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Nos. 10-30080 and 10-30146
(Consolidated for Briefing and Argument)

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANH "JOSEPH" CAO and the REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Certified Constitutional Questions and Appeal from
the United States District Court for the Eastern District of Louisiana

SUR-REPLY FOR THE FEDERAL ELECTION COMMISSION

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As the Federal Election Commission ("Commission" or "FEC") explained in its opening brief, this case attempts to overturn *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("*Colorado II*"), by characterizing a frontal attack on the Supreme Court's understanding of coordination as a purportedly limited "as-applied" challenge. The Court long ago explained that the Constitution prohibits limits on expenditures only if they are "made *totally* independently of the candidate and his campaign." *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (quoted in *McConnell v. FEC*, 540 U.S. 93, 221 (2003)) (emphasis added). "By contrast, expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'" *McConnell*, 540 U.S. at 221 (quoting *Colorado II*, 533 U.S. at 442, 446). The plaintiffs' (collectively "RNC") broad arguments, if accepted, would permit virtually unlimited coordination between spenders and candidates, and thus lead to massive circumvention of contribution limits and the corruption that these limits aim to prevent.

I. THE COURT SHOULD DECIDE THE CERTIFIED QUESTIONS IN THE COMMISSION'S FAVOR

A. Limits on Coordinated Expenditures Are Constitutional When Applied to Communications RNC Describes as a Party's "Own Speech"

RNC devotes more than half its reply brief to the claim that the Constitution prohibits limits on coordinated communications that it describes as a party's "own speech." RNC reaches this conclusion by (1) misstating the appropriate level of

scrutiny for the case; (2) claiming erroneously that the First Amendment distinguishes speech based upon "attribution"; (3) disguising its facial challenge as an as-applied one; (4) falsely suggesting (Reply Br. 2) that the anti-circumvention rationale underpinning *Colorado II* is "dead in general application"; and (5) exaggerating the purported disadvantages of engaging in independent party speech. The FEC addresses each point in turn.

1. Limits on What RNC Calls "Own Speech" Coordinated Communications Are Not Subject to Strict Scrutiny

The Supreme Court has held that limits on coordinated expenditures are subject to the same scrutiny as limits on contributions. *Colorado II*, 533 U.S. at 456. Although *independent* expenditure limits are subject to strict scrutiny, contribution limits and *coordinated* expenditure limits are reviewed under a less rigorous standard. *Id.*; *McConnell*, 540 U.S. at 134-36. The limits at issue in this case are therefore valid so long as they satisfy the "lesser demand" of being "closely drawn" to match a "sufficiently important interest." *Colorado II*, 533 U.S. at 435 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000)).

Despite this clear precedent, RNC argues (Reply Br. 3) that strict scrutiny applies here. RNC relies on a *Colorado II* footnote that declined to reach the issue of "[w]hether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on

application of the limit to specific expenditures… .” 533 U.S. at 456 n.17. The footnote did not articulate what sort of “specific expenditures,” if any, might potentially be deserving of a different level of scrutiny. Nor did the footnote indicate what the appropriate level of scrutiny might be for these hypothetical “specific expenditures.” Here, because RNC’s challenge encompasses virtually all coordinated expenditures, it fails to provide the kind of “specific” expenditure that might properly raise the question the footnote suggests. Rather, RNC’s expansive claims are equivalent to a facial challenge and thus require the same scrutiny the Court applied in *Colorado II*.

2. RNC’s Concept of “Own Speech” Has No Basis in Law

The Commission’s opening brief explained the flaws in RNC’s contention that its “own speech” coordinated communications cannot be constitutionally limited. RNC now criticizes (Reply Br. 8-9) that explanation for purportedly misstating its “own speech” concept.[1]

[1] Although the Commission described its understanding of RNC’s concept of “own speech” identically before both the district court and this Court, this is RNC’s first objection to that description. *Compare* FEC Br. 13 *with* FEC’s Supplemental Response To Motion To Certify Questions at 12-13 [Doc. 65] (R. 913-14) (“they now generally allege that *every time a political party pays for a communication and discloses publicly that it has done so*, it is, ipso facto, the party’s “own speech.”). Furthermore, any confusion stems from RNC’s shifting definition of “own speech” throughout this litigation. *See* FEC’s Proposed Findings Of Fact [Doc. 66] (E.D. La. Aug. 31, 2009) (“FEC Facts”) ¶¶ 182-96 (R. 1016-19) (detailing contradictory explanations about what plaintiffs regard as parties’ “own speech”).

