United States District Court
Eastern District of Louisiana
New Orleans Division

Anh "Joseph" Cao, **Republican National Committee**, and **Republican Party of Louisiana**, ***Plaintiffs***, ***v.*** **Federal Election Commission**, ***Defendant***	**Case No. 2:08-cv-4887-HGB-ALC** **Section C, Mag. 5**

Supplemental Memorandum In Support of *Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc*

In their *Memorandum* (Dkt. 19-2) supporting *Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc* (Dkt. 19), Plaintiffs demonstrated that they had standing and that the questions to be certified were unresolved issues of constitutional law and proper for certification. The present memorandum supplements that *Memorandum* (and uses its terminology).

In Defendant's *Response* (Dkt. 28), the FEC asserted a more substantive role for this court in considering the merits than statute and precedent allow. In **Part I**, Plaintiffs show that this Court's role now is to certify questions unless they are "frivolous."

The FEC's *Response* further challenged whether the proposed questions ought to be certified based on various arguments, including lack of factual development[1] and the substantive merits argument that the unambiguously-campaign-related principle is not a first-principle of constitutional campaign-finance jurisprudence. In **Part II**, Plaintiffs will: (**A**) explain that such substantive arguments are improper, but that questions based on the unambiguously-campaign-related principle cannot, as a matter of law, be frivolous because a U.S. Court of Appeals has expressly held that the principle governs all campaign-finance law and because it is the same analysis argued by Senator McCain et al. in *McConnell v. FEC*, 540 U.S. 93 (2003), and adopted by that decision; (**B**) explain that questions based on the issue of whether one's "own speech" may be treated as a regulable "contribution" cannot, as a matter of law, be frivolous because the United States Supreme Court has expressly left that issue undecided; (**C**) show that current "independent expenditure" rules actually prevent political parties from being able to engage in their "own speech" (so that they must be able to coordinate speech to make it truly their "own speech"); and (**D**) summarize how each proposed question is non-frivolous and should be certified.

Argument

I. This Court Should Certify Non-Frivolous Questions.

The motion before this Court is unusual. Unlike a summary judgment motion, *Plaintiffs' Motion to Certify* will not be decided by the district court on the merits. Rather, the governing statute, 2 U.S.C. § 437h, provides that, when parties with statutory standing bring an action questioning the constitutionality of the Federal Election Campaign Act, "[t]he district court immedi-

[1] Additional factual development has occurred. *See Proposed Findings of Fact* (Dkt. 38) and Plaintiffs' *Supplemented Proposed Findings of Fact*. Facts are further discussed herein as relevant.

ately shall certify all questions of constitutionality . . . to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." The en banc appellate court, then, has the authority to make determinations as to the merits of the constitutional claims.

In its *Response*, the FEC effectively seeks a result on the merits from this court. However, that is not the appropriate response to *Plaintiffs' Motion to Certify*. Rather, under § 437h, the district court has a more limited role. The district court is instructed to *immediately* certify all non-frivolous constitutional questions to the Court of Appeals. *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 192 n.14 (1981). The Fifth Circuit determined that a claim is not frivolous if it raises "colorable constitutional issues." *Khachaturian v. Federal Election Comm'n*, 980 F.2d 330, 332 (5th Cir. 1992). As further explained below, each of the questions outlined in *Plaintiffs' Motion to Certify* raises colorable constitutional claims and, therefore, is not frivolous.

The FEC misinterpreted the certification standard to include a "requirement of substantiality." *Response* at 1. However, the leading Fifth Circuit case on this issue, *Khachaturian*, does not require a showing of substantiality. In that case, the lower court prematurely certified the constitutional questions. *Khachaturian*, 980 F.2d at 331. The Fifth Circuit remanded the case, explaining that only non-frivolous questions may be certified, i.e. those that raise "colorable constitutional issues." *Id*. at 332. The Fifth Circuit then explained that the district court, after determining that the claims are not frivolous, must immediately take four steps. First, it must "[i]dentify constitutional issues in the complaint." *Id.* (*quoting Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975)). As the questions will be identified while determining if they are frivolous, this step will already be completed. Next, the district court must "[t]ake whatever may be necessary in the form of evidence—over and above submissions that may suitably be handled through judicial

notice. . . ." *Id*. Notably, this evidence is limited to only what is necessary for the certification of the constitutional questions. Third, the district court must "[m]ake findings of fact with reference to those issues." *Id*. Finally, the court must "[c]ertify to [the court of appeals] constitutional questions arising from [the above]. . . ." *Id*. All of these steps must take into consideration Congress' insistence that the questions be certified "immediately." 2 U.S.C. § 437h.[2]

Here, the parties have engaged in lengthy discovery and are presenting proposed findings of fact to this Court. With this developed factual record, this Court must immediately certify all "'colorable constitutional issues,'" *Khachaturian*, 980 F.2d at 332 (*quoting Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990)), i.e., those that are non-frivolous.

