNC and afforded him access to its candidates, the party's lack of federal officeholders limited its ability to offer him any political favors. CF 4, JA 182. "Ingratiation and access, in any event, are not corruption." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

The FEC's prospects for meeting its heightened scrutiny burden ended when the District Court found that "[t]he FEC is unaware at this time of any quid pro quo arrangement related to Mr. Shaber's bequest to the LNC." CF 125, JA 224. When "there is no corrupting 'quid' for

which a candidate might in exchange offer a corrupt ‘quo’ . . . we must conclude that the government has no anti-corruption interest in limiting contributions” *SpeechNow*, 599 F.3d at 694-95. “Even a modest burden on one’s ability to raise funds may be undue if such burden serves no corruption concern whatsoever.” JA 161 n.9. Since “something outweighs nothing every time,” *Speechnow*, 599 F.3d at 695 (internal quotation marks and punctuation omitted), the “something” of the LNC’s substantial First Amendment interest in accepting Shaber’s contribution outweighs the FEC’s nothing.

II. FECA, ON ITS FACE, VIOLATES THE LNC’S FIRST AMENDMENT RIGHTS BY RESTRICTING THE LNC’S SPENDING OF CONTRIBUTIONS ABOVE SECTION 30116(A)(1)(B)’S BASE GENERAL PURPOSE LIMIT TO THOSE SPECIALIZED PURPOSES ENUMERATED IN SECTION 30116(A)(9).

“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (internal quotation marks and citations omitted). And at any time, “[t]he independent expression of a political party’s views is ‘core’ First Amendment activity no less than is the independent expression of

individuals, candidates, or other political committees.” *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.) (citation omitted).

A political party’s independent expression not only reflects its members’ views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure.

Id. at 615-16. FECA’s new content-based spending restrictions do not respect the LNC’s First Amendment speech rights.

A. FECA’s New Regime for Limiting Contributions to Political Parties Imposes Expenditure Restrictions Subject to Strict Scrutiny.

The LNC would not have brought, and the District Court would not have certified, a challenge to the sort of contribution limits that the Supreme Court upheld in *McConnell*. *LNC I* made no such claim against pre-cromnibus FECA. But the 2014 cromnibus amendments radically altered FECA’s nature and structure. As the Supreme Court said of another provision reviewed for the first time, “[w]e are confronted with a different statute and different legal arguments, at a different point in the development of campaign finance regulation.” *McCutcheon*, 572 U.S. at

203. Congress transformed FECA from a contribution limit to, at best, a hybrid contribution/expenditure limit.

The FEC argued below that the Supreme Court “defined how to distinguish between a contribution limit and an expenditure limit” by looking to the restriction’s impact on speech, with a contribution limit’s “hallmark” being that it “entails only a marginal restriction upon the contributor’s ability to engage in free communication.” FEC Br., Dist. Ct. Dkt. 26 at 13 (quoting *Buckley*, 424 U.S. at 20).

The FEC erred. The Court may have “distinguished expenditure limits from contribution limits based on the degree to which each encroaches upon protected First Amendment interests,” *McCutcheon*, 572 U.S. at 196-97, but that distinction is not defining; it only explains why expenditure and contribution limits warrant different levels of scrutiny. To the extent the Court defined these terms, it referred to an expenditure limit as “[a] restriction on the amount of money a person or group can spend on political communication during a campaign,” *Buckley*, 424 U.S. at 19, and it referred to a contribution limit as “a limitation upon the amount that any one person or group may contribute

to a candidate or political committee,” *id.* at 20; *see also id.* at 13. And as this Court recently explained, “[a] contribution limit necessarily contains two essential ingredients: (i) a monetary cap, and (ii) a time period.”

Holmes v. FEC, 875 F.3d 1153, 1161 (D.C. Cir. 2017) (en banc).

McConnell supplies a test for distinguishing the two types of limits.

Rejecting charges that the previous “soft money” ban effected an expenditure limit, the Supreme Court explained that

[I]t is irrelevant that Congress chose . . . to regulate contributions on the demand rather than the supply side. The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, *burdens speech in a way that a direct restriction on the contribution itself would not.*

McConnell, 540 U.S. at 138-39 (citation omitted) (emphasis added). As an example, the Court offered that the previous soft money ban was a contribution limit, because it did not “in any way limit[] the total amount of money parties can spend.” *Id.* at 139 (citations omitted).

Under *McConnell*’s test, Section 30116(a)(1)(B) now imposes an expenditure limit on political parties. To be sure, this provision still limits contributions, but the amounts that parties may accept today depend on how the money is “used.” Sections 30116(a)(9)(A), (B), and

(C); *cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (First Amendment scrutiny applies where “the conduct triggering coverage under the statute consists of communicating a message”). A “direct restriction on the contribution itself,” *McConnell*, 540 U.S. at 139, would simply limit annual contributions to \$X, as before. The current restrictions burden speech in a way that direct contribution restrictions would not, *id.*, because they make a contribution legal or illegal depending on the content of the funded speech.

The new statute also limits “the total amount of money that can be spent,” *id.*, as shown by the FEC’s first unsuccessful motion to dismiss. The LNC could have deposited the entirety of Shaber’s bequest in various segregated accounts when it became available in 2015, but it would have still been unable *to spend* approximately \$168,000 that year, *LNC III*, 228 F. Supp. 3d at 26, JA 39. The District Court thus erred in offering that *McConnell* forecloses description of the current limit as an expenditure limit, JA 169-70, a determination that, in any event, Section 30110 leaves to this Court. Yet the District Court correctly found that

“[t]he specialized purpose regime is neither a pure contribution limit nor a pure expenditure limit, but contains elements of both” JA 169.

The LNC respects the fact that tremendous litigation and judicial resources have been expended in determining that FECA’s soft money ban on political party contributions was a contribution limit. In *LNC I*, it let the matter lie. But Congress has since restructured the provision to include what *McConnell* would plainly describe as expenditure limits.

“[W]e should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA’s restrictions on political party spending.” *Colo. Republican*, 518 U.S. at 629 (Kennedy, J., concurring in the judgment and dissenting in part).

Expenditure limits are subject to “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”

McCutcheon, 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 44-45).

- B. Even if Viewed as Imposing a Pure Contribution Limit, FECA’s New Regime for Limiting Contributions to Political Parties Imposes Content-Based Restrictions Subject to Strict Scrutiny.

The purposes to which the segregated accounts are restricted each have particular expressive aspects. Although it cannot “know[] the goals

of every presidential nominating convention[] . . . the FEC admits that promoting the election of a party's federal candidates has been a goal of many recent presidential nominating conventions." JA 51. It admits that "[f]unds spent on conducting a presidential nominating convention may influence the outcome of federal elections, by persuading voters who attend or watch the convention to vote for or against the candidates featured at that convention." *Id.* And "the FEC admits that public statements of those at presidential nominating conventions often express support for the nominated candidates and opposition to those candidates' opponents." JA 52.

A building may make an architectural statement consistent with the party's mission, CF 15, JA 184, and display political signs, CF 16, JA 185. The FEC "admit[s] that funding for a political party's headquarters building assists the party in expressing its views." JA 52. Litigation for political ends is "a form of political expression." *NAACP v. Button*, 371 U.S. 415, 429 (1963). The FEC admits that "election-related litigation may affect the ultimate victor of an election." JA 52.

The spending purpose restrictions directly limit how the LNC may express itself, in preparation for and during political campaigns, based on the subject matter, function, or purpose of its speech. The LNC is allowed to accept contributions to fund its political activities, but may only use them towards the purposes and in the amounts ordained by Congress. Consider a \$33,901 contribution, which exceeds the base unrestricted limit by one dollar: if the LNC speaks as it wishes with that contribution, distributing pamphlets about the party's ideology or supporting a non-presidential candidate, the contribution is illegal. If the LNC spends one dollar of that same contribution broadcasting its presidential nominating convention, hanging a sign on its building, or litigating an election contest, the contribution is legal.

Donating \$101,700, the maximum segregated purpose limit, for any of these latter purposes is perfectly legal, as would be a \$305,100 donation divided equally for each of these purposes; donating \$101,700 to broadcast movies about the party's ideology—or its midterm, *non-*presidential conventions, is illegal. And as the FEC helped demonstrate

with its first motion to dismiss, the amount of speech the LNC may exercise turns on that speech's content.

“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citations omitted). “Facial distinctions based on message, whether they regulate the speech’s subject matter, function, or purpose, are content based and so subject to strict scrutiny.”