The line RNC attempts to draw is a distinction without a difference. Its reply brief stands by its argument that even if it *actually* coordinates with a candidate about the content, media, or timing of a communication, as long as it pays for and "adopts" the speech, it is "attributable" to RNC and thus RNC's "own speech." Reply Br. 8. RNC also confirms (*id.* at 9) its view that "how the law and regulations determine attribution of an ad" in turn determines whether speech is its "own." Next, RNC does not dispute that the operable regulation requires RNC to state on its ads that it has paid for them if it has done so. 11 C.F.R. § 110.11(b); *see* Reply Br. 10 ("It is attributable to RNC, and RNC will appear as payor in the disclaimer."). Thus, RNC's own representations show that it is claiming that whenever the party pays for an ad and abides by the law, the communication should be treated as its "own" — *even if the candidate co-authored the script of the ad with RNC*.

RNC tries to distance itself from its own argument by distinguishing the above so-called "attributable" speech from a situation in which a candidate runs an ad and then has RNC pay his or her media bill. Reply Br. 8. That would be an in-kind contribution which, under Commission regulations, *see* 11 C.F.R. § 109.37(b), can be financed up to the limits in 2 U.S.C. §§ 441a(d)(2)-(3) ("Party Expenditure Provision"). But the fact that in-kind contributions can be distinguished from RNC's "own speech" coordinated expenditures has no bearing

on whether the latter should be treated the same as *independent expenditures* under the Constitution. They *both* raise concerns about *quid pro quo* corruption that justify Congress's decision to treat them like contributions for purposes of establishing reasonable limits.[2]

In any event, RNC's focus on "attribution" rests on the false premise that once RNC "adopts" speech it can no longer be "attributed" to anyone else. This theory would destroy the Supreme Court's concept of coordination. In fact, once coordination has taken place, the resulting communication is "attributable" to both actors, which is why the constitutionality of coordinated expenditure limits has always depended upon the absence or presence of "prearrangement and coordination of an expenditure." *Colorado II*, 533 U.S. at 464; *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) ("*Colorado*

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[2] To the extent RNC is now relying on (*see* Reply Br. 9) the idea that its "own speech" communications communicate the "underlying basis for [its] support" of a candidate, RNC provides no basis for determining from the four corners of a communication how a viewer would know whether the ad's message is RNC's true "underlying basis" for supporting a candidate or whether the message is really one created by a candidate but then "adopted" by RNC. Moreover, campaign ads are sometimes designed for reasons independent of the speaker's own beliefs, such as their perceived persuasiveness to voters. RNC does not suggest how viewers could distinguish these situations. *See, e.g., McConnell v. FEC*, 251 F. Supp. 2d 176, 550-51 (2003) (Kollar-Kotelly, J.) ("[A]nother indicia that an issue advertisement has an electioneering purpose is that, in certain instances, candidate-centered issue advertisements are run by organizations who have no organizational interest in the advertisement's 'issue.'" — noting example of how EMILY's List supported a candidate by running ads about gun safety).

I") ("[T]he constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure."); *Buckley*, 424 U.S. at 47 (emphasizing that the presence of "prearrangement and coordination" is what increases the value of a coordinated expenditure to the candidate and creates the "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

3. Regardless of RNC's Characterization of This Case, a Decision in Its Favor Would Effectively Reverse *Colorado II*

The FEC has never suggested that all as-applied challenges to the Party Expenditure Provision are foreclosed by the facial upholding in *Colorado II*. But not every as-applied claim is viable, and labeling a challenge "as-applied" does not necessarily make it so. As previously explained (FEC Br. 16-17), a plaintiff cannot get two bites at the apple by merely repackaging the same losing factual and legal arguments as an "as-applied challenge." RNC's claims are incompatible with the reasoning in *Colorado II*, and therefore must fail.

RNC relies (Reply Br. 4-6) on *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"), but that case is easily distinguished because it involved three particular advertisements that were not representative of the ads that had been before the Court in *McConnell* when it facially upheld the financing restriction concerning electioneering communications; nor did that case involve

broad categories of communications that would swallow up the rule if they went unregulated. While it is true that when the Court first heard the *WRTL* case, it explained that in *McConnell* it had "not purport[ed] to resolve future as-applied challenges," *Wisconsin Right To Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) ("*WRTL I*"), the Court also suggested that an as-applied challenge would not be successful if it involved advertisements that "fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* at 412.

