

EN BANC ARGUMENT SCHEDULED FOR NOVEMBER 30, 2018

No. 18-5227

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

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LIBERTARIAN NATIONAL COMMITTEE, INC.,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

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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)

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PLAINTIFF'S REPLY BRIEF

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October 26, 2018

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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 each filed amicus curiae briefs in support of Plaintiff before this Court.

The Campaign Legal Center and Democracy 21 have filed an amicus curiae brief in support of Defendant before this Court.

### B. RULINGS UNDER REVIEW

This case is not appellate in nature, as 52 U.S.C. § 30110 assigns resolution of the 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. That decision is published at 317 F. Supp. 3d 202 (“*LNC IV*”), 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 not-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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## GLOSSARY

- BCRA — Bipartisan Campaign Reform Act of 2002
- CF — Certified Fact
- 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
- LNC — Libertarian National Committee

## PLAINTIFF'S REPLY BRIEF

## SUMMARY OF ARGUMENT

Were the LNC's arguments "meritless under decades of clear precedent," FEC Br. 2, the District Court would not have certified three questions, the first of which tracks Judge Wilkins's 2013 certification.

The FEC's brief is unpersuasive. The Commission fails to carry its burden under any level of First Amendment scrutiny. Ignoring the central fact inherent in every case certified under 52 U.S.C. § 30110<sup>1</sup>—that something differs here from what has been considered before—the FEC opens by declaring that "closely drawn" scrutiny applies here because it applied previously in different contexts. Not so. Precedent guides future courts by its reasoning, not its conclusion. That reasoning requires strict scrutiny, as the challenged statute targets political speech on the basis of its content.

The FEC cannot qualify its concession that it lacks knowledge of any quid pro quo arrangement between the now-dead Shaber and the LNC. It can say only that Shaber was a Libertarian whose party solicited his

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<sup>1</sup>All statutory references are to Title 52 of the United States Code unless noted otherwise.

donations. True, but this does not move the clear-error needle in contesting the certified absence of quid pro quo corruption evidence.

Unable to justify its restriction of Shaber's bequest, the FEC argues that there is no First Amendment right *at all* in receiving testamentary bequests for the purpose of engaging in political speech. Were this correct, the government could outright ban all testamentary bequests to political parties. But the argument misreads and contradicts precedent—including circuit precedent that the FEC simply ignores.

This Court, among others, has acknowledged the right to receive and speak with the money whose solicitation is itself secured by the First Amendment. Shaber's death did not terminate the LNC's speech rights in the money he gave it. It merely clarifies what is at stake.

The second two questions relate not to "FECA's contribution limits" as they have existed over the past "forty year[s]," FEC Br. 2, but to a novel statutory creature that Congress summarily hatched in the 2014 omnibus without examination. The FEC errs in viewing the relevant limit not as the sum of its parts—how much can someone give a political party committee in a year—but as an array of allegedly unconnected

limits, all of which coincidentally apply in the same timeframe to the same donor and the same recipient. But as a single contribution or as several, the cromnibus scheme cannot be justified.

At bottom, the FEC's cromnibus defense rests upon a faulty syllogism:

1. Contribution limits have been upheld;
2. The challenged limit is a contribution limit;
3. Ergo, FECA's post-cromnibus party contribution limit is constitutional. QED.

The first proposition is irrelevant. Not *all* contribution limits are per se constitutional. The second proposition is at best debatable, but in any event irrelevant, as the FEC finally concedes that the challenged provision imposes content-based speech restrictions.

And even were the Court to apply only "closely drawn" scrutiny in assessing the only scheme at issue, the FEC cannot carry its burden to justify these impositions on core First Amendment political speech. After three rounds of briefing through nearly three years of litigation, the FEC still fails to conjure a coherent rationale for them under any standard of review.

Considering the complete lack of evidence purporting to justify the scheme, and the FEC's shifting and equivocal rationales, the current incarnation of FECA's limit on contributions to political party committees is unconstitutional on its face. This Court should honor Congress's decision to improve the parties' abilities to speak, but excise that decision's accompanying unlawful content-based restrictions.

#### ARGUMENT

#### I. RESTRICTIONS OF POLITICAL SPEECH, AND CONTENT-BASED SPEECH RESTRICTIONS, ARE SUBJECT TO STRICT SCRUTINY.

This case should not turn on the standard of scrutiny. Given the FEC's lack of justification for restricting Shaber's bequest, and its various defenses of the omnibus expressive purpose limits that read more like an indictment of the scheme, the LNC should prevail even under rational basis review.

