UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	)	Civ. No. 11-562 (RLW)
Plaintiff,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY MEMORANDUM
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT

Defendant Federal Election Commission's ("FEC" or "Commission") Proposed Findings of Fact (Docket No. 24) contain a number of legislative facts, largely drawn from *McConnell v. FEC*, that are directly relevant to a central issue of this case: how unlimited contributions to national political party committees cause corruption and its appearance. In its response, plaintiff Libertarian National Committee, Inc. ("LNC") does not dispute the accuracy of these facts, but instead claims that the FEC's legislative facts are inadmissible hearsay. However, unlike adjudicative facts, legislative facts are not subject to the Federal Rules of Evidence. Thus, as explained *infra* in Part I, the Court can adopt the FEC's legislative facts, including those drawn from *McConnell*, just as other courts have done in cases brought under 2 U.S.C. § 437h — regardless of the hearsay rules that apply to adjudicative facts.

The LNC also goes to great lengths to try to distance itself and this case from *McConnell*, but in fact, the LNC *was a plaintiff* in *McConnell* — contrary to the LNC's false representation to this Court that it "was not a party to *McConnell*." (Pl.'s Objections to Def.'s Facts Submitted for Cert. ("Pl.'s Objs.") at 4 (Docket No 30).) *See* Exh. A (LNC's *McConnell* Complaint); Exh.

B (LNC's *McConnell* Supreme Court brief); *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 222 (D.D.C. 2003) (listing parties, including the LNC); *McConnell v. FEC*, 540 U.S. 93, 110, 159 (2003) (listing the LNC as a party and rejecting claim "of minor parties such as the Libertarian National Committee"). As a result, the LNC concedes that it could be collaterally estopped from relitigating facts from *McConnell* in this case. (Pl.'s Objs. at 4-5.) In any event, estoppel is unnecessary, since the Court may rely upon legislative facts from *McConnell*.

The Commission's proposed legislative facts are critical to the Court's gatekeeper role in deciding a certification motion under section 437h, as explained *infra* in Part II. Contrary to the LNC's suggestion (Pl.'s Objs. at 1-2), the Court does not "certify facts" and simply pass them on to the en banc Court of Appeals; instead, the Court certifies substantial "*questions of constitutionality*" concerning provisions of the Federal Election Campaign Act ("FECA"). 2 U.S.C. § 437h (emphasis added); *see Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). The parties' proposed facts — including legislative facts — aid the Court's determination of whether the LNC's proposed question is substantial, as it must be to qualify for certification and to survive the FEC's motion for summary judgment. *See Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (en banc); *Cao v. FEC*, 688 F. Supp. 2d 498, 502-03 (E.D. La.), *aff'd and remanded sub nom. In re Cao*, 619 F.3d 410 (5th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1718 (2011).[1]

Finally, even though the LNC already had an opportunity to propose any facts — legislative or adjudicative — that it wished in its own proposed findings of fact, it now proposes

[1] Facts adopted by the district court are sent to the *en banc* Court of Appeals only if the district court *first* determines that the plaintiff's constitutional question is worthy of certification, as was the case in *SpeechNow.org v. FEC*, No. 1:08-cv-00248-JR, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2008).

new, additional facts in its response to the FEC's proposed facts. The Court should decline to consider these facts, but in any event, the Commission responds to them in Part III below.

ARGUMENT

I. UNDER 2 U.S.C. § 437h, THE COURT MAY ADOPT LEGISLATIVE FACTS, INCLUDING THOSE FROM PREVIOUS CASES, REGARDLESS OF EVIDENTIARY RULES APPLICABLE TO ADJUDICATIVE FACTS

The LNC objects to virtually all of the Commission's proposed legislative facts on the grounds that they are either inadmissible hearsay or improperly quote previous court rulings, or both.[2] In contrast to adjudicative facts, however, legislative facts are not subject to the Federal Rules of Evidence. As the 1972 Advisory Committee Notes to Federal Rule of Evidence 201(a) explain,

> [n]o [evidence] rule deals with judicial notice of "legislative" facts. . . . The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

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[2] The Commission's proposed legislative facts come from four sources: (1) court rulings in the *McConnell* litigation, *see* ¶¶ 20-21, 23, 28-31, 33-51, 63-64, 66, 69-71, 73-75, 80-82, 118-19, 123, 129, 136; (2) the Supreme Court's ruling in *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), *see* ¶¶ 34, 71-72; (3) news articles, *see* ¶¶ 53, 76-79, 85, 92, 115-16; and (4) various other sources on the Internet, *see* ¶¶ 83, 85-86, 92, 111-14. The LNC objects to each of these proposed facts, except facts 31, 83, 85-86, 92.