Contrasting the as-applied challenge in *WRTL* with the as-applied challenge in this case exposes why this one is foreclosed by precedent. RNC's "own speech" challenge (as well as the "vague and overbroad" challenge that was not certified by the district court) encompasses virtually all party coordinated expenditures. RNC's proposed coordination therefore falls squarely within the activity contemplated by *Colorado II* decision, and that opinion's reasoning applies equally here. Thus, like RNC's recently failed "as-applied" challenge to the limits on "soft money" contributions that were upheld in *McConnell*, this case "is not so much an as-applied challenge as it is an argument for overruling a precedent." *RNC v. FEC*, No. 08-1953, 2010 WL 1140721, at *5 (D.D.C. Mar. 26, 2010), *appeal docketed*, S. Ct. No. 09-1287 (Apr. 23, 2010).

For the first time, RNC devotes substantial attention in its reply brief to the "Cao Ad", the single concrete example of a communication contained in the

complaint: a potential advertisement that was allegedly written without Cao's involvement, but for which the RNC would have liked to consult with him merely "as to [the] timing" of the ad's broadcast.[3] Reply Br. 1, 6-8, 10-11, 10 n.5, 14 n.6. But the three specific ads litigated in *WRTL* were the focus of the case, even though the plaintiff also alleged that it intended to broadcast "materially similar" ads in the future. *WRTL II*, 551 U.S. at 460. By contrast, the Cao Ad is not at all representative of the broad universe of coordinated communications that RNC claims cannot be constitutionally limited, but is arguably close to the outer boundary of what constitutes a coordinated communication. The Court should reject RNC's attempt to allow the proverbial camel to follow its nose under the tent.

[3] RNC suggests (Reply Br. 10-11) that the FEC has failed to adequately rebut its arguments about the Cao Ad, but the single paragraph the FEC devoted to the Cao Ad in its initial brief (FEC Br. 18 n.2) is commensurate with the attention that RNC has devoted to it in this litigation. In over 150 pages of briefing before this Court and the district court, RNC has barely mentioned the ad. *See* Memorandum in Support of Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc [Doc. 19-1] (R. 127-44) (18-page brief does not mention Cao Ad); Supplemental Memorandum in Support of Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc [Doc. 62] (R. 434-63 (30-page brief mentions Cao Ad twice merely as an illustrative tool); Plaintiffs' Memorandum Opposing FEC's Summary Judgment Motion and FEC's Supplemental Response to Certification Motion [Doc. 76] (R. 3049-3100 (46-page brief mentions Cao Ad in one sentence); RNC Br. (59-page brief discusses the Cao Ad in one paragraph).

In any event, RNC's argument about the Cao Ad is more properly viewed as an attack on the FEC's regulations, not the statute, and therefore not appropriately before this Court.[4] Even if this Court considers this claim, however, RNC's argument (Reply Br. 10 n.5) that the "FEC doesn't really think degree matters" is inaccurate. FEC regulations provide detailed guidance about the content and conduct that define a coordinated communication. *See* 11 C.F.R. §§ 109.21, 109.37. The regulations already have the equivalent of de minimis exceptions. *See* 11 C.F.R. §§ 109.21(d)(2) (communication is considered coordinated only if there is "*material* involvement" by the candidate, authorized committee, or political party about issues such as content or timing); 109.21(d)(3) (communication is considered coordinated only if there are "*substantial* discussions" between the payer and the candidate, committee, or party) (emphases added).[5]

Coordination about the timing of an advertisement meets the "conduct" portion of the definition of a coordinated communication because such collaboration provides the candidate sufficient control over the communication to

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[4] Under 2 U.S.C. § 437h, a district court may certify questions to an en banc court of appeals only if they involve colorable challenges to the constitutionality of the Act, not to regulations promulgated by the Commission.

[5] RNC's allegations about the Cao Ad do not indicate whether Cao would have "material involvement" in deciding when to broadcast the ad. It appears, however, that RNC's intent was to create a hypothetical scenario that would be covered by the regulations.

benefit the campaign in the same manner as a contribution. (Obviously, candidates would not agree to any "timing" for an ad if they objected to its content.) *See* Declaration of Martin Meehan ¶ 21 (R. 1064) ("[I]f candidates or their campaign staffs collaborate with the party to decide when or where the party will run an ad, it benefits the candidate's campaign."). As Professor Krasno noted in his expert report, "[g]iving candidates a direct say in whether, when, and how often a party's speech is broadcast essentially gives them a direct say in the content of what the voters get to hear." Jonathan Krasno, Political Party Committees and Coordinated Expenditures in *Cao v. FEC* ("Krasno Rept.") at 18 (R. 1045).

Finally, even if the Court were to find that the Cao Ad could not be regulated as a coordinated communication, the Court should not strike down the statute as unconstitutional. Under the doctrine of constitutional avoidance, the Court should interpret "coordination" in a manner that would, at most, require a narrowing interpretation of the Commission's regulations but leave both them and the statute intact. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Hersh v. U.S. ex rel. Mukasey*, 553

F.3d 743, 761 (5th Cir. 2008) (applying doctrine of constitutional avoidance in interpreting meaning of bankruptcy statute).