A.N.S.W.E.R. Coal. v. Basham, 845 F.3d 1199, 1208 (D.C. Cir. 2017) (citing *Reed*, 135 S. Ct. at 2227). Strict scrutiny also applies “when the purpose and justification for the law are content based.” *Reed*, 135 S. Ct. at 2228).

Characterizing FECA’s revised contribution limit as a pure contribution limit does not alter the fact that it “target[s] speech based

on its communicative content,” *Reed*, 135 S. Ct. at 2226, “by particular subject matter, and . . . by its function or purpose,” *id.* at 2227. There is no “contribution limit” exception to the content-based discrimination doctrine. Nor would fabricating such an exception assist the FEC.

McConnell upheld the pre-cromnibus soft money ban precisely because it was content-neutral. “[L]arge soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used.*” *McConnell*, 540 U.S. at 155 (emphasis added). Courts have since invoked content-neutrality in upholding contribution limits. *See Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 97 (D.D.C. 2016) (three-judge panel), *aff’d*, 137 S. Ct. 2178 (2017) (state party committees); *Republican Nat’l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010) (three-judge panel), *aff’d*, 561 U.S. 1040 (2010).

But that logic works only if the parties get to decide how to spend their money for expressive purposes—as the District Court described the pre-cromnibus state of affairs “[w]ith respect to national political parties,” when contribution limits “appl[ied] regardless of how a

national party might want to use the money.” *Republican Nat’l Comm.*, 698 F. Supp. 2d at 153. That was then, this is now: FECA’s contribution limit *depends* on how a national party uses its money, regardless of whether courts might describe the limit as a “contribution limit,” “expenditure limit,” or a hybrid. As the District Court explained,

[T]he LNC’s second question raises an issue less akin to a traditional challenge to a contribution limit than to a challenge to a statute alleged to restrict speech on the basis of content. As such, the appropriate framework for review is that governing content-based restrictions on speech, requiring [strict scrutiny], rather than the contribution limit framework.

JA 170-71 (citations omitted). However one slices it, FECA imposes content-based speech discrimination. It is subject to strict scrutiny.

C. FECA’s New Regime for Limiting Contributions to Political Parties Fails Any Level of First Amendment Scrutiny.

The choice between strict or intermediate “closely drawn” scrutiny is ultimately inconsequential. “[R]egardless whether we apply strict scrutiny or *Buckley*’s ‘closely drawn’ test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. Or to put it another way, if a law that restricts political speech does not avoid unnecessary abridgement of First Amendment rights, it

cannot survive ‘rigorous’ review.” *McCutcheon*, 572 U.S. at 199 (citations and internal quotation marks omitted).

Unlike the “soft money” ban reviewed in *McConnell*, FECA’s “Other Matters” omnibus amendments were not produced by the sort of fact-finding, analysis, and reasoned deliberation that might overcome heightened scrutiny. If anyone in Congress believed, or even considered, that the segregated spending purpose structure is tailored to addressing corruption while respecting First Amendment rights, those views warranted discussion. The omnibus amendments reflect no “historical pedigree,” *Wagner v. FEC*, 793 F.3d 1, 10 (D.C. Cir. 2015) (en banc) (“*Wagner II*”) (internal quotation marks omitted), no “century of careful legislative adjustment.” *Id.* at 14.

Nor can it be argued that “Congress and outside experts have generated significant evidence corroborating [a] rationale” for FECA’s spending purpose restrictions, “and [that] the only reason we do not have any of the relevant materials before us is that the Government had no reason to develop a record.” *Citizens United*, 558 U.S. at 457 (Stevens, J., dissenting). Congress and outside experts have generated

nothing. Discovery yielded nothing, and the FEC has introduced nothing by way of relevant evidence into the record. The FEC has not “assembled an impressive, if dismaying, account,” *Wagner II*, 793 F.3d at 17, of why FECA’s spending restrictions are needed. Nothing shows why a six-figure gift ostensibly restricted to promoting presidential candidates, which is in any event completely fungible for the large parties, is less corrupting than an unrestricted gift one-third its size.

In the absence of any real evidence, the FEC hypothesized a rationale. It mused that unlike contributions restricted to spending on presidential conventions, building, and litigation, unrestricted contributions “*may* be used for activities that maximally benefit federal candidates and thus *may* pose a relatively more acute danger of actual and apparent corruption.” CF 37, JA 191-92. “Congress *could have* permissibly concluded” that this risk justifies the restricted spending scheme. CF 37, JA 191 (emphasis added). Whether Congress reached that conclusion is a matter of pure speculation and, given the known circumstances, exceedingly unlikely. To be sure, this Court cannot “accept[] the

Government's conclusive presumption that all party expenditures are 'coordinated.'" *Colo. Republican*, 518 U.S. at 619.

In any event, the FEC's claim is irrational. Even were money not fungible, rendering these distinctions irrelevant for parties (*e.g.*, the Republican and Democratic parties) whose designated purpose spending matches or exceeds their "restricted" contributions, the designated spending purposes are plainly capable of "maximally benefit[ing] federal candidates."

The *whole point* of presidential nominating conventions is to "maximally benefit" candidates for President and Vice-President, by selecting and showcasing them. Such soirees regularly promote other federal officeholders and candidates as well. Parties can use buildings to feature signs and other displays supporting particular candidates. And winning an election recount or contest surely provides federal candidates a "maximum benefit."

To borrow the FEC's language, contributions funding presidential conventions or election contests are obvious examples of contributions "that directly benefit a particular candidate or can be spent directly on a

particular *election contest*,” thus “pos[ing] an especially acute risk warranting a *lower* dollar limit.” CF 36, JA 191 (emphasis added).

Indeed—the FEC literally contradicts the logic of Section 30116(a)(9)(C), which allows donations up to 300% of the base limit to fund “election recounts or contests.”

Strict scrutiny does not allow content-based speech restriction on such a weak “this-on-the-one-hand, that-on-the-other” rationale. Neither does “closely drawn” scrutiny. “The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000). Here, the novelty is high, and the plausibility of the FEC’s (not Congress’s) hypothesized justification is low. “We have never accepted mere conjecture as adequate to carry a First Amendment burden,” *id.* at 392, but mere conjecture is all that the FEC can offer.

“Congress could have permissibly concluded,” because this dubious distinction “may” be true, is the language of the rational basis test. But under heightened constitutional review, the government’s “justification

must be genuine, not hypothesized or invented post hoc in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). Where First Amendment rights are at stake, the government cannot “get away with shoddy data or reasoning.” *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion). “[T]here must be evidence; lawyers’ talk is insufficient.” *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009).

The “lawyers’ talk” here is bewildering. Are radically-higher but lawful, restricted contributions more potentially corrupting than lower, unrestricted contributions? Yes and no. Parties might “value a contribution with use restrictions more highly than a smaller contribution without such restrictions.” CF 39, JA 192; CF 40, *id.* The FEC asserts that “generally,” larger contributions are more potentially corrupting “regardless of how the money is spent”—until now, the prevailing logic of imposing contribution limits—and yet, in the same breath, this is not “true as a general matter,” because parties allegedly value unrestricted contributions more than restricted contributions. CF 41, JA 193-94.

But it cannot be that parties generally favor unrestricted contributions in the current scheme, because as the District Court found, CF 38, JA 192, money is fungible. If the “restricted” contribution merely offsets general account spending that would have occurred anyway, the “restricted” contribution is, for all intents and purpose, unrestricted, and its size is more relevant than its restriction. And the congressional record is not silent as to members’ appreciation of *this* point. As Rep. Slaughter remarked, “those of us in the political field know what it means to have the housekeeping accounts: that means it can go for absolutely anything.” 160 Cong. Rec. H9068 (daily ed. Dec. 11, 2014) (statement of Rep. Slaughter). Senators Manchin and Wyden completely disregarded the spending restrictions in describing the omnibus amendments as raising the contribution limit to party committees by a factor of ten. 160 Cong. Rec. S6812 (daily ed. Dec. 13, 2014) (statement of Sen. Manchin); 160 Cong. Rec. S6860 (daily ed. Dec. 15, 2014) (statement of Sen. Wyden).

Rather than dispute this point, the FEC made it the centerpiece of its first motion to dismiss. It tried to jam the round peg of the LNC’s minor-

party math into Section 30116(a)(9)'s square segregated spending hole, hoping to show that the LNC could have winked and nudged its way around the spending restrictions to accept Shaber's bequest in full.

But as the District Court held in *LNC III*, the math did not work for the LNC with respect to Shaber. It also does not work out for Rufer, or Chastain, or Redpath, or Clinard, and it may not work out for any donor who would give the LNC an amount greater than the general purpose limit, but within the total contribution limit. The LNC speaks relatively little in the ways and on the subjects that Congress has advantaged.