Yet the LNC is constrained to respond to the FEC's assertion that the limits here "are subject to, at most, closely drawn scrutiny," FEC Br. 18, because that was the standard applied in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

*Buckley* applied “closely drawn” scrutiny in evaluating a facial challenge to a pure contribution limit. *Buckley*, 424 U.S. at 25. It also applied strict scrutiny to expenditure limits. *Id.* at 44-45. The second question here raises a facial challenge, but to a contribution limit that also functions as an expenditure limit and in any event, along content-based lines. By *Buckley*’s own terms, the LNC’s facial challenge warrants strict scrutiny. So, too, under the rule of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which subjects all content-based speech restrictions to strict scrutiny.

The FEC ignores the challenged restriction’s expenditure- and content-based aspects, as though the LNC challenges the 1974 law and not its 2014 omnibus replacement. The District Court saw through this gloss. So should this Court. “[T]he appropriate framework for review [of the LNC’s facial challenge] is that governing content-based restrictions on speech, requiring narrow tailoring to serve a compelling state interest, rather than the contribution limit framework.” *Libertarian Nat’l Comm., Inc. v. FEC*, 317 F. Supp. 3d 202, 219 (D.D.C. 2018) (“*LNC IV*”) (citation omitted); JA 171.

Strict scrutiny likewise governs the LNC's as-applied challenges relating to Shaber's bequest. *Buckley* did not concern as-applied challenges, and it related presumptively to living people. Here, the as-applied challenges relate to the testation context unexamined in *Buckley*. The focus is not on Shaber's association with the LNC, but on the LNC's ability to receive and express itself with Shaber's gift. The FEC may dispute this right's existence, but if it exists (and it does), it is a right of expression. Per *Buckley*'s terms, it warrants strict scrutiny.<sup>2</sup>

## II. FECA'S APPLICATION TO SHABER'S BEQUEST IS UNCONSTITUTIONAL.

### A. The LNC Has A Right to Receive Contributions.

That the First Amendment secures a right to solicit contributions is firmly established. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788-89 (1984). What use is the right to solicit contributions, if there is no inherent concomitant right to *accept* them?

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<sup>2</sup>The FEC also overreads the LNC's disinterest in reviving its categorical challenge to FECA's application to testamentary bequests. FEC Br. 20. Conceding that FECA can apply to bequests hardly precludes as-applied challenges. Indeed, the LNC specifically endorsed the District Court's reading of *LNC I* as suggesting that "most bequests" should not be restricted, and that FECA would only "rarely" apply to bequests. LNC Br. 36 (internal quotation marks and citation omitted).

The right to receive donations is also inherent in the right to speak. “[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980) (footnote omitted) (First Amendment right to attend criminal trial). *Buckley* acknowledged the right to receive speech-enabling money in observing that speech requires money. 424 U.S. at 19. “[C]ontributions may result in political expression if spent by a candidate or an association to present views to the voters,” an act “which involves speech by someone,” presumably, the recipient. *Id.* at 21. Regardless of contribution limits’ impact “upon the contributor’s ability to engage in free communication,” *id.* at 20-21, the Court offered that “contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy,” *id.* at 21—a clear statement that contribution limits impact the *recipient’s* speech rights.

The difference between *Buckley* on this score and the LNC's Shaber claim is that *Buckley* concerned a facial challenge questioning a limit's systemic impact, while the latter concerns the impact of limiting a particular contribution. The FEC never questioned the obvious fact: the LNC would spend Shaber's money to speak. CF 127, JA 224.

And contrary to the FEC's claim, the LNC need not prove that silencing it with respect to Shaber's bequest causes the same harm as a law that sweeps too broadly against *all* contributions. If the FEC lacks an anti-corruption interest in restricting access to Shaber's bequest, it fails to carry *its* First Amendment burden, even if it considers the LNC's injury de minimus. Again, "something outweighs nothing every time." *Speechnow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) (internal quotation marks and punctuation omitted); JA 161 n.9.

This Court has acknowledged the right to receive political contributions. The FEC ignores *Speechnow*, where the first certified question asked whether contribution limits violated the lead plaintiff's First Amendment right to receive political contributions—and this Court held that it did. *Speechnow*, 599 F.3d at 696.