II. The Questions Are Non-Frivolous And Should Be Certified.

Given the non-frivolous standard, this Court's task is to apply that standard to Plaintiffs' Questions to determine if they should be certified.

This application is clearly not to involve an analysis on the *merits* because the merits are to be considered by the en banc appellate court. This is not a summary judgment proceeding, so merits determinations have no place here, only a determination as to whether the Questions are non-frivolous.

That Plaintiffs' Questions are non-frivolous has already been clearly demonstrated in Plaintiffs' *Memorandum*. But in its *Response*, the FEC attempted to show that certain questions should not be certified because it took issue *on the merits* of two asserted overarching first-principles of constitutional law. These merits arguments have no place in this certification proceeding, and the fact that the FEC resorted to them should be viewed as a concession that the FEC has no sound arguments as to why the questions at issue are non-frivolous.

[2] *See Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (entire process took one month).

However, because these merits arguments have been raised as to the overarching first-principles, they are addressed to show that they do not alter the fact that Plaintiffs' Questions should be certified because the Questions are non-frivolous. So Plaintiffs begin by addressing the unambiguously-campaign-related principle that governs all campaign-finance law, *see* II-A, and the open question of whether coordinated expenditures that constitute one's "own speech" may be treated as a "contribution," *see* II-B and II-C.

A. Whether Government May Regulate First Amendment Activity That Is Not "Unambiguously Campaign Related" Activity Is a Non-Frivolous Issue.

In its *Response*, the FEC asserted that "Questions 2 and 5 are insubstantial to the extent that they argue that it is unconstitutional to limit any coordinated expenditures that are not 'unambiguously campaign related.'" *Response* at 13.[3] This assertion was improper and erroneous.

Plaintiffs' *Memorandum* had already clearly established that the application of the unambiguously-campaign-related principle was not a frivolous issue. *See Memorandum* at 6-9. It did so, inter alia, by citing a U.S. Court of Appeals decision holding that "'after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular . . . candidate."'" *Memorandum* at 7 (*quoting North Carolina Right to Life v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) (*quoting Buckley v. Valeo*, 424 U.S. 1, 80 (1976))). Plaintiffs' *Memorandum* also quoted *Leake*'s holding that the appeal-to-vote test in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007) ("*WRTL-II*"), implemented the unambiguously-campaign-related principle. *Id.* at 7 n.8 (*quoting Leake*, 525 F.3d at 282-83. And it showed how the principle underlay implementing tests in *Buckley*, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), and (as noted *supra*) *WRTL-II*.

[3] The FEC conceded that "[t]o the extent Questions 2 and 5 are not dependent on plaintiffs' 'unambiguously campaign related' argument, they may not be insubstantial . . . ." *Id.*

Whether the FEC agreed with *Leake* or not, the mere presence of *Leake* was sufficient to show that the issue concerning the unambiguously-campaign-related principle was *non-frivolous* (and also substantial). Even if the FEC disagreed with Plaintiffs' analysis of *Buckley*, *MCFL*, and *WRTL-II* (all improper merits arguments) it had to deal with *Leake*'s unmistakable agreement with Plaintiffs' analysis. The FEC's task under the controlling non-frivolous test for certification was not to debate the merits (which are only to be considered by the en banc appellate court) but to somehow show that *Leake* did *not* say what it said, or to somehow prove that a federal appellate court's holding that a constitutional principle controls campaign-finance law did *not* prevent an issue concerning the application of that principle from being non-frivolous.

The FEC failed to meet this burden. It did not really try. It did not even mention *Leake* in its *Response*. *See Response* at 13. Instead, it argued the merits. It tried to limit the application of *Buckley*'s analysis. *Id.* It argued that *McConnell*, 540 U.S. 93, had somehow vitiated the unambiguously-campaign-related principle, although of course *Leake* was decided *after* *McConnell* (as was *WRTL-II*, which *Leake* expressly held applied the unambiguously-campaign-related principle by creating the appeal-to-vote test for "electioneering communications," *see supra*).

It was improper for the FEC to argue the merits, as it clearly did, in an effort to convert this certification process into the equivalent of a summary judgment proceeding. But even on the merits, the FEC was wrong because, as it well knows (as the defendant in *McConnell*), the unambiguously-campaign-related principle was precisely the constitutional analysis argued in *McConnell* by Senators McCain and Feingold and the other primary sponsors of McCain-Feingold[4] to justify extending regulation of communications from express advocacy to "election

[4] McCain-Feingold is the popular name of the Bipartisan Campaign Reform Act of 2002

eering communications."

In *McConnell*, the campaign-finance "reformers" (McCain-Feingold's primary sponsors and supporting reform-community counsel) argued that, although the electioneering-communication definition went beyond express advocacy, it was a constitutional "adjustment of the definition of which advertising expenditures are *campaign related*." *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93 (emphasis added) (*available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf).