4. Preventing Circumvention of Contribution Limits Remains a Valid Justification for the Party Expenditure Provision

In the absence of limits on coordinated expenditures, a donor who wanted to exceed his contribution limit to a candidate could "use a party committee to 'launder' the money" by contributing to the party committee, which could turn around and spend that money in the precise manner directed by the candidate. *See* Krasno Rept. at 4 (R. 1031). RNC argues that, because individuals can already contribute $30,400 per year to parties, and parties can already coordinate at least $43,500 per election cycle with candidates, the opportunity for this circumvention already exists and has been approved by Congress. Reply Br. 11-12. But the law does not look myopically at one donor at a time; it addresses a systemic issue. As *Colorado II* explained:

> If suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify. Indeed, if a candidate could be assured that donations through a party could result in funds passed through to him for spending on virtually identical items as his own campaign funds, a candidate enjoying the patronage of affluent contributors would have a strong incentive not merely to direct donors to his party, but to promote circumvention as a step toward reducing the number of donors requiring time-consuming cultivation. If a candidate could arrange for a party committee to foot his bills, to be paid with $20,000 contributions to the party by his supporters, the number of donors necessary to raise $1,000,000 could be reduced from

> 500 (at $2,000 per cycle) to 46 (at $2,000 to the candidate and $20,000 to the party, without regard to donations outside the election year).

533 U.S. at 460 (using the contribution limits applicable at the time) (footnote omitted).[6] As Professor Krasno explained, without coordinated expenditure limits candidates "could draw a relatively straight line from their own 'maxed-out' donors' contributions to a party and, then, to the benefit of their campaign." Krasno Rept. at 4 (R. 1031). By contrast, under the current limits "an individual donor's contribution might count for a smaller amount of the lower level of party spending." *Id.* The Party Expenditure Provision therefore still diminishes the possibility of corruption, because there is "negligible corrupting momentum to be carried through the party conduit." *Colorado II*, 533 U.S. at 461.

As previously explained (FEC Br. 20-23), prevention of circumvention continues to be a viable rationale for restricting coordinated expenditures. Many of the most important Supreme Court decisions involving campaign finance rely explicitly upon anti-circumvention in upholding the various limits in the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 ("FECA") and Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 — precedent

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[6] There is no merit to RNC's claim (Reply Br. 14) that *Colorado II* "excluded" purported own-speech communications from this anti-circumvention analysis. The Court merely stated that it was not reaching any such claim in its decision, and proceeded to uphold the statute facially based on the anti-circumvention rationale. *Colorado II*, 533 U.S. at 456 n. 17.

that RNC does not dispute. *See* FEC Br. 20-21. Every one of those decisions upholds one or more statutory provisions limiting the indirect flow of money if that flow would be illegal if given directly. *See id.* (citing *Buckley*, *Colorado II*, *McConnell* and other cases limiting the flow of money through intermediaries). *Colorado II* described this rationale as "anti-circumvention," and it remains untouched by *WRTL II* and *Citizens United*, 130 S. Ct. 876 (2010) — neither of which dealt with the flow of contributions.

WRTL involved the *content* of speech: The controlling opinion's concern about "prophylaxis-upon-prophylaxis" was about Congress's efforts to regulate more speech by enacting increasingly broader definitions of what constitutes electoral advocacy — and to do so by drawing a "bright-line" that would inevitably capture some genuine issue advocacy. *WRTL II*, 551 U.S. at 479. In contrast, the kind of anti-circumvention provision at issue here deals only with tracing the flow of money from a donor who would use the unique, close relationship that parties have with their candidates to provide a benefit to those candidates that would be functionally equivalent to a direct donation.

Finally, as previously explained (FEC Br. 20-21), *Citizens United* did not mention the type of circumvention at issue in *Colorado II* and several other Supreme Court cases. In 2001, the Court stated that "all members of the Court

agree that circumvention is a valid theory of corruption." *Colorado II*, 533 U.S. at 456. No Justice in *Citizens United* suggested a change in that view.

5. Political Parties Can Exercise Their First Amendment Rights Through Independent Expenditures

RNC's reply brief again argues (Reply Br. 17-18) that coordinated expenditures cannot be limited because independent expenditures are not "practical" and therefore insufficiently protect First Amendment rights. As the amicus brief filed by Campaign Legal Center makes clear, however, RNC's difficulties in this regard stem largely from a misunderstanding of the law. *See* Brief *Amici Curiae for* Campaign Legal Center and Democracy 21 in Support of Defendant-Appellee at 13-14.[7]

RNC's insistence that it must be able to coordinate with candidates in order to make "independent" expenditures would erode the longstanding constitutional distinction between independent and coordinated expenditures that the Supreme Court has recognized since *Buckley*. The Court there recognized what RNC complains about now — *i.e.*, that independent expenditures are less valuable to a candidate than coordinated expenditures; for that very reason, independent expenditures pose less danger of corruption and therefore cannot be limited.

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[7] Neither of RNC's briefs cites any statutes or regulations that purportedly make it impractical for the party to conduct independent expenditures; instead, RNC relies on self-serving deposition testimony from the party's own Fed. R. Civ. Pro. 30(b)(6) deponent. *See* RNC Br. 19-24; Reply Br. 17-18.

Buckley, 424 U.S. at 47. RNC's comparison (Reply Br. 18) between the supposed burden of making independent expenditures and the burden of the (pre-*Citizens United*) requirement that corporations and unions finance independent expenditures through a PAC makes no sense. *Citizens United* merely gave corporations the ability to make independent expenditures, the same right that RNC now complains is too onerous to exercise.[8] Taking RNC's argument to its logical conclusion would mean that independent expenditures are also too burdensome for corporations to make, but *Citizens United* explicitly limited its holding to those corporate expenditures that are *not* coordinated. *Citizens United*, 130 S. Ct. at 908.

Thus, this Court should reject RNC's "own speech" challenge to the Party Expenditure Provision.

[8] RNC also criticizes (Reply Br. 17) the FEC's focus on the efficacy of using independent party expenditures to benefit candidates, rather than focusing on whether independent party expenditures are sufficient to protect the rights of the parties themselves. But the plaintiffs have all acknowledged that the desire for coordination, particularly in the period shortly before elections when such expenditures are limited, is intended to benefit candidates. *See* FEC Facts ¶¶ 67, 147 (R. 977, 1006) (quoting depositions of all three original plaintiffs acknowledging that they generally prefer coordinated expenditures, including the Fed. R. Civ. Pro. 30(b)(6) deponent for the Republican Party of Louisiana, whose motivation for coordinating was that "it brings the candidate into the message and gives us a greater chance of electing a candidate.")

B. The $5,000 Limit on Political Parties' Contributions Is Constitutional Although It Applies Equally to Political Parties and PACs

The $5,000 limit on contributions that political parties can give to candidates is constitutional. *Buckley* upheld this limit for political committees generally, and party committees have no constitutional right to be treated more favorably than other committees. *See* FEC Br. 25-26. Indeed, *Colorado II* explained that "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution" limits. 533 U.S. at 455. In any event, FECA affords parties numerous advantages over other political committees, including the unique ability to make large coordinated expenditures. *See* FEC Br. 27-33.

RNC does not really dispute that parties are treated favorably as a general matter, but it argues (Reply Br. 19) that "much of the favorable treatment of political parties to which FEC points" would be eliminated if the section 441a(d) limits were struck down, apparently suggesting that party coordinated expenditures would then be subject to the far lower $5,000 limit in 2 U.S.C. § 441a(a)(2). But this is a red herring, because it is hard to imagine a holding that the Constitution bars application of the section 441a(d) limits that would not also bar application of the section 441a(a) limits to party coordinated expenditures. Thus, if RNC were to

prevail on its section 441a(d) claim, the parties would *increase* their already favored status compared with non-party political committees.

RNC uses this same argument — that a victory on one of its section 441a(d) claims could result in the section 441a(a) limit "standing alone" to limit party coordinated expenditures — to suggest that FECA places parties in the same situation parties faced in *Randall v. Sorrell*, 548 U.S. 230 (2006). Reply Br. 19. But that, too, makes no sense. *Randall* struck down a contribution limit that shrank from $3,000 to $400 for both the primary and general election, that applied as a single limit to all affiliated committees of a party, and that included coordinated expenditures. 548 U.S. at 257, 249, 259; *see also* FEC Br. 30-31. Here, RNC challenges a contribution limit of $10,000 ($5,000 for the primary and $5,000 for the general elections) that applies separately to each affiliated party organization (the three national committees and every state and local committee). Of course, national and state party committees also each enjoy the generous section 441a(d) limits at issue in this case. *Randall* employed a five-factor test to determine whether the "suspiciously low" Vermont limits at issue were closely drawn, and one of those factors was that the statute imposed the same limit on political parties as it did on individuals. *Randall*, 548 U.S. at 256-62. But the Court specifically distinguished the far higher federal limits upheld in *Colorado II*, and contrary to

