UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiff-Appellant, v. FEDERAL ELECTION COMMISSION, Defendant-Appellee.	No. 13-5094 MOTION FOR SUMMARY AFFIRMANCE

APPELLEE FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY AFFIRMANCE

Appellee Federal Election Commission ("FEC" or "Commission") respectfully moves for summary affirmance of the district court's decision that the claim of appellant Libertarian National Committee, Inc. ("LNC") is frivolous. (Memorandum Opinion ("Mem. Op.") and Order, Civ. No. 11-0562 (RLW) (D.D.C. Mar. 18, 2013) (Docket Nos. 41 and 42) (copy attached as Exhibit 1).) The LNC asserts that the contribution limit that applies under the Federal Election Campaign Act ("FECA") to bequests made to national party committees, currently $32,400 per year, violates the First Amendment. Pursuant to a special judicial review provision in FECA, 2 U.S.C. § 437h, the LNC asked the district court to certify this claim directly to the Court of Appeals sitting *en banc*.

The district court properly found the LNC's claim frivolous and granted partial summary judgment to the Commission. The Supreme Court has repeatedly held that large contributions to political parties can cause corruption or appear corrupt, and that FECA's limits on such contributions are thus constitutionally sound. Given those landmark rulings, the LNC's claim plainly fails. Because no benefit would be gained from further briefing and argument on these issues, this Court should summarily affirm the district court's dismissal.

LEGAL AND FACTUAL BACKGROUND

A. The FEC and the Federal Election Campaign Act

The FEC is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Congress enacted FECA primarily "to limit the actuality and appearance of corruption resulting from large individual financial contributions[.]" *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (*per curiam*).

B. FECA's Limit on Contributions to National Political Parties

FECA has placed dollar limitations on contributions to federal candidates and national political party committees for nearly forty years. *See* 2 U.S.C. § 441a(a)(1)(A)-(B); *Buckley*, 424 U.S. at 12-13, 38. While FECA currently limits contributions to candidates to $2,600 per election, 2 U.S.C. § 441a(a)(1)(A), it

allows individuals to contribute up to $32,400 per calendar year to national political party committees such as the LNC, *id.* §§ 441a(a)(1)(B), 441i(a)(1).[1] This $32,400 limit also applies to contributions made by an individual's estate to a political party. FEC Advisory Op. 2004-02, 2004 WL 1402536, at *2 (Feb. 26, 2004). Therefore, when an individual dies and leaves money to a political party in his or her will, the party may receive the full amount from the decedent's estate, but only in annual amounts that comply with FECA's $32,400 limit. *Id.*

C. Appellant Libertarian National Committee, Inc.

Appellant LNC is the national committee of the Libertarian Party. (Mem. Op. at 2.) In April 2007, an individual named Raymond Groves Burrington died, and his will contained a $217,734 bequest to the LNC. (*Id.*) The Burrington estate has since made annual contributions from the bequest to the LNC in amounts that comply with FECA's limit. (*See id.* at 34-35, ¶¶ 36-37, 39-40.)

D. Proceedings Before the District Court

The LNC alleges that FECA's limits on contributions to national party committees violate the First Amendment when applied to decedents' bequests to parties. (Mem. Op. at 3.) The LNC invoked a special judicial review provision that applies to certain constitutional challenges to FECA. *See* 2 U.S.C. § 437h.

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[1] *See also Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013) (adjusting section 441a(a)'s limits for inflation).

Section 437h requires a district court to (1) make findings of fact; (2) determine whether the constitutional challenge is "frivolous or involve[s] settled legal questions"; and (3) "immediately certify the record and all *non-frivolous* constitutional questions to the *en banc* court of appeals." *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (emphasis added).

After the parties compiled a record in the district court (Mem. Op. at 3), the LNC moved to certify the following constitutional question to the *en banc* Court under section 437h:

> Does imposing annual contribution limits against testamentary bequests directed at, or accepted or solicited by political party committees, violate First Amendment speech and associational rights?

(*Id.*) The Commission opposed and sought summary judgment (*id.* at 1), pointing out that the Supreme Court, in *Buckley* and *McConnell v. FEC*, 540 U.S. 93, 142-61 (2003), had already upheld the facial validity of FECA's limits on contributions and found that limits on contributions to national parties are valid methods of preventing corruption and its appearance. *See infra* pp. 8-9. The FEC then demonstrated that unlimited bequeathed contributions to political parties would present the same threats of corruption. *See infra* p. 10.

The district court agreed with the Commission that the LNC's question, as stated, is frivolous and therefore does not warrant section 437h certification. (Mem. Op. at 18-22.) The district court also granted in part the Commission's

motion for summary judgment.[2] (*Id.* at 29.) The district court held that the LNC's question was frivolous because it "raises issues that the Supreme Court has already addressed." (*Id.* at 19.) Specifically, bequests to political parties "may very well raise the anti-corruption concerns that motivated the *Buckley* and *McConnell* Courts to dismiss a facial attack on contribution limits." (*Id.* at 20.) The district court further rejected certification of the LNC's proposed question because it encompassed not simply the Burrington bequest to the LNC, but "*all* bequests to *all* political parties," and therefore it presented "hypothetical questions about parties not involved in this litigation." (*Id.* at 18-19 (emphases added).)

The district court also denied in part the FEC's motion, made findings of fact (Mem. Op. at 29-48), and certified a narrowed question to the *en banc* Court that addresses only the Burrington bequest to the LNC (*id.* at 23-28):

> Does imposing annual contribution limits against the bequest of Raymond Groves Burrington violate the First Amendment rights of the Libertarian National Committee?

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[2] The district court's determination that the LNC's question is frivolous required the court to grant the FEC's motion for summary judgment. The standard of review for determining whether a question is frivolous under section 437h lies "somewhere between a motion to dismiss . . . and a motion for summary judgment'" — therefore, it "'follows that any question that the Court finds 'frivolous' is also appropriate for summary judgment.'" (Mem. Op. at 12 (quoting *Cao v. FEC*, 688 F. Supp. 2d 498, 503 (E.D. La. 2010), *aff'd sub nom. In re Cao*, 619 F.3d 410 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1718 (2011)).)

(*Id.* at 28.) The certified question is pending before the *en banc* Court in a separate matter numbered 13-5088.

E. Proceedings Before This Court

On April 22, 2013, the LNC moved to consolidate this appeal with matter number 13-5088 before the *en banc* Court. (*See* LNC's Pet. for Initial Hr'g En Banc and Mot. to Consolidate Related Appeals (Doc. No. 1432045).) The FEC opposed that motion, arguing that consolidation would amount to a summary reversal of the district court's ruling that the LNC's broader question is frivolous and therefore unworthy of *en banc* consideration. (*See* Appellee FEC's Resp. in Opp'n to Appellant LNC's Mot. to Consolidate Related Appeals (Doc. No. 1445147).) The LNC's motion was denied on September 23, 2013 by this Court, sitting *en banc*. (Per Curiam Order (*en banc*) at 2 (Doc. No. 1457785).) The *en banc* Court also granted the LNC's request that, in the event consolidation was denied, this matter (No. 13-5094) be set for briefing, argument, and decision prior to scheduling of the *en banc* matter (No. 13-5088). (*Id.*)

F. Standards of Review

This Court's review of the district court's ruling is *de novo*. *Judicial Watch, Inc. v. United States Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (summary judgment reviewed *de novo*); *Goland v. United States*, 903 F.2d 1247, 1252 (9th Cir. 1990) (section 437h ruling reviewed *de novo*).

Summary affirmance is appropriate where "[t]he merits of the parties' positions are so clear as to warrant summary action," *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at *1 (D.C. Cir. Mar. 11, 2013) (*per curiam*), and "no benefit will be gained from further briefing and argument of the issues presented," *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (granting summary affirmance).

ARGUMENT

The LNC's broad question is frivolous because the general merits of the national-party contribution limit have been addressed in previous Supreme Court rulings, and the district court correctly dismissed the LNC's question on this basis. (*See* Mem. Op. at 19-22.) Generally, a "plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C.) (three-judge court), *aff'd*, 130 S. Ct. 3544 (2010). In *Republican National Committee*, a three-judge district court rejected an as-applied challenge to FECA's limits on contributions to political parties on the basis of the Supreme Court's facial upholding of that limit in *McConnell*. *Id.* at 153, 156-62. The Supreme Court affirmed that ruling. 130 S. Ct. at 3544.

Here, as in *Republican National Committee*, the district court correctly dismissed the as-applied challenge presented "because it raises issues that the Supreme Court has already addressed" in *Buckley* and *McConnell*. (Mem. Op. at 19.) In those cases, the Supreme Court rejected challenges by, among others, the Libertarian Party and upheld the facial validity of FECA's contribution limits on the basis of the same corruption concerns that the district court here found would be raised by unlimited bequeathed contributions to political parties. (*Id.* at 19-22.)