*Speechnow* is consistent with a host of cases acknowledging the right to receive political contributions. LNC Br. 32-33. The FEC ironically claims that these courts had “no need” to distinguish between speech and associational scrutiny standards because the donors were living, FEC Br. 23-24, yet these courts clearly affirmed the right to receive contributions. The FEC then wrongly claims that the courts lacked “occasion to distinguish between a prospective donor’s right to speech and the speech rights of the recipient.” FEC Br. 24. The occasions arose when plaintiffs brought suit and obtained certified questions seeking to vindicate the right to receive contributions. *Speechnow* was no oversight.

Yet while it ignores *Speechnow* and the other cases affirming the right to receive contributions, the FEC illogically claims that cases offering that contribution limits (on their face) “bear more heavily” on associational than speech rights, or which “focused” on associational rights, disprove the existence of speech rights. FEC Br. 21 (internal quotation marks omitted). It even seizes on a decision striking down Missouri’s PAC-to-PAC transfer ban for the proposition that a transfer “implicates speech rights on the donor side, not the recipient side.” FEC

Br. 25 (citing *Free & Fair Election Fund v. Mo. Ethics Comm'n*, 903 F.3d 759 (8th Cir. 2018) (“*FFEF*”)).

But only the first part of that assertion is true. Nowhere in *FFEF* did the court *deny* that transfers implicate a recipient’s speech. If all the court did was strike down a receipt-ban based on its impact upon donors, that does not negate the receiver’s interest. Indeed, *FFEF* claimed that it “receives contributions and makes independent expenditures to influence voters. *FFEF* alleged that it desired to accept contributions from other PACs and to contribute to those PACs that make only independent expenditures.” *FFEF*, 903 F.3d at 762. The other plaintiff “alleged that it wished to accept contributions from and contribute to other PACs.” *Id.* Had the Eighth Circuit intended to reject a right to receive, it doubtless would have said so given the plaintiffs’ posture.

The FEC cannot have it both ways, dismissing cases that uphold the right to receive because they never thought to reject it, but then endorsing cases upholding a right to donate as silently rejecting the right to receive. The right to receive may not attract as much attention as the right to contribute, as cases typically involve living donors with present

contribution interests. But existence of the right to receive contributions is not a matter of first impression, nor would it pose a particularly difficult question if it were. The FEC's position, however, contains no limiting principle—it would immunize all campaign finance restrictions from constitutional review. Any unconstitutional contribution limit could simply be reconfigured as a receipt limitation.

The LNC has the right to receive contributions enabling its First Amendment political speech.

B. The LNC Is Entitled to Raise an As-Applied Challenge to the Restriction of Shaber's Bequest.

The FEC misses the point in arguing that the as-applied Shaber challenge “is inconsistent with the Supreme Court's treatment of FECA's prophylactic contribution limits.” FEC Br. 26. The Shaber challenge is not “inconsistent with,” but irrelevant to prophylactic considerations. It does not at all “resemble” *Buckley's* overbreadth claim, as it does not contest any contribution limit's general sweep.

It may well be true that “under closely drawn scrutiny, a generally valid contribution limit is not unconstitutionally overbroad because it prohibits more than only corrupt contributions.” FEC Br. 17. But the

LNC does not challenge any limit's general validity as overbroad. The question is not whether the limit facially fits some standard of review, with the understanding that no "fit" must or could ever be perfect. As-applied challenges exist precisely because even valid prophylactic rules are imprecise. That *other* as-applied challenges to contribution limits have failed, FEC Br. 28, does not mean that *all* such challenges must fail. The repeated certification of as-applied challenges answers the FEC's claim that such challenges are barred. They are not.

C. The FEC Fails to Establish Any Regulatory Interest in Restricting Shaber's Bequest.

The FEC asserts, but fails to carry its burden of proving, that "applying [FECA's] limits to Shaber's contribution is justified by the government's interests in combatting the actuality and appearance of corruption." FEC Br. 29.

The Commission argues that large contributions, including bequests, "*can* corrupt, or at the very least, create the appearance of corruption," *id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 144 (2003) (emphasis added)). It claims that "even if Shaber's contribution" is not problematic, "several other large potential testamentary contributions" are, and "the

LNC offers no workable way to distinguish among them.” FEC Br. 30. It argues that the LNC should not be “exclude[d] . . . en masse” from FECA, *id.* at 31 (internal quotation marks omitted), and that “if [testamentary] contributions were excluded from FECA’s limits,” donors would shift from current to testamentary giving, *id.* at 32.

Nobody here disputes the theoretical corruption potential of bequests, or the merits of *other* donors’ plans (which the LNC would defend, if need be, at the appropriate time).<sup>3</sup> The LNC does not argue that it should be “excluded en masse” from FECA (although its electoral success at any given time may be relevant to the as-applied analysis). And for what it may be worth, the LNC doubts that motivated donors would forego aiding political victories in their lifetimes to maximize the value of gifts they hope come in the most distant possible future, the fruits of which they may not expect to see.<sup>4</sup>

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<sup>3</sup>The FEC states that a recipient may grant favors “in the hopes of preventing the individual from revoking his or her promise” to bequeath money, FEC Br. 30 (internal quotation marks omitted), but politicians always *hope* that donors reward their performance and access. Court dockets are replete with disappointed heirs.

<sup>4</sup>As they followed lifetimes of unremarkable, even scant giving, the Burrington, Shaber, and Clinard bequests might demonstrate that

But what about *Shaber*?

The FEC wrongly asserts that each of FECA's bequest applications must be presumptively valid. But it does not respond to the District Court's rejection of this theory, which the LNC endorsed. *See supra* n.2. Bequests are different. Until death, they are merely a revocable promise. After death, they are irrevocable, and cannot be policed by the dead for quid pro quo compliance. There is no need to speculate about an appearance of corruption. The donor/donee relationship has ended, and can be examined.

Here, that examination failed to reveal any quid pro quo arrangement. *Shaber* was a small and unknown donor, and no one on the LNC side did him or his family any favors. Moreover, *Shaber's* gift was contingent and not apparently timed. The FEC's response? That "corruption risks attend *Shaber's* specific contribution," because he trickled small donations amounting to over \$3,000 over the course of a lifetime, and received solicitations. FEC Br. 30. The FEC's failure to spell out these "risks" is unsurprising, as the record negates even the appearance of

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testamentary giving helps relatively less-affluent people contribute money they could not afford to part with while alive.

corruption, let alone the actual corruption that the FEC should identify to justify FECA's application to testamentary bequests.

FECA's application to Shaber's bequest violates the LNC's First Amendment rights.

### III. FECA'S CONTENT-BASES RESTRICTIONS ON THE USE OF FUNDS CONTRIBUTED TO NATIONAL PARTY COMMITTEES ARE UNCONSTITUTIONAL.

The FEC argues that because FECA's annual limits on contributions to national party committees survived *McConnell*, FECA's radical 2014 restructuring is irrelevant. Indeed, the FEC and its amici present the cromnibus amendments as a sort of favor to the LNC, because they raised the political committee contribution limit.

But the ability to accept donations for the purpose of political speech is not a special government dispensation for which Americans must be grateful—it is a fundamental First Amendment right. The cromnibus amendments rendered FECA's current incarnation unconstitutional for precisely the reason on which the predecessor statute's validity hinged. The predecessor scheme did not discriminate based on the content of the LNC's speech. The current scheme plainly does.

A. FECA Restricts Expenditures, Including Total Spending, by Dictating How Money Is “Used.”

The FEC finally agrees that in determining whether a restriction is a contribution or expenditure limit, “the ‘relevant inquiry’ is whether a given campaign finance restriction ‘burdens speech in a way that a direct restriction on the contribution would not.’” FEC Br. 34 (quoting *McConnell*, 540 U.S. at 138-39); LNC Br. 42.

Alas, the FEC’s quotation of the relevant statute is highly selective. The FEC quotes a portion of the limit imposing “a direct restriction on the contribution,” offering that Section 30116(a)(1)(B) “provid[es] that ‘no person shall make contributions’ which ‘exceed 300 percent of the amount otherwise applicable’.” FEC Br. 34. This is incomplete. The total contribution limit is not 300% of anything.

The part of the statute that the FEC does not wish to quote speaks of three accounts that may receive 300% of the base limit, restricted as to how deposits are “used.” Sections 30116(a)(9)(A), (B), and (C) (emphasis added). The subjects being “used” are not contributions, but “account[s],” *id.*, or more precisely, account funds. When money leaves the accounts to pay for something, it is not a contribution leaving the

account, but an expenditure. By restricting how *account expenditures* are “used,” the statute burdens the LNC’s speech in a way that directly restricting the contribution would not. It no longer “simply limit[s] the source and individual amount of donations.” *McConnell*, 540 U.S. at 139.

The FEC’s claim that “the segregated account provisions do not cap spending, either generally or in connection with the categories of [privileged] expenses,” FEC Br. 34, is demonstrably untrue. Even its ill-considered motion to dismiss admits that the LNC could not spend Shaber’s entire bequest in 2015 owing to the use restrictions. The FEC still talks of absorption “in 2015 and 2016,” FEC Br. 36, as though the contribution limits are biannual, and ignoring its prohibition on strategically varying the amounts of contributions from escrow. Yet as the FEC acknowledges, the District Court concluded that Shaber’s bequest could not “fully” offset general spending. *Id.* That is why some portion of it had to go into escrow—it could not all be spent that year. The gift exceeded what the LNC was allowed to spend of it, so the use restrictions reduced the LNC’s overall spending.

And Shaber's 2015 gift is just one example. The LNC's segregated purpose spending is low enough that in most years, a single donor could exceed its absorption ability.<sup>5</sup> To this reality, the FEC responds that "the LNC may *choose* not to incur more expenses, but that does not convert FECA's limits into expenditure restrictions." FEC Br. 36. In other words, the LNC should hold presidential nominating conventions every year, litigate meritless election contests upon winning 3% of the vote, and buy more headquarters buildings. If it can't find a useless, government-approved way to waste money, that's not the FEC's fault. The argument is unserious.<sup>6</sup>

But the FEC is onto something. The fact that the statute dictates to the LNC how it would "choose" to spend its money is *precisely* why the statute burdens speech. The choice of how to spend segregated account

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<sup>5</sup>The LNC spends nothing on presidential conventions during the two years following such conventions, and spends only a symbolic amount on such conventions in their preceding years. CF 28, JA 188; JA 78. It will retire its headquarters mortgage by 2024. CF 25, JA 187. It has never spent money on election recounts and is unlikely to do so in the foreseeable future. LNC Br. 15.

<sup>6</sup>In any event, *McConnell* spoke of a total expenditure limit only as an "example" of expenditure limits. *McConnell*, 540 U.S. at 139.

money is not made by the LNC; it is made by Congress. *Of course* “the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money or to structure its finances,” FEC Br. 36 (quoting *Republican Nat’l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010) (three-judge panel), *aff’d*, 561 U.S. 1040 (2010))—when contribution limits “apply regardless of how a national party might want to use the money.” *Republican Nat’l Comm.*, 698 F. Supp. 2d at 153.

That is not the case here.

B. FECA Imposes Content-Based Speech Restrictions, Triggering Strict Scrutiny.

If “The Segregated Account Provisions Are Content Neutral,” FEC Br. 37, on what basis are they segregated? Incredibly, the FEC *admits* that these restrictions are content-based: “each category of expenses serves a different purpose and frequently features a discussion of different issues and priorities.” FEC Br. 48 (internal quotation marks and brackets omitted). Indeed.

The LNC nonetheless addresses the FEC’s lengthier denial of this plain fact:

The FEC's claim that the challenged limits "only *indirectly* have *potential* impacts on the speech of political parties" because not all money might be used for "speech," FEC Br. 38 (emphasis added), is frivolous. The same might be said to defend a contribution limit of \$0. Parties are in the speaking business; speaking "requires the expenditure of money," *Buckley*, 424 U.S. at 19. The less money parties have, the less they might speak. Moreover, a limit's impact determines whether it survives constitutional scrutiny; it does not alter the standard of review.

The FEC's obsessive focus on contributors' interests is irrelevant, because the restrictions at issue target *the parties'* accounts. It is not the donors who are barred from spending beyond the accounts' segregated purposes. Not that focusing on the donors would help the FEC. The record establishes that the speech restrictions substantially impact donors, who limit and refrain from contributing because they object to the restrictions placed on their contributions. *See* CF 32, JA 189; CF 144, 145, JA 228; CF 153, 154, JA 230; CF 157, 158, JA 231; CF 166, JA 233-34; LNC Br. 19-22. This, in turn, impacts the LNC's ability to speak.

At bottom, the FEC's theories as to why a statute directing political parties' spending somehow does not impose content-based speech restrictions rely on an excessively narrow definition of "content-based." To the FEC, content-based restrictions are only those based on viewpoint, ideology, or specific content. This position has a surface-level appeal, because some of the restrictions the FEC disclaims would be egregiously content-based.

But the fact that FECA is not content-based in the worst possible ways does not excuse its still-serious content-based restrictions from strict scrutiny. The FEC errs largely in the manner that the Supreme Court cautioned against in *Reed*, conflating or glossing over several of that leading precedent's instructions.

*Reed* began by explaining that the "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 2227 (internal quotation marks omitted). It then described two ways in which a restriction may be facially message-based and thus, content based: it may make "obvious" distinctions, "defining

regulated speech by particular subject matter, and . . . more subtle [distinctions], defining regulated speech by its function or purpose.” *Id.* “Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.” *Id.*

*Reed* then described “a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with [the speech’s] message.” *Id.* (internal quotation marks omitted).

The FEC offers only a poor argument with respect to the first type of facial, message-based restriction: subject matter. The LNC can discuss topics “unrelated to its presidential nominee” at its presidential conventions, FEC Br. 39-40, or use its headquarters telephone “to order catering,” *id.* at 40. Of course, it bears repeating that the FEC also admits that “each category of expenses . . . frequently features a discussion of different issues and priorities,” FEC Br. 48 (internal

quotation marks and brackets omitted), but to be sure, the segregated account restrictions are viewpoint- and ideology-neutral.

But do they not relate to subject matter? The subject matter of a presidential nominating convention is the nomination of a presidential ticket. The LNC could not spend segregated convention account funds on its mid-term conventions, as those relate to a different subject. The litigation accounts are even more narrowly restricted. They can only be used for expression on the subject matters of election contests, recounts or other legal proceedings. “[T]he lawfulness of a particular expenditure by the LNC may indeed turn on the message that the expenditure conveys.” *LNC IV*, 317 F. Supp. 3d at 219; JA 172.

Beyond this, the FEC main denial of the restrictions’ nature simply skips past *Reed*’s “more subtle” forms of content-based message regulation, which are not so subtle here: function or purpose. Even if the segregated accounts do not restrict spending according to subject matter, they definitely restrict spending based on *function* and *purpose*. Presidential nominating conventions and political litigation are essentially expressive functions that serve particular purposes. Much of

what goes on at a headquarters building, if not parts or aspects of a building itself, might be similarly described. Again, the FEC's latest admission: "each [cromnibus] category of expenses serves a different purpose." FEC Br. 48 (internal quotation marks omitted). When FECA demands that funds be spent on the functions and for the purposes of presidential conventions, headquarters buildings, and legal proceedings such as election contests, it forbids the funds from being spent to serve any other function or purpose.

Even if FECA's restrictions were considered content-neutral, the FEC cannot justify them "without reference to the content of the regulated speech." *Reed*, 135 S. Ct. at 2227. For example, if the LNC spends restricted money expressing itself at a convention, it must nominate a presidential ticket.

Unable to contest the plain fact that the segregated account structure imposes content-based speech restrictions, the FEC argues that *Buckley*-era FECA "would have been content-discriminatory . . . under the approach the LNC proposes," as it targeted contributions "made for the

purpose of influencing a federal election.” FEC Br. 41 (internal quotation marks omitted). Even were this true, it would be irrelevant.

As a preliminary matter, the theory was not apparently considered. If *Buckley* “rejected the Libertarian Party’s argument that the statute regulated the content of speech,” *id.* (citing *Buckley*, 424 U.S. at 20-23), that rejection does not appear on the pages cited by the FEC (or anywhere else).<sup>7</sup> And had the Supreme Court analyzed FECA’s targeting of federal funds as a content-based restriction, it would have likely upheld the provision given Congress’s greater interest in regulating federal rather than state and local election activity. *LNC IV*, 317 F. Supp. 3d at 221-22; JA 175. “The pre-BCRA soft money regime simply does not establish that the FECA’s current specialized purpose regime passes constitutional muster.” *Id.*

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<sup>7</sup>With respect to contribution limits, the *Buckley* plaintiffs “contend[ed] that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with” corruption concerns. *Buckley*, 424 U.S. at 27. They also contended that the limits were overbroad, *id.* at 29-30, and favored incumbents over challengers and major- over minor-party candidates and independents, *id.* at 30-35.

The FEC makes a similar point by arguing that *McConnell* rejected a call to apply strict scrutiny to arguably content-based restrictions. But as the District Court pointed out, “[*McConnell*] plaintiffs did not raise the argument that § 30125(b)(1) unconstitutionally conditioned a contribution's lawfulness on the purpose for which the contribution was made, which is the argument the LNC raises here. As such, *McConnell* cannot be read to foreclose the LNC's claim.” *LNC IV*, 317 F. Supp. 3d at 221 (citations omitted); JA 174. “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” *Id.* (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004)). And again, had *McConnell* considered Section 30125(b)(1) as a content-based restriction, it is easier for Congress to justify making such distinctions in regulating federal and state election funds differently. *Id.*

However courts might have described other FECA provisions, the limit at issue is riddled with content-based restrictions that target the

subject matter, function, and purpose of speech, and which cannot be justified (if at all) without reference to the speech's content.