By this argument, the reformers clearly recognized that First Amendment activity in the campaign-finance context may only be regulated if it is sufficiently "*campaign* related." In other words, the activity must be related to a candidate's *campaign* for election, i.e., it must be about whether one should *vote* for or against that person as a *candidate*. So to be regulable, the First Amendment activity must involve more than just being about *issues* in public debate during an election that may involve the candidate or just being somehow related to an *election*.

By "campaign related," the reformers meant *unambiguously* campaign related because they argued that the "[d]isclosure rules . . . 'shed the light of publicity on spending that is *unambiguously campaign related* but would otherwise not be reported.'" *Id.* at 58 (emphasis added) (*quoting Buckley*, 424 U.S. at 80. They expressly urged approval of "electioneering-communication" regulation based on *Buckley*'s unambiguously-campaign-related analysis:

> Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not 'dissolve in practical application,' 424 U.S. at 42; and they should be 'directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*,' *id*. at 80; *see id*. at 76-82. Those are *precisely the precepts to which Congress adhered in framing Title II*.

Id. at 62 (*quoting Buckley*) (emphasis added).

("BCRA"), Public Law 107–155, 116 Stat. 81.

So the reformers recognized: (a) that the First Amendment and the dissolving-distinction problem, *see Memorandum* at 6, require a bright-line test[5] for regulable First Amendment activity; (b) that *Buckley* established the unambiguously-campaign-related analysis as that bright-line test for identifying regulable communications; and (c) that *Congress* itself had recognized the principle and based its campaign-finance legislation in BCRA on it.

Comparing the reformers' twin "precepts" for regulable speech with what *McConnell* held makes it clear that *McConnell* endorsed the reformers' interpretation of *Buckley* as the controlling analysis that permitted regulation of "electioneering communications" in addition to express advocacy. The reformers' controlling "precepts" were that the regulation be neither (1) vague nor (2) overbroad (beyond unambiguously-campaign-related activity). *See supra*. *McConnell* also said that the constitutional analysis required "avoid[ing] . . . vagueness and overbreadth," 540 U.S. at 192. And as to the nature of the referenced "overbreadth" precept, *McConnell* said it was "'[t]o insure that the reach' of the disclosure requirement was 'not impermissibly broad,'" for which it cited and quoted the very *Buckley* passage to which the reformers pointed for the unambiguously-campaign-related precept, *id.* at 191 (citation omitted).

So *McConnell* plainly recognized the analysis proffered by reformers as its own from *Buckley* and employed the unambiguously-campaign-related principle as the centerpiece of its holding that the government could regulate not only express advocacy but also "electioneering communications." In other words, the express-advocacy test was created in the cited portion of *Buckley* precisely to comply with the articulated unambiguously-campaign-related principle, and *McConnell* (agreeing with the reformers) returned to the same principle to hold that Congress

[5] The reformers conceded the necessity of bright-line tests, arguing that their new "standards for defining which ads will be treated as campaign-related squarely serve a compelling interest in using clear and objective lines to frame any rule that affects speech." *Id.*

could reach further to encompass "electioneering communications," not just express advocacy.[6] So when *McConnell* said that it considered the express-advocacy line inadequate alone to capture electioneering activity, it was simply adding to it the "electioneering communication" line based on the *same principle* that gave rise to the express-advocacy line. That principle gave rise to both tests, just as it governs all of campaign-finance law, as *Leake* recognized. *See supra*.

This unambiguously-campaign-related principle and its implementing tests and constructions have been recognized as controlling campaign-finance law by *Buckley*, *MCFL*, *McConnell*, and *Leake*, by lower federal courts,[7] and by FEC commissioners.[8] To now place off limits in the present context the application of the very constitutional analysis that was employed by Congress and

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[6] *WRTL-II* further employed the unambiguously-campaign-related principle in narrowing the scope of regulable "electioneering communications" to those fitting its appeal-to-vote test in an as-applied challenge, 551 U.S. at 470, as *Leake* recognized, *see supra* at 5.

[7] *See New Mexico Youth Organized v Herrera*, No. 08-1156 (D. N.M. Aug. 3, 2009) (mem. and order granting summ. j.) (recognizing and applying unambiguously-campaign-related analysis as threshold requirement); *Broward Coalition of Condominiums, Homeowners Associations and Community Organizations v. Browning*, No. 4:08-cv-445, 2009 WL 1457972 (same); and *National Right to Work Legal Defense and Education Foundation v. Herbert*, 581 F. Supp. 2d 1132, 1149 (D. Utah 2008) (same).

[8] This unambiguously-campaign-related analysis has been expressly recognized by FEC Commissioners. In their *Statement of Reasons* (Dec. 16, 2003) in Matters Under Review ("MURs") 5024, 5154, and 5146 (*available at* www.fec.gov), Chair Weintraub and Commissioners Thomas and McDonald noted that *Buckley* expressed concern about reporting provisions "that might be applied broadly to communications discussing public issues which also happened to be campaign issues," and so imposed the express-advocacy construction. *Id.* at 2. "[T]he *Buckley* Court explained the purