IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

APPELLANT LIBERTARIAN NATIONAL COMMITTEE'S REPLY IN OPPOSITION TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Appellee Federal Election Commission ("FEC" or "the Commission") applies the Federal Election Campaign Act's ("FECA's") contribution limits to testamentary bequests. See, *e.g.*, FEC Advisory Op. 2004-02, 2004 WL 1402536 at *2 (Feb. 26, 2004). But the deceased are plainly incapable of associating with political parties (or anyone else), nor can they enforce *quid pro quo* arrangements with individuals or political parties whom they may remember in their last wills and testaments. Bequests also differ from contributions given by living individuals in other critical ways. Usually, donors have no way of knowing when their

contributions might be received, who the candidates in the elections succeeding their deaths might be, or what issues the parties would stress in those elections.[1]

Of greater salience to this stage of the case, the question of whether contributions from the deceased pose a threat of corruption or the appearance thereof has never been litigated in any federal court—until now.

Appellant Libertarian National Committee ("LNC"), bequeathed an amount of money in excess of the current limits, asserts that the FEC's restrictions on its ability to accept testamentary bequests violate the First Amendment. Consequently, pursuant to 2 U.S.C. § 437h, the district court certified the dispute to this Court sitting *en banc*. FEC Mot. to Sum. Aff. at 1. It did so because "the plain text of section 437h grants exclusive merits jurisdiction to the *en banc* court of appeals." *Wagner v. FEC*, 717 F. 3d 1007, 1011 (D.C. Cir. 2013).

Although the FEC could point to no case determining the constitutionality of applying contribution limits to bequests, the district court granted partial summary judgment to the Commission and narrowed LNC's question to the *en banc* Court of

[1]Burrington's bequest is instructive. When he drafted his will in 2000, Burrington could not have predicted his death seven years later, that his bequest might most immediately impact the 2008 election, or the identity of the presidential candidates and issues debated in that election.

Appeals, an action that forms the basis of the instant, preliminary appeal. The FEC again brings forward no authority foreclosing LNC's question. It thus fails to meet the extraordinary burden that summary affirmance requires.

LEGAL AND FACTUAL BACKGROUND

A. The Litigants

"The FEC is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA." FEC Mot. for Sum. Aff. at 2. The LNC is the national party committee of the Libertarian Party of the United States. Mem. Op., Civ. No. 11-562, at 2 (D.D.C. Mar. 18, 2013) (Dkt. 41).

In 2007, the LNC learned that Raymond Groves Burrington had passed on, leaving it $217,734. *Id.* However, owing to the FEC's interpretation of FECA, the LNC may presently only receive $32,400 per calendar year from an individual, even if that individual is deceased. 2 U.S.C. §§ 441a(a)(1)(B), 441i(a)(1); FEC Advisory Op. 2004-02 (Feb. 26, 2004). As a result, the LNC has been forced to leave the bequest in trust, withdrawing only this limited amount each year. But the LNC wants not only to recover the entirety of Burrington's bequest immediately; it also wishes to establish a planned giving program by which it would solicit—and accept without restriction—testamentary bequests.

B. Proceedings Before the District Court

FECA contains a special judicial review provision designed to ensure that "serious question[s] as to [FECA's]…constitutionality" are resolved "at the earliest possible time." *Bread PAC v. FEC*, 455 U.S. 577, 582 (1982) (internal citations and quotations omitted).

> Under section 437h, a district court should perform three functions. First, it must develop a record for appellate review by making findings of fact. Second, the district court must determine whether the constitutional challenges are frivolous or involve settled legal questions. Finally, the district court must immediately certify the record and all non-frivolous constitutional questions to the *en banc* court of appeals.

Wagner, 717 F.3d at 1009 (internal citations omitted). Indeed, "the plain text of section 437h grants exclusive merits jurisdiction to the *en banc* court of appeals." *Id.* at 1011.

Frivolity under §437h is a legal term of art. The district court "must … determine [that] the Supreme Court's previous rulings have foreclosed the challenges before it," or that the case raises otherwise "settled legal questions" by presenting a mere "sophistic twist" on settled doctrine. *Cao v. FEC*, 688 F. Supp. 2d 498, 534 (E.D. La. 2010); *see also SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 at *2 (D.D.C. 2009) ("The task before me is not to answer any

constitutional questions, or a render a judgment of any kind"); *Wagner*, 717 F.3d at 1009; *Goland v. United States*, 903 F.3d 1247, 1257 (9th Cir. 1990).

The LNC sought to certify the following question: "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?" The parties briefed the merits of LNC's §437h claim and proposed findings of fact for certification to the *en banc* Court of Appeals. (Dkt. Nos. 24-38). The district court conducted a two-hour summary-judgment hearing on February 25, 2013, and handed down its ruling on March 18, 2013.

The district court's ruling revised LNC's question to create a narrower challenge to the rule against a party committee soliciting or receiving bequests in excess of annual contribution limits. Mem. Op. at 23-28. In dismissing LNC's broader question, the district court did not determine that the legal question regarding testamentary bequests had been resolved by any federal court ruling, but rather that "bequests other than Burrington's *may very well* raise the anti-corruption concerns that motivated the *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] and *McConnell* [*v. FEC*, 540 U.S. 93 (2003)] Courts to dismiss a *facial* attack on contribution limits." Mem. Op. at 20 (emphasis supplied).

On April 15, 2013, the FEC filed a Fed. R. Civ. P. 59(e) motion to alter or amend the district court's ruling, asserting that the court's certification of the revised question was clear legal error because all challenges to party contribution limits had been resolved by, *inter alia*, the facial ruling in *McConnell*. FEC Mot. to Alt. (Dkt. 48). This motion necessitated a reply brief from the LNC on April 29, 2013 (LNC's Reply to FEC Mot. to Alt. (Dkt. 50)), followed by the FEC's response on May 9, 2013 (FEC Response to LNC's Reply to Mot. to Alt. (Dkt. 54)). The district court denied the Commission's Rule 59(e) motion on June 17, 2013. Mem. Op., Civ. No. 11-0562 (D.D.C. June 17, 2013) (Dkt. 59).[2] Thus, the narrower certified question is now pending before the *en banc* Court. *See* No. 13-5088.

C. Proceedings Before This Court

On April 22, 2013, the LNC sought to have this appeal heard initially *en banc*, to have this appeal consolidated with the certified *en banc* proceeding (No. 13-5088), or in the alternative, to have the *en banc* proceeding stayed until this appeal resolved the certified question's scope. *See* LNC's Pet. For Initial Hr'g En Banc and Mot. to Consolidate Related Appeals (Doc. No. 1432045). On September 23, 2013, this Court, sitting *en banc*, denied the LNC's initial *en banc* and

[2] A copy of the district court's ruling is attached as Exhibit 1.

consolidation request, but granted LNC's alternative request that the present matter be heard before its certified question. Per Curiam Order at 2 (Doc. No. 1457785).

STANDARD OF REVIEW

"A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *see also Truesdale v. U.S. Dept. of Justice*, 2012 U.S. App. LEXIS 17125 (D.C. Cir. Aug. 15, 2012). Accordingly, "[p]arties should avoid requesting summary disposition of issues of first impression for the Court." D.C. CIRCUIT HANDBOOK OF PRACTICES AND INTERNAL PROCEDURES 36 (2013).

Indeed, the FEC's motion for summary affirmance must be denied if "[t]he merits of the parties' positions are not so clear as to warrant summary action." *Baird v. Gotbaum*, 2013 U.S. App. LEXIS 21064 (D.C. Cir. July 19, 2013) (per curiam) (citing *Taxpayers Watchdog*, 819 F.3d at 297).

> Summary disposition is appropriate only where the moving party has carried the heavy burden of demonstrating that the record and the motion papers comprise a basis adequate to allow the fullest consideration necessary to a just determination.

Cascade Broad. Group, Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (internal quotation and citation omitted). Such motions are generally disfavored. *See, e.g. United States v. Fortner*, 455 F.3d 752 (7th Cir. 2006).

ARGUMENT

The LNC appealed this matter because the district court improperly ruled on the merits of its claim, even though "Congress's obvious intent in enacting section 437h was to deprive district courts and panels of the circuit courts of appeals of jurisdiction to consider the constitutionality of the FECA." *Wagner*, 717 F.3d at 1011 (quoting *FEC v. Lance*, 617 F.2d 365, 374 (5th Cir, 1980)).

The Commission's request for summary affirmance is extraordinary. Appellate review is an essential component of the due process of law. That is especially true in the instant case, which presents a novel and complex First Amendment issue.[3]

The standard governing this motion reflects the deep suspicion with which courts have approached motions for summary affirmance. The heavy burden the

[3]Indeed, the district court found briefing and argument helpful: full briefing on the findings of fact, the FEC's motion for summary judgment, and the FEC's Rule 59(e) motion were conducted below. Further, the summary judgment hearing in the district court lasted more than two hours. *See Taxpayers Watchdog*, 819 F.2d at 297-298 ("To summarily affirm an order of the district court, this court must conclude that *no benefit* will be gained from further briefing and argument of the issues presented.") (emphasis supplied).

Commission must bear is compounded by the low standard the LNC must meet in this appeal. At this stage of a § 437h action, the FEC must show not only that the LNC is incorrect, but that its claim is frivolous and the "Supreme Court's previous rulings have [either] foreclosed the challenges before it" or the case presents a mere "sophistic twist" on concretely settled law. *Cao*, 688 F. Supp. 2d at 534; *Goland*, 903 F2d at 1257.

A claim is not frivolous if the "window remains open" and the case has not been necessarily decided. *Cao*, 688 F. Supp. 2d at 534. As no federal court has ruled on the applicability of campaign finance statutes to the dead, that window indeed remains open. Further, by not certifying the full question to the *en banc* Court of Appeals, the district court exercised jurisdiction that Congress explicitly denied it. *Wagner*, 717 F.3d at 1016-1017 ("Inferior federal courts have only the jurisdiction the Congress confers upon them.").

The FEC's objection to this appeal is actually no different than its unsuccessful objection to the district court's certification of this case, or, indeed, to the certification of *any and all* as-applied challenges to FECA's contribution limits. "[B]ecause the *general* merits of the national-party contribution limit have been addressed in previous Supreme Court rulings," the Commission asserts that LNC's case has necessarily been decided, and its argument—that the deceased

cannot possibly serve as a nexus for *quid pro quo* corruption—is frivolous. Mot. for Sum. Aff. at 7 (emphasis supplied).This reasoning guided the FEC's argument through extensive briefing below—including the Commission's Fed. R. Civ. P. 59(e) motion, which asserted that the court erred merely by certifying *any* portion of the LNC's question.

In the FEC's Rule 59(e) briefing, the Commission claimed that the district court acted erroneously because "[c]ourts have *almost* universally rejected such as-applied challenges to FECA's contribution limits—even in cases where the threat of corruption was concededly somewhat diminished." FEC Mot. to Alt. at 8 (emphasis supplied). The FEC's notion that "prophylactic contribution limits validly apply to *all* contributions, including those with no actual corrupt practice or effect," is simply wrong. Mot. to Alt. at 7 (emphasis in original).

If the FEC's argument were correct, there could never be a successful as-applied challenge to a prophylactic contribution limit. But such challenges have been brought. *See e.g. SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (successful challenge to prophylactic contribution limit as-applied to those giving to political committees which only produce independent expenditures).

The Commission's argument revisits a well-trod path. The FEC has long relied upon facial constitutional holdings in an effort to block otherwise-valid as-

applied challenges. But the courts have repeatedly rejected the Commission's peculiar theory of constitutional jurisprudence. Indeed, the FEC fails to even cite the most important ruling on this point, the Supreme Court's unanimous decision in *Wisc. Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"). There, the Court explicitly rejected the Commission's view that *McConnell* "left 'no room' for as-applied challenges." *FEC v. Wisc. Right to Life*, 551 U.S. 449, 456 (2007) ("*WRTL II*").

In the follow-on litigation, *WRTL II*, the Court also rejected the Commission's contention that after "*McConnell* already held" a provision of the law "facially valid" the burdens of determining a law's constitutionality must shift to the as-applied challenger. *WRTL II*, 551 U.S. at 464. The *WRTL II* Court noted that "*McConnell*'s analysis was grounded in the evidentiary record before the Court" and the *McConnell* Court considered the facial challenge before it on that record. *WRTL II*, 551 U.S. at 466, *compare* Mot. for Sum. Aff. at 9 (relying heavily on the evidentiary record before the Supreme Court in *McConnell*.) *McConnell* "did not adopt any test as the standard for future as-applied challenges." *Id.*

The same is true here: the record in *McConnell* and *Buckley* does not address bequests, and those cases consequently cannot block a subsequent as-applied challenge on that basis.

It remains undisputed that, in the §437h context, "[o]nce a core provision of FECA has been reviewed and approved by the courts, unanticipated variations also may deserve the full attention of the appellate court." *Goland*, 903 F.2d at 1257. A question presented to the district court for certification under §437h is only frivolous if it has been necessarily decided by the federal courts. *Goland*, 903 F.2d at 1257-1259 (where *Buckley* had upheld FECA's contribution limits and its ban on anonymous contributions, "sophistic" to say contribution limits invalid "simply because [contributors] were anonymous"). And again, the Commission can point to no ruling discussing the applicability of contribution limits to bequests.

The Commission correctly states that "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." Mot. for Sum. Aff. at 10. But *Buckley* and *McConnell* hardly foreclose this case, given that both cases addressed the political activities of the *living*, not the dead, and upheld contribution limits precisely because the donors in those cases could engage in a variety of party-supporting activities not known to occur beyond the grave. *Buckley*, 424 U.S. at 28 (contribution limits "leav[e] persons free to engage in independent political expression [and] to associate actively through volunteering their services"); *McConnell v. FEC*, 540 U.S. at 136 (contribution limits "leave the contributor free

to become a member of any political association and to assist personally in the association's efforts on behalf of candidates") (quoting *Buckley*, 424 U.S. at 22). No plaintiff in either case sought to challenge contribution limits as applied to bequests.