The LNC also poses hearsay objections to two of FEC's proposed *adjudicative* facts. (Pl.'s Objs. ¶¶ 138-39.) These objections should be rejected since both facts cite documents the LNC provided in discovery, which it admitted qualify for the business records hearsay exception of Federal Rule of Evidence 803(6). (*See* Exh. C (Def.'s Second Set of Disc. Reqs. to Pl. at Reqs. for Admis. Nos. 2, 4); Exh. D (Resp. to Def's Second Set of Reqs. for Admis. Nos. 2, 4).)

Finally, the LNC objects to other FEC proposed facts (and headings) on numerous other grounds. (*See* Pl.'s Objs. ¶¶ 8, 12-16, 18, 22, 27, 31-32, 52, 54-62, 65, 67-68, 93, 106-10, 117, 120-21, 124-28, 135, 137.) These insignificant objections are also without merit.

The difference "between legislative and adjudicative facts has been widely accepted both within and without this circuit." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162 n.20 (D.C. Cir. 1979). Adjudicative facts "are the facts that normally go to the jury in a jury case." *Id.* at 1161 (internal quotation marks omitted). They concern the immediate parties to a lawsuit and address who did what, where, when, and how. *Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200 n.11 (D.C. Cir. 1976). Thus, adjudicative facts must meet the "high degree of indisputability" required by the Federal Rules of Evidence. Fed. R. Evid. 201(a), Advisory Comm. Notes (1972).

In contrast, legislative facts are "general facts which help the tribunal decide questions of law and policy." *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) (internal quotation marks omitted); *accord Ass'n of Nat'l Advertisers*, 627 F.2d at 1161-62. They are "without reference to specific parties" and because they "combine empirical observation with application of [judicial] expertise to reach generalized conclusions, they need not be developed through evidentiary hearings." *Ass'n of Nat'l Advertisers*, 627 F.2d at 1161-63; *accord Friends of the Earth*, 966 F.2d at 694; *see also Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) ("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court.").

Legislative facts are frequently based on a variety of materials such as academic studies, research papers, news articles, polling data, and political and social science analyses. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (using opinion polls, views of religious and professional groups, and world opinion to evaluate Eighth Amendment claim); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding law protecting women from workplace health and safety risks,

on basis of Louis Brandeis's famous brief presenting over 100 pages of legislative facts, including sociological and economic reports, and committee testimony).

Courts often rely upon legislative facts in ruling on the constitutionality of a law. Because such rulings usually affect many non-litigants, the basis for the judicial reasoning extends well beyond the limited set of adjudicatory facts concerning the parties to the case. *See Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) ("The constitutionality of statutes is typically determined by reference to general considerations, values, intuitions, and other 'legislative facts' . . . rather than to facts presented through testimony and other formal evidence subject to rules of evidence developed largely for control of lay juries.").

Legislative facts also commonly play a critical role in campaign finance cases. In the seminal campaign finance case, *Buckley v. Valeo*, the en banc D.C. Circuit instructed the district court, pursuant to 2 U.S.C. § 437h, to gather all "necessary" evidence including "legislative facts"; "[m]ake findings of fact"; and "[c]ertify to this court constitutional questions arising" from those facts and the complaint. 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc). In its subsequent merits opinion, the D.C. Circuit relied upon legislative facts such as polling data, a report concerning illegal contributions by the dairy industry, congressional floor statements, and a Senate committee report. 519 F.2d 821, 837-40 nn. 23, 28, 34, 36, 38 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). The Supreme Court then explicitly relied on the D.C. Circuit's discussion of these legislative facts. 424 U.S. at 27 & n.28.

Since *Buckley*, the Supreme Court has continued to rely upon legislative facts in evaluating the constitutionality of FECA, without regard to the Federal Rules of Evidence. *See, e.g., FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 451-52 & nn.12-13 (2001) (relying upon a political scientist's statement, a former Senator's anecdote, a

political science book, and FEC disclosure reports); *McConnell*, 540 U.S. at 129-32, 145-52 (relying extensively on legislative facts detailing how national party committees solicited soft money contributions); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 470 n.6 (2007) (relying on a national survey for the legislative fact that most citizens could not name their congressional candidates); *id*. at 504-09, 515-17 (Souter, J., dissenting) (quoting from newspaper articles, publications by political scientists and lawyers, surveys by pollsters, an *amicus curiae* brief in *McConnell*, congressional hearings, and the conclusions of a state "blue ribbon" commission).

Accordingly, this Court may adopt and rely upon the Commission's proposed legislative facts from *McConnell* and *Colorado II*, as well as similar facts supported by news articles and Internet sources. Indeed, the Supreme Court's and other courts' prior reliance on these kinds of legislative facts provides more, not less, reason for this Court to rely on them now. For example, the district court in *Cao* made dozens of findings of legislative facts relating to the activities of political parties taken directly from *McConnell* and *Colorado II*, 688 F. Supp. 2d at 515-16 & n.11, 519-20, 523-28, 531; the court then relied on those facts when it determined that only four of the plaintiffs' seven proposed questions warranted section 437h certification, *id.* at 503-04, 549.[3] Nothing in the Federal Rules of Evidence prevents this Court from doing the same, and thus, the LNC's objections to the Commission's proposed legislative facts should be rejected.[4]

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[3] Against this great weight of authority, the LNC relies upon two tort cases that are irrelevant because they involve adjudicative, not legislative, facts, *see Haim* v. *Islamic Republic of Iran*, 784 F. Supp. 2d 1, 6 (D.D.C. 2011); *Athridge* v. *Aetna Cas. & Sur. Co.*, 474 F. Supp. 2d 102, 110 (D.D.C. 2007), and a single, unpublished district court opinion that failed to appreciate that legislative facts are not subject to the Federal Rules of Evidence, *see Speechnow.org v. FEC*, No. 08-0248, 2009 WL 3101036 (D.D.C. Sept. 28, 2008).

[4] If the Court adopts the FEC's proposed facts, the LNC should not now be given a second chance to "provide many more" facts to the Court, as it requests. (Pl.'s Objs. at 10.) The principle that legislative facts may be evaluated by a court without regard to the Federal Rules of Evidence is not new; indeed, it has been described in those Rules since 1972. Fed. R. Evid. 201(a), Advisory Comm. Notes (1972).

II. LEGISLATIVE FACTS FROM *McCONNELL* ARE RELEVANT TO WHETHER THE LNC'S PROPOSED QUESTION FOR CERTIFICATION IS SUBSTANTIAL

The Commission's proposed legislative facts from *McConnell* are directly relevant to whether the LNC's proposed constitutional question for certification is substantial. The LNC's lawsuit and proposed question ask whether FECA may constitutionally limit *any* bequest to *any* national party committee, not just the Burrington bequest to the LNC. (LNC's Mot. to Cert. Facts and Questions at 1 ("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?" (emphasis omitted)) (Docket No. 25)); *see also* Compl. ¶ 3 & Prayer for Relief ¶¶ 1-2 (Docket No. 13); Def.'s Proposed Findings of Fact ("FEC Facts") ¶ 8 (Docket No. 24).) In support of its claim, the LNC argues that, in general, unlimited bequeathed contributions to national party committees would not lead to corruption or the appearance of corruption. (*See, e.g.*, Mem. in Supp't of Pl.'s Mot. to Cert. Facts and Questions at 2, 17, 22-24 (Docket 25-1).) Thus, the FEC's proposed legislative facts from *McConnell* and other sources — detailing, *inter alia*, the nature of national party committees, their relationship with federal officeholders, and how they have sold preferential access to those officeholders in exchange for unlimited contributions, leading to corruption and its appearance — are plainly relevant to the LNC's claim here.

Nevertheless, the LNC repeatedly asserts that *McConnell*'s facts have "nothing to do with the Libertarian Party" (*see, e.g.*, Pl.'s Objs. ¶¶ 34-51), and stresses that *McConnell* involved a facial challenge to 2 U.S.C. § 441i, whereas here the LNC asserts an "as-applied challenge" (*id.* at 3, 15-16). As noted above, however, the LNC was a party in *McConnell*, so the case has plenty to do with the LNC. In any event, the LNC cannot evade *McConnell*'s relevance simply by calling its new lawsuit "as-applied." "The label [of 'as-applied' or 'facial'] is not what

matters. The important point is that plaintiff[']s[] claim and the relief that would follow . . . reach beyond the particular circumstances of th[is] plaintiff[]." *Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010). The LNC's complaint seeks a broad permanent injunction barring the FEC from enforcing FECA's contribution limits on bequests *at all — i.e.*, as to any bequest to any national party committee. (*See* Compl., Prayer for Relief ¶¶ 1-2.) Thus, *McConnell*'s facts relating to national party committees other than the LNC are directly relevant here.

Finally, *McConnell*'s facts remain relevant here even though the LNC's claim presents a new twist on how unlimited contributions can be delivered to the national party committees (*i.e.*, through bequests). Even if the Rules of Evidence applied to such legislative facts, which they do not, the scope of relevance is quite broad. *See* Fed. R. Evid. 401. And the Commission's merits briefing clearly shows why making a contribution by bequest does not remove the corruptive dangers posed by unlimited contributions to national party committees identified in *McConnell*. (Def.'s Mem. in Opp'n to Pl.'s Mot. at 23-35 (Docket No. 29).)