C. FECA's Limit on Contributions to National Party Committees Is Unconstitutional Under Any Standard of Review.

The First Amendment requires courts to take seriously restrictions on core political speech. Even "closely drawn" scrutiny is no rubber stamp. Congress may have a keen understanding of the political process, but there is no irrebuttable presumption that it used that understanding in good faith, or at all. The burden in this First Amendment case is the FEC's. *Buckley*, 424 U.S. at 25. The Commission does not carry its burden here by showing that Congress enacted dollar limitations, and calling it a day. Whatever deference is owed Congress in setting a dollar limit governing (1) the total amount that (2) one entity may give another (3) in a set timeframe, cannot extend to content-based spending restrictions.

The FEC asks this Court to pretend that the cromnibus content-based restrictions are the product of some hallowed "particular expertise" to which deference is owed. But as Members themselves declared, the

cromnibus amendments were a midnight scam, an increase in the party contribution limit under a Potemkin facade of restrictions on fungible money that typically prove toothless. Indeed—the FEC still argues that the LNC should act more like other parties and simply circumvent the restrictions by spending differently. It complains that the restrictions are needed to fight corruption (how exactly remains a secret), and then it complains that the LNC does not take all the money.

Because it is naive to view the cromnibus as a carefully calibrated exercise of expertise, the FEC imagines FECA's current party contribution limit not as the single limit with problematic use restrictions that it is, but as an allegedly more-digestible collection of limits, each of which, taken separately, require deference.

This approach is irrational. If one simply asks how much a person may give the LNC each year, the answer is \$339,000. “Altogether . . . an individual may contribute \$339,000 per year to accounts established and maintained by national political parties.” *LNC IV*, 317 F. Supp. 3d at 210, JA 158; *id.* at 216, JA 167 (“the limit of \$339,000 that individuals may contribute for either general or specialized purposes”).

At one point the FEC slips, and speaks against “*maintaining* a \$339,000 contribution limit.” FEC Br. 54 (emphasis added). When it wants to, the FEC understands what this Court explained in *Holmes v. FEC*, 875 F.3d 1153, 1161 (D.C. Cir. 2017) (en banc): that contribution limits are defined by size and time. It complains that the LNC did not, in 2015, accept what it constantly describes in the singular as “Shaber’s contribution,” *see, e.g.* FEC Br. 36, an amount that Shaber “left all at once,” *id.* at 14. What limit applied to Shaber’s contribution, such that the LNC could have accepted all of it in 2015? It would be odd to say there was no one limit, only “current combined limits,” FEC Br. 22, merely because the LNC could only accept the gift by dispersing it among various accounts.

But even were the FEC correct, and FECA imposed not a single limit but a collection of limits, the FEC errs in arguing that it “need not prove that the specific dollar amount of a limit independently furthers some corruption rationale.” FEC Br. 43. It most assuredly does, because the “limits” at issue are not generalized—they do much more than limit time and amount. *Holmes*, 875 F.3d at 1161.

All of the cases relied upon by the FEC that upheld contribution limits deferred to *generic* dollar limits for particular donors and recipients at particular times. No court has ever deferred to content-based expenditure restrictions under the guise of deferring to a generic contribution limit.

The FEC misrepresents this Court’s decision in *Holmes* with selective quotation: “Congress need not . . . separately justify its decision to adopt a ‘graduated scheme allowing for higher ceilings for’ certain categories of expenses.” FEC Br. 45 (quoting *Holmes*, 875 F.3d at 1162) (other citation omitted). In the quoted passage, the words following “higher ceilings for” cannot fairly be described as “certain categories of expenses;” the omitted words are “certain elections.” *Holmes*, 875 F.3d at 1162. In discussing “certain elections,” *Holmes* referenced “the other essential element of a contribution limit—its timeframe.” *Id.* The timeframe here, one year, is not the issue. And the issue—use restrictions—is not an “essential element” of contribution limits.

Likewise, when the Supreme Court spoke of legislative expertise in “in matters related to the costs and nature of running for office,”

*Randall v. Sorrell*, 548 U.S. 230, 248 (2006), it did so in the context of a generic contribution limit—and it *rejected* the legislative “expertise” in striking down the limits. The FEC’s reliance on *Ill. Liberty PAC v. Madigan*, 2018 U.S. App. LEXIS 25927 (7th Cir. Sept. 13, 2018) is likewise misplaced. Like *Holmes* and *Randall*, that case too involved generic contribution limits without regard to the content of any expenditure.