Accordingly, while the Commission correctly notes that "[t]he Supreme Court's rejection of the Libertarian Party's challenge to contribution limits in *Buckley* remains good law, as does its rejection of the LNC's challenge in *McConnell*," the Commission pointedly ignores the obvious: in neither *Buckley* nor *McConnell* did the LNC challenge contribution limits as they applied to donations from the deceased. FEC Mot. for Sum. Aff. at 11 (internal citations omitted).[4] For the same reason, the FEC misplaces reliance on *Republican Nat'l Comm. v. FEC*,

[4] Indeed, if any argument presents a mere "sophistic twist," it is the Commission's assertion that the LNC's participation in cases challenging campaign finance rules on other grounds forecloses it from bringing further as-applied challenges. *Goland*, 903 F.2d at 1257; *compare McConnell* (Republican National Committee a plaintiff), *with McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (Republican National Committee a plaintiff), *probable jurisdiction noted* (U.S. Feb. 19, 2013).

698 F. Supp. 2d 150 (D.D.C. 2010) ("*RNC*").[5] At the risk of landing blows the horse can no longer feel, *RNC* plainly did not involve testamentary bequests. *RNC* does not demonstrate that *McConnell*, or any other case, has necessarily or even theoretically decided the LNC's full question.

Indeed, the FEC's use of *RNC* is an odd choice at this point in the proceedings. *RNC* is not a §437h challenge to FECA, but a decision by a three-judge panel of the district court with full authority to decide a question on the merits. And the *RNC* Court was able to reach conclusive determinations precisely because *McConnell*, a case "grounded in the evidentiary record before the [Supreme] Court," explicitly foreclosed much of the *RNC* plaintiffs' case. *WRTL II*, 551 U.S. at 466; *see also RNC*, 698 F. Supp. 2d 150, 157 ("*McConnell* upheld [Bipartisan Campaign Reform Act] § 323(a) against a facial challenge based on the same applications of the statute that the RNC now raises in its as-applied challenge.").

Because the Commission points to no evidence that the *McConnell* Court ever contemplated the ramifications of political contributions from the deceased,

[5] The *RNC* Court did not, of course, rule that the RNC's claims were invalid merely because the party participated in *McConnell*.

the *McConnell* record, holding, and subsequent case law relying on *McConnell*, such as *RNC*, do not foreclose the LNC's full question.

Indeed, the FEC's arguments in this respect are bizarre, considering its very aggressive discovery and factual development in this case. If *McConnell*'s record truly contained all the information needed to resolve LNC's challenge, what was the point of FEC's various third-party subpoenas, depositions, interrogatories, and document demands? The Commission certainly did not litigate this case as though all the necessary facts were settled and on file before the Supreme Court.

As-applied challenges to the campaign finance laws, even those laws that function as prophylactic measures, are not automatically frivolous under §437h. *See SpeechNow.org*, 599 F.3d at 686; *Cao*, 688 F. Supp. 2d at 534. The LNC is before this Court because the district court improperly ruled on the merits of its proposed certified question, rather than merely determining if the LNC's question was a novel one. And, indeed, in the two years and numerous briefs filed by the Commission, it has pointed to no case that has decided—or even considered—the constitutionality of restricting contributions from the dead. The FEC has simply not met the "heavy burden" required for the grant of a motion for summary affirmance. *Taxpayers Watchdog*, 819 F.2d at 297.

CONCLUSION

The Commission's motion for summary affirmance should be denied.

Dated: November 21, 2013

Respectfully submitted,

/s/ Allen Dickerson

Alan Gura
Gura & Possessky, PLLC
101 N. Columbus St., Suite 405
Alexandria, VA 22314
703.835.9085/F: 703.997.7665
alan@gurapossessky.com

Allen Dickerson
Center for Competitive Politics
124 S. West St., Suite 201
Alexandria, VA 22314
703.894.6800/F: 703.894.6811
adickerson@campaignfreedom.org

Counsel for Appellant

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LIBERTARIAN NATIONAL COMMITTEE, INC., Appellant, v. FEDERAL ELECTION COMMISSION, Appellee.	)	No. 13-5094 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2013, I filed the LNC's Reply in Opposition to Appellee's Motion for Summary Affirmance with the Clerk of the Court of the United States Court of Appeals for the District of Columbia via United States mail and the Court's CM/ECF system.

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

Kevin P. Hancock
Lisa J. Stevenson
Kevin Deeley
Harry J. Summers
Holly J. Baker
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

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