III. THE COURT SHOULD NOT CONSIDER PLAINTIFF'S NEW PROPOSED FINDINGS OF FACT

In its response to the Commission's Proposed Findings of Fact, the LNC proposes *new* findings of fact, styled as "counter-facts" (Pl.'s Objs. ¶ 41), in addition to those it already offered in its earlier proposed findings of fact (Docket No. 25-3). The Court should decline to consider these new facts, as they go beyond simply "respond[ing] to proposed findings of fact," as envisioned by the scheduling order (Docket No. 19-20); they are improper, late-filed proposed findings of fact in their own right. If the Court were to consider the LNC's new facts, however, the Commission submits the following specific responses to those facts to which it objects:

1. LNC does not have any control over its federal candidates, and cannot direct their actions. LNC 30(b)(6) Dep. at 27:3-6, FEC Exh. 20.

FEC RESPONSE: The Commission objects to this fact as contrary to the record. According to its bylaws, the LNC has the power to take the Libertarian Party nomination away from a presidential ticket that fails to conduct its campaign in accordance with the party's platform. (FEC Facts ¶ 27.) Indeed, the page of deposition testimony the LNC cites confirms that "the LNC could remove the presidential ticket" if it "felt that the campaign was ill-Libertarian." (FEC Facts, Exh. 20 (LNC 30(b)(6) Dep. at 27:10-19).) Moreover, according to the LNC's policy manual, the LNC can deny financial support to Libertarian Party candidates who are either not properly certified or who support a presidential ticket other than the Libertarian Party's candidates. (FEC Facts ¶ 27.) In its response, the LNC does not dispute the veracity of these facts, but only claims they are irrelevant. (Pl.'s Objs. ¶ 27.)

3. Libertarian donors do not request personal meetings with candidates or special benefits beyond what the party offers in exchange for donations. Id. at 48:10-49:1.

FEC RESPONSE: The Commission objects to this fact on the ground that it misstates the record. William Redpath, who testified on behalf of the LNC, stated that he could not "recall" whether LNC donors had ever requested benefits beyond those the LNC already offers to people who qualify for its major donor groups, not that LNC donors "do not request" such additional benefits. (FEC Facts, Exh. 20 (LNC 30(b)(6) Dep. at 48:10-49:1).)

4. Promises of testamentary bequests do not earn perks from the LNC. Id. at 49:17-50:9, 67:7-68:4.

FEC RESPONSE: The Commission objects to this fact on the ground that it misstates the record. The LNC's witness Redpath first testified, "I don't think so," when asked whether a promised bequest could earn entry into a major donor group (FEC Facts, Exh. 20 (LNC 30(b)(6) Dep. at 49:17-21)), but then conceded that it would be "possible" if a potential donor promised to

bequeath an amount of money vastly higher than what would normally be required for membership (*id.* at 50:1-14; *accord id.* at 67:20-68:4).

5. LNC is unaware of any attempts to seek benefits or perks in exchange for testamentary bequests, nor is LNC aware of any attempt to direct the funds made by a bequest. Id. at 55:17-56:6.

FEC RESPONSE: The Commission does not object to this fact to the extent it applies only to bequests to the LNC and not to any other national party committee.

6. [I]t is doubtful that LNC would solicit bequests with promises of special access to candidates. Id. at 72:15-73:3.

FEC RESPONSE: The Commission objects to this fact on the ground that it is contrary to the record. The LNC's witness Redpath testified, "I don't know. I doubt it, but I don't know," when asked whether the LNC would solicit bequests from donors in exchange for preferential access to its federal candidates. (FEC Facts, Exh. 20 (LNC 30(b)(6) Dep. at 72:15-18).) Other parts of the record suggest that the LNC would, in fact, solicit bequests with promises of preferential access to candidates. In particular, the LNC already (1) solicits contributions with promises of preferential access to its federal candidates (FEC Facts ¶¶ 54, 57-61); (2) offers preferential access in exchange, in part, for promises of future contributions (*id.* ¶¶ 55-56); (3) offers preferential access as an inducement for future contributions (*id.* ¶ 62); and (4) plans to implement a planned-giving program to solicit bequests at events involving its federal candidates from people who are "well-to-do" (*id.* ¶ 104).

CONCLUSION

For the foregoing reasons, the Court should adopt the FEC's Proposed Findings of Fact, reject the LNC's objections, and decline to consider the LNC's new proposed findings of fact.

Respectfully submitted,

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