Indeed, *Illinois Liberty* supports the LNC’s position. The *Illinois Liberty* plaintiffs complained that individuals’ contributions were more limited than those of various entities, which the Seventh Circuit understood as an argument that the challenged limits were underinclusive. *Ill. Liberty*, 2018 U.S. App. LEXIS 25927 at \*13-\*14. Rejecting that theory, the Seventh Circuit held that “Liberty PAC must instead plausibly plead that Illinois was not *actually* concerned about corruption when it promulgated the individual contribution limits. It has not done so.” *Id.* at \*14. But this is exactly what the LNC claims—that the challenged restrictions do not address, let alone even rationally relate to corruption concerns.

Given its opposition to any sort of actual scrutiny, it is no surprise that the FEC fails to give a better account of how the cromnibus spending restrictions are “closely drawn” to corruption concerns than it attempted in discovery. It falls back on Speaker Boehner’s perfunctory recitation of the cromnibus amendments’ features that accompanied their introduction in the House, but nothing in that statement addressed corruption concerns or the illogic revealed here in discovery.

Congress may have wanted to compensate parties for the loss of public presidential convention funds, FEC Br. 45, or revert to the pre-BCRA arrangement that allowed for more money to flow to election recounts, *id.* 46-47. But these are still the spending purposes that the FEC identified in discovery as being the *most* dangerous—such contributions “maximally benefit” particular candidates or are tailored to particular contests, CF 36, JA 191; CF 37, JA 191-92—and the cromnibus privileges them. The notion that these activities are “less tied to particular candidates,” FEC Br. 51, defies credulity.

Headquarters and legal proceeding spending may be “less directly tied to the core electoral purpose of persuading voters,” FEC Br. 46 (citation

omitted), but contributions for these purposes are still fungible, as are other restricted contributions, and may still be more or less appreciated by parties, depending on their circumstances.

The FEC claims that the cromnibus structure is supported by the fact that parties “place a higher value on unrestricted contributions than” restricted ones, FEC Br. 47 (citing JA 197), but that is false and unsupported by its citation, which provides that unrestricted *funds* are more valuable than restricted *funds*, CF 50; JA 197. Contributions are not funds, and the FEC has admitted, repeatedly, that parties may value restricted contributions more than restricted ones, depending on the circumstances. *See discussion* LNC Br. 9-12. It should have addressed these admissions.

The FEC gets one thing correct: “it is simple common sense that the more a political party values a contribution, the more likely that contribution will be or appear to be part of a quid pro quo corruption scheme.” FEC Br. 47. That is why it loses, having admitted that parties may prize larger, restricted cromnibus contributions more highly, because they are often perfectly fungible with unrestricted funds that

they liberate, and because they maximally benefit particular candidates and particular contests.

At bottom, the FEC has no answer for how these restrictions might pass any standard of review. It concedes, if inadvertently, that FECA imposes content-based speech restrictions, but fails to attempt justifying the restrictions under strict scrutiny; its “closely drawn” scrutiny amounts to, “because Congress said so.” This is not even loosely-drawn scrutiny. It is a rubber stamp.

IV. EXCISING THE OFFENDING PROVISIONS, NOT REVERTING TO THE SITUATION CONGRESS DEEMED UNTENABLE, IS THE OPTIMAL COURSE.

Having argued at great length that Congress properly expanded the amount of money available to parties, compensating for the loss of convention and recount funds and exercising its special expertise in the overall cost of running for office, the FEC makes a U-turn regarding the remedy. It urges that the only way to correct FECA’s content-based restriction is to roll back Congress’s decision to increase the parties’ fundraising abilities.

That option is available. But it would stifle the most speech, and subvert “Congress’s desire to permit political parties to acquire more resources.” FEC Br. 10. Congress would respond to any remedy, but this Court should still retain as much of what Congress has lawfully done.

#### CONCLUSION

All three certified questions should be answered in the affirmative. The Court should direct the entry of appropriate declaratory and injunctive relief.

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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 6,420 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

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/s/ Alan Gura

Alan Gura

CERTIFICATE OF SERVICE

I certify that on October 26, 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 and service will be accomplished by the appellate CM/ECF System.

/s/ Alan Gura

Alan Gura