RNC's claim, did not suggest that contribution limits could never be the same for parties and PACs.[9]

RNC again argues (Reply Br. 20) that parties are disadvantaged compared with corporations and labor organizations because RNC believes it is more difficult for parties to make independent expenditures. But the Supreme Court has rejected the idea that parties are too close to their candidates to be make expenditures that are truly independent. *Colorado I*, 518 U.S. at 619-23. No doubt parties would prefer to coordinate with candidates to achieve electoral goals, but the Court recognized in *Colorado II* that this would be the case, 533 U.S. at 453, and in any event this preference is hardly unique to parties. Many corporations and unions, especially "interest groups" that are incorporated, would also appreciate the opportunity to coordinate with their favored candidates. But it is precisely this

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[9] RNC also argues (Reply Br. 20) that Congress cannot take into account the size and population of a jurisdiction because *Randall* "rejected the argument that because Vermont was a small state it could impose low limits." This argument would seem to relate more to RNC's flawed variability claim (*see infra* pp. 25-27), but in any case *Randall* did not question the discretion Congress exercises in setting contribution limits. *See* FEC Br. 48-52. Rather, in discussing the "danger signs" that led the Court to undertake its five-factor analysis, the Court noted that even though the Vermont limits were lower than the limits upheld in *Shrink Missouri*, the Vermont limits were slightly higher per citizen because Vermont's population is only one-ninth the size of Missouri's population. *Randall*, 548 U.S. at 251-53. The Court cautioned that this "does not necessarily mean that Vermont's limits are less objectionable," *id.* at 252, but it never suggested that legislatures could not take factors like population and geography into account.

heightened effectiveness and mutual benefit that caused Congress to find, and the Court to recognize, a potential for corruption in coordinated expenditures, including those made by political parties. *Colorado II*, 533 U.S. at 464-65.

C. The $5,000 Contribution Limit Is Constitutional Although It Is Not Indexed for Inflation

The Commission showed (FEC Br. 33-35) that the $5,000 contribution limit in 2 U.S.C. § 441a(a)(2)(A) is valid although it is not indexed for inflation. The Supreme Court upheld the unindexed limit against a facial challenge. *See Buckley*, 424 U.S. at 35-36. Nevertheless, RNC argues (Reply Br. 21) that the lack of indexing means inflation continually decreases the value of the limit to the point that it now falls below the level that Congress judged was adequate to deter corruption. However, in enacting FECA, Congress made a deliberate choice to index some limits and not others. "Courts . . . must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002) (citation omitted). Members of Congress operate under these limits every election cycle, and they have ample opportunity to index them if they believe the existing limits are inadequate.

No court has ever found indexing alone renders a contribution limit unconstitutional,[10] nor has a court ever required Congress to revisit its limits to

[10] *See Ognibene v. Parkes*, 599 F. Supp. 2d 434, 449-50 (S.D.N.Y. 2009) (explaining that under *Randall*, the absence of indexing alone is not determinative).

ensure their continued efficacy, as RNC urges this Court to do. RNC relies heavily (Reply Br. 21) on *California Prolife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999), but that district court case did not address indexing, and the variable limit system it found problematic is not relevant here because it applied *within* specific races. *See infra* pp. 26-27. And the RNC fails to counter the Commission's showing that a lack of indexing was just one of many factors *Randall* found relevant in evaluating low contribution limits. Thus, there is no basis to invalidate the $5,000 limit simply because it is not indexed for inflation.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE FEC AS TO ALL NON-CERTIFIED ISSUES

As the FEC's initial brief stated, this Court should determine that the district court correctly found that all the non-certified issues are either "insubstantial [or] settled." *Caifornia Med. Ass'n v. FEC*, 453 U.S. 182, 192 (1981). If this Court believes any of these issues are substantial enough that they should have been certified, the Court should nonetheless reject them on the merits.

A. The District Court Correctly Found RNC's Claim of Vagueness and Overbreadth to Be Frivolous

RNC's claim of vagueness and overbreadth was properly found to be "frivolous" by the district court. *Cao v. FEC*, No. 08-4887, Order and Reasons (Berrigan, J.) [Doc. #89], slip op. at 78-79, 2010 WL 386733, at *40 (E.D. La. Jan.

27, 2010) (R. 3229-30) ("Order"). In its reply brief, RNC pursues this claim by incorrectly citing the holdings of cases and by suggesting that the FEC should ignore precedent.[11] This Court should affirm the district court's grant of summary judgment to the FEC.

RNC's claim stems from its assertion that *Buckley* created a general constitutional test for all campaign finance laws when it used the words "unambiguously campaign related." *See* FEC Br. 38. The Court's use of that phrase, however, was merely part of the Court's explanation of how "expenditure" should be read in the context of independent expenditures made by individuals and groups *other than* political committees (like RNC). *Id.; Buckley*, 424 U.S. at 79-81; *see also RNC v. FEC*, 2010 WL 1140721 at *5 (describing RNC's "unambiguously campaign-related" as just "another way of describing the express advocacy test….").

RNC now insists that because *Buckley* used the term "expenditure" rather than "independent expenditure" in its analysis of the issue, it might also have been talking about coordinated expenditures. *See* Reply Br. 25 (citing *Buckley*, 424 U.S. at 80); Reply Br. 26 n.10. *Buckley* flatly contradicts this claim. A mere two pages

[11] RNC also criticizes the FEC for responding to the "terminology" RNC has "freshly minted" rather than the "substance" of its arguments. Reply Br. 24. But RNC's constantly changing and novel terminology are not terms of art, do not appear in the case law, and have no constitutional authority.

before the part of *Buckley* RNC cites, the Court stated that the definition of "contributions" includes "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley*, 424 U.S. at 78. On the page of *Buckley* immediately after the page cited by RNC, the Court stated that the provision at issue "encompasses purely independent expenditures uncoordinated with a particular candidate or his agent." *Id.* at 81. RNC's claim of ambiguity about the Court's interpretation of "expenditure" misreads a single sentence of the opinion, devoid of the context and broader discussion into which the sentence fits.

RNC also accuses (Reply Br. 26) the FEC of "not provid[ing] the line" that divides constitutional and unconstitutional limits on coordinated expenditures. But the FEC's role is to interpret and enforce FECA, guided by the Act's legislative history and constitutional interpretations from the courts. As stated above, the Supreme Court has defined "contributions" as including "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley*, 424 U.S. at 78. More recently, the Court explained that it has relied on the Act's legislative history for "guidance in differentiating individual expenditures that are contributions . . . from those treated as independent expenditures … ." *McConnell*, 540 U.S. at 222 n.99. "And the legislative history … described as independent *an expenditure made by a supporter*

completely on his own, and not at the request or suggestion of the candidate or his agen[t]." *Id.* (quoting *Buckley* and Senate report; citations and quotation marks omitted) (emphasis added). The Court gave this explanation as part of its decision upholding a BCRA amendment that applied the "same coordination rules to parties as to candidates"; the Court upheld the provision against a claim of overbreadth and vagueness even though the statute permits a "finding of coordination even in the absence of an agreement" between the spender and the candidate or party. *Id.* at 220.

Within these parameters and consistent with guidance from other courts, the Commission has promulgated regulations that define "coordinated communication" and "party coordinated communication." 11 C.F.R. §§ 109.21, 109.37. *See also supra* p. 9. These rules draw a line between independent and coordinated spending well within the Commission's delegated authority to construe these terms. *See* BCRA § 214(c) (ordering the Commission to promulgate "new regulations [on] 'coordinated communications'"); *McConnell*, 540 U.S. at 219-220 (explaining same). In turn, these lines are drawn well within Congress's power to regulate coordinated expenditures as contributions, regardless of RNC's overarching and unsupported theories such as its invented "unambiguously campaign related" principle.

The case law does not support RNC's implication that the FEC's regulations are overbroad. To the contrary, the most recent case examining the constitutionality of the regulations found that they failed to regulate enough activity. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008); FEC Br. 41-42. Moreover, RNC grossly misstates the holdings of several other courts. None of these cases supports its claim that "express-advocacy is the only expressive activity that may [*sic*] considered coordinated." Reply Br. 27 n.11. *See Orloski v. FEC*, 795 F.2d 156, 166-67 (D.C. Cir. 1986) (explaining that the "express advocacy" standard is limited "to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions."); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993) (judgment vacated by *Colorado I*);[12] *Clifton v. FEC*, 927 F. Supp. 493, 500 (D. Me. 1996) (stating only that "the mere act of communication between a corporation and a candidate" does not by itself constitute coordination), *remanded in relevant part*, 114 F.3d 1309, 1316-17

[12] Although both the district court and Tenth Circuit decisions were superseded by the Supreme Court's decision in *Colorado I*, the Tenth Circuit explicitly rejected the lower court's view that express advocacy was required before a coordinated communication could be regulated as a contribution: "Giving deference to the FEC's interpretation, we hold that § 441a(d)(3) applies to coordinated spending that involves a clearly identified candidate and an electioneering message, *without regard to whether that message constitutes express advocacy*." *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995) (emphasis added).

(1st Cir. 1997) (declining to reach question of whether express advocacy is required for coordinated voting guides); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 86-87 (D.D.C. 1999) ("The quasi-statutory argument is that under Supreme Court precedent, the term 'expenditure' has been limited throughout the Act to express advocacy. This position is untenable." (Footnote omitted.)).

The district court's determination that RNC's vagueness and overbreadth claim is "frivolous" should be affirmed.

B. RNC's Claims Based on the Variability of the Party Coordinated Expenditure Limits Are Frivolous

As we explained (FEC Br. 48-57), the party coordinated expenditure limits are constitutional even though they vary depending, in part, upon the voting age population of different states. RNC fails to counter our showing (FEC Br. 48-50) that the Supreme Court has deferred to Congress's discretion to set specific contribution limits, and has never suggested that legislatures cannot take into account the relative size and population of a jurisdiction. In fact, no court has ever found variability in contribution limits for different races to be a constitutional defect.

RNC discounts (Reply Br. 29-30) *Randall*'s reference to the "far less problematic" Party Expenditure Provision limits upheld in *Colorado II*, but the fact remains that the Supreme Court *did* uphold the constitutionality of those limits despite their variability, and it likewise upheld contribution limits that varied by

office and size of constituency in *Shrink Missouri*. *See* FEC Br. 51. Moreover, although *Randall* found contribution limits to be too low, it took no issue with the variation of the limits among different offices (from $200 to $400) and did not suggest that population size or geography were improper tools to determine an appropriate contribution limit. Rather, in comparing the Vermont limits to those the Court had upheld in *Buckley* and *Shrink*, the *Randall* Court specifically examined population to assess Vermont's limits in real dollars, and thus suggested that such factors may be relevant to the constitutional analysis.

RNC again relies on the district court decision in *California Prolife*, but the district court in the present case correctly found that reliance "not persuasive" (Order at 87), because the potential variation in contribution limits in the California case operated *within specific races*. *California Prolife* struck down a lower contribution limit of $100 where a higher limit of $200 was available only to candidates who agreed to expenditure limits. 989 F. Supp. at 1282.[13] Thus, as the district court below explained (Order at 86), candidates competing in the same race could be subject to different limits, which is not permissible. *See Davis v. FEC*, 128 S. Ct. 2759, 2770-71 (2008) (Court has "never upheld the constitutionality of a

[13] The Ninth Circuit affirmed the grant of a preliminary injunction, but it did not discuss the merits in detail and emphasized the limited nature of its inquiry: "We do not, however, decide whether the application of the legal principles was or was not erroneous." *California Prolife Council PAC v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999).

law that imposes different contribution limits for candidates who are competing against each other."). RNC claims (Reply Br. 28) that *California Prolife* held that there is no anti-corruption interest for lower limits where limits vary "for the same or similar offices," but the case held no such thing. In any event, the variable limits in FECA do not apply differently to competing candidates.

Finally, RNC fails to counter the Commission's showing (FEC Br. 52-56) that RNC has provided no evidence that candidates are unable to wage effective campaigns — the proper test for evaluating contribution limits, as the Supreme Court has emphasized. *See Randall*, 548 U.S. at 248; *Shrink*, 528 U.S. at 380; *see also Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992). For these reasons, this Court should affirm the district court's finding that this question is frivolous.

C. The District Court Correctly Found Plaintiffs' Remaining Challenges to the $5,000 Contribution Limit to Be Frivolous

As the FEC's earlier brief explains, (FEC Br. 58-59) the $5,000 limit at 2 U.S.C. § 441a(a)(2)(A) does not prevent parties from fulfilling their historic role. Although the Framers designed our constitutional system in part to limit the potential corruptive threats posed by political parties, the parties have never been financially stronger, they raisied more than $1 billion in each of the last three two-year election cycles, and enjoy ample opportunities to participate in the electoral process. RNC's perfunctory response (Reply Br. 31) to the Commission's arguments simply refers to a statement in *Randall* that excessively low limits can

harm parties and their supporters. But that general statement says nothing about the many avenues parties have to help candidates under FECA, and *Randall* itself stressed that in evaluating contribution limits, the Court had to "determine whether [the state's] contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 21). *Randall* determined that the very low limits at issue would reduce the parties' voices to a whisper, but there is no such evidence here, and a wealth of evidence to the contrary. Thus, the district court correctly found this claim to be frivolous.

CONCLUSION

For the foregoing reasons and those explained in our opening brief, all certified questions should be decided in favor of the Commission and the district court's grant of summary judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I will cause the Sur-Reply for the Federal Election Commission to be filed electronically using the Court's CM/ECF system, which will then send a notification of such filing to counsel below, on the 26th day of April 2010. Paper copies will also be mailed to:

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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