Congress has placed the FEC in the impossible position of trying to parse, from nothing, a coherent rationale that might explain how the cromnibus spending purpose restrictions, with all their inherent contradictions, might be narrowly tailored or closely drawn to relevant corruption concerns. It is one thing to generalize that larger contributions pose a greater risk, and for that reason, impose a simple contribution limit. Restricting how a party spends 90% of a contribution, in 30% tranches tied to presidential nominating conventions, buildings, and litigation, cannot be explained on a corruption-fighting rationale.

For all its vacillation, the FEC has admitted that no answer exists. To review: the essential truth is that “[a]ll contributions to political parties can create the risk of corruption or its appearance regardless of the way that money is ultimately spent” CF 36, JA 191 (emphasis in original). The FEC “rejects the premise that a contribution of any particular dollar value is ‘corrupting’ but that lower values are not ‘corrupting.’” CF 34, JA 189-90.

But if the line at which corruption concerns overtake First Amendment rights is to be set, it must be set somewhere. And the iron fact of this case is, for good or ill, Congress has set that line at \$339,000 per year from any one person. A contribution of \$101,700 for any designated spending purpose (let alone a lawful \$305,100 contribution for all three of them) might well “appear as corrupt as or more corrupt than” an unlawful-by-one-dollar \$33,901 unrestricted contribution. CF 43, JA 195. Yet it is lawful.

How to discern the potential corruption levels within the overall limit? It depends on any number of shifting, case-specific factors, including “the financial needs and goals of the receiver including as to

the types of spending for which segregated account funds might be used.” *Id.* The LNC submits that FECA’s massively-privileged special spending purposes align with “the financial needs and goals” of the incumbent parties, as some members of Congress declared. In any event, they do not align with the LNC’s expressive goals. The statute plainly sweeps too broadly.

Congress acted within its power to raise the contribution limit for political parties. But all the evidence indicates a complete absence of tailoring between the spending restrictions and corruption concerns. Congress thus violated the First Amendment by imposing content-based restrictions on the parties’ speech.

III. FECA VIOLATES THE LNC’S FIRST AMENDMENT RIGHTS BY RESTRICTING THE LNC’S SPENDING OF THAT PORTION OF SHABER’S BEQUEST EXCEEDING SECTION 30116(A)(1)(B)’S BASE GENERAL PURPOSE LIMIT TO THOSE SPECIALIZED PURPOSES ENUMERATED IN SECTION 30116(A)(9).

Even if this Court believes that Shaber’s bequest raises an appearance of corruption, and even if this Court believes that FECA satisfies heightened scrutiny notwithstanding its pervasive content-based

discrimination, the question would nonetheless arise: what justifies applying the spending restrictions against Shaber's bequest?

Because nothing justifies applying contribution limits against Shaber's bequest, and nothing justifies FECA's content-based discrimination, nothing plus nothing equals nothing. The FEC has not established why the special spending purpose restrictions should be applied, in particular, as against Shaber's bequest, even if they contain some generally applicable logic.

IV. THE COURT SHOULD EITHER ENJOIN FECA'S POLITICAL PARTY CONTRIBUTION LIMIT, OR EXCISE THE LIMIT'S SPENDING PURPOSE RESTRICTIONS.

The injuries inflicted by FECA's content-based spending restrictions are redressable in two ways. The first is the most straightforward: enjoining the defective contribution limit of Section 30116(a)(1)(B) and concurrent operation of Section 30125.¹² Congress could re-impose a contribution limit consistent with current constitutional precedent if it

¹²If only Section 30116(a)(1)(B) were enjoined, political parties could not raise or spend any money at all given Section 30125's language barring funds not subject to FECA's limits.

wished—and it probably would before this Court’s mandate could issue.¹³ This option ensures that the Court would not “rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018) (internal quotation marks omitted).

But “[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (internal quotation marks omitted). And so the Court might also excise the spending purpose restrictions, respecting Congress’s desire to maintain an overall limit at the level it found typically palatable.

“The inquiry into whether a statute is severable is essentially an inquiry into legislative intent.” *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (citation omitted). FECA’s severability clause, Section 30144, “creates a presumption that Congress

¹³The LNC maintains that “Congress shall make no law . . . abridging the freedom of speech,” U.S. Const. amend. I, but this case does not challenge *Buckley*.

did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) (citations omitted). Absent “strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute.” *Id.*

“We seek to determine what Congress would have intended in light of the Court's constitutional holding. Would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?” *United States v. Booker*, 543 U.S. 220, 246 (2005) (internal quotation marks omitted). “[A] court should refrain from invalidating more of the statute than is necessary.” *Alaska Airlines*, 480 U.S. at 684 (internal quotation marks omitted). “Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” *Id.* (quoting *Buckley*, 424 U.S. at 108). “We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory text

and context that Congress would have preferred no statute at all.” *Exec. Bens. Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014) (internal quotation marks omitted).

Leaving the current total contribution limit in place, while excising the spending purpose restrictions, would yield a result that is both constitutional under existing precedent, and easily workable. And while the precise balance Congress would have struck, had it cared to avoid content-based speech restrictions, is unknowable, some of Congress’s preferences are obvious.

First and foremost, Congress found the old limits insufficient. The statement of intent, *supra* at 7, offered that at least a third of the limit increase was necessitated by the loss of public financing for presidential nominating conventions. Presumably the increasing fundraising targeted toward headquarters buildings and litigation.

Second, Congress has always been aware of money’s fungible nature. Some members opposed the limit expansion on these grounds, but any corruption risk at these levels must have been acceptable to Congress, because the measure passed. And Congress must have intended that the

moneys contributed to the segregated spending accounts was money that at least the two major parties would have to spend; why else would it be donated? There is no evidence, let alone “strong evidence,” *Alaska Airlines*, 480 U.S. at 686, that Congress would prefer to return to the old limits, or have no limits at all, as the price of foregoing the unconstitutional spending purpose restrictions.

Because the Court can “clearly . . . articulate[] the background constitutional rules at issue and . . . easily . . . articulate the remedy,” it can excise the spending purpose restrictions without performing “quintessentially legislative work.” *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). And to the extent that Congress could be viewed as having increased the contribution limit in an underinclusive manner, excising the problematic spending restrictions would be consistent with the judicial preference for extending benefits, “rather than nullification.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (internal quotation marks omitted).

CONCLUSION

All three certified questions should be answered in the affirmative.

The Court should direct the entry of appropriate declaratory and injunctive relief.

Dated: September 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,688 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect in 14-point Century Schoolbook font.

/s/ Alan Gura

Alan Gura

Addendum

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52 U.S.C. § 30110

Judicial review

The 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. The 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.

52 U.S.C. § 30116

Limitations on contributions and expenditures

(a) Dollar limits on contributions.

- (1) Except as provided in subsection (i) and section 315A [52 USCS § 30117], no person shall make contributions—

* * *

- (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed \$ 25,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year;

* * *

(9) An account described in this paragraph is any of the following accounts:

(A) A separate, segregated account of a national committee of a political party (other than a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may make from such account may not exceed \$ 20,000,000 with respect to any single convention.

(B) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses (including expenses for obligations incurred during the 2-year period which ends on the date of the enactment of this paragraph).

(C) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.

* * *

(c) Increases on limits based on increases in price index.

(1) (A) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period.

(B) Except as provided in subparagraph (C), in any calendar year after 2002--

(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of \$ 100, such amount shall be rounded to the nearest multiple of \$ 100.

(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election.

(2) For purposes of paragraph (1)--

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items--United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means--

(i) for purposes of subsections (b) and (d), calendar year 1974; and

(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), calendar year 2001.

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2), (3), and (4) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds--

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of--

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e)); or

(ii) \$ 20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, \$ 10,000.

(4) Independent versus coordinated expenditures by party.

(A) In general. On or after the date on which a political party nominates a candidate, no committee of the political party may make--

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 301(17) [52 USCS § 30101(17)]) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 301(17) [52 USCS § 30101(17)]) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) Application. For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) Transfers. A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

(5) The limitations contained in paragraphs (2), (3), and (4) of this subsection shall not apply to expenditures made from any of the accounts described in subsection (a)(9).

52 U.S.C. § 30125

Soft money of Political Parties

(a) National committees.

(1) In general. A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability. The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

CERTIFICATE OF SERVICE

I certify that on September 10, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users. Accordingly, electronic copies of this joint appendix were served through the Court's CM/ECF system, on:

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