In *Buckley*, after the Libertarian Party and others brought suit, the Supreme Court upheld the facial constitutionality of FECA's limits on contributions to candidates in light of the "deeply disturbing examples" of corruption relating to contributions found in the record, and the Court concluded that FECA's purpose of "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions" was a "constitutionally sufficient justification" for the limits. 424 U.S. at 26-29. The Court also upheld FECA's annual $25,000 aggregate contribution limit, explaining that it prevents individuals from circumventing the limit on contributions to candidates with "huge contributions to the candidate's political party." *Id.* at 38.

Subsequently, in *McConnell*, after the Act's limits had begun to be circumvented through the use of funds given in unlimited amounts and ostensibly used for nonfederal elections, the Court upheld the facial constitutionality of

Congress's 2002 ban on such "soft money" contributions to national political parties. 540 U.S. at 142-61. On the basis of a voluminous record, the Court found that "there [was] substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *Id.* at 154. Further, the Court emphasized that the "idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible." *Id.* at 144.

The Court in *McConnell* relied "not only on the selling of access in exchange for soft-money contributions, . . . but also on 'the close relationship between federal officeholders and the national parties.'" *Republican National Committee*, 698 F. Supp. 2d at 159 (quoting *McConnell*, 540 U.S. at 154). Indeed, "there was 'no meaningful separation between the national party committees and the public officials who control them,'" and "contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption." *Id.* (quoting *McConnell*, 540 U.S. at 155). The Court thus rejected the challenge by the LNC and others to the fortification of the national-party contribution limit through elimination of the soft-money loophole.

Despite *Buckley* and *McConnell*, the LNC contends here that a large contribution to a national party is no longer potentially corrupting and will no longer look corrupt simply because it is bequeathed. (*See* Mem. Op. at 20-21.) The district court rejected that contention, however, and correctly concluded that "bequests . . . may very well raise the anti-corruption concerns that motivated the *Buckley* and *McConnell* Courts to dismiss a facial attack on contribution limits." (*Id.* at 20.) If bequeathed contributions were no longer limited by FECA, national party committees could sell access to their candidates and officeholders in exchange for donors recording or otherwise promising large bequests in their wills, just as the parties once sold access for unlimited soft-money contributions before that practice was banned (as detailed in *McConnell*, 540 U.S. at 146-54). (*See* Mem. Op. at 21.) Alternatively, the national party committees could, upon receiving a large bequest, grant the access to officeholders that the deceased donor purchased and would have received to his or her friends, family, or associates. (*See id.* at 20.)

Indeed, even the LNC conceded that in certain cases (involving soliciting bequests from "terminally-ill individual[s]") bequeathed contributions could raise valid anti-corruption concerns that justify FECA's limits. (Mem. Op. at 20.) The district court therefore concluded that the risk of corruption "should be the same for bequests as for other contributions." (*Id.* at 21.)

The LNC's broad claim thus "raises issues that the Supreme Court has already addressed," and the Court "already closed this door in *Buckley*, *McConnell*, and other cases by rejecting facial attacks to contribution limits." (Mem. Op. at 19, 21.) Congress is permitted to enact "preventative" contribution limits, *Citizens United v. FEC*, 558 U.S. 310, 357 (2010), even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," *Buckley*, 424 U.S. at 29. The Supreme Court's rejection of the Libertarian Party's challenge to contribution limits in *Buckley* "remains good law" (Mem. Op. at 18), as does its rejection of the LNC's challenge in *McConnell* ten years ago and its summary affirmance of *Republican National Committee* three years ago. Though now narrowed to the context of bequests, there is no reason for this Court to provide full briefing and oral argument on the LNC's attempted additional bite at the apple.

CONCLUSION

This Court should summarily affirm the grant of partial summary judgment to the Commission because, as the district court held, the LNC's claim is frivolous.

Respectfully submitted,

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

Kevin Deeley
Acting Associate General Counsel

Harry J. Summers
Assistant General Counsel

Holly J. Baker
Attorney

/s/ *Kevin P. Hancock*
Kevin P. Hancock
Attorney

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FOR THE APPELLEE
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2013, I electronically filed the Commission's Motion for Summary Affirmance with the Clerk of the Court of United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

Service was made on the following through the CM/ECF system:

Alan Gura
GURA & POSSESSKY, PLLC
101 North Columbus Street
Suite 405
Alexandria, VA 22314
(703) 835-9085
alan@gurapossessky.com

Allen Joseph Dickerson
CENTER FOR COMPETITIVE POLITICS
124 S. West Street
Suite 201
Alexandria, VA 22314
(703) 894-6800
adickerson@campaignfreedom.org

/s/ *Kevin P. Hancock*
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650
khancock@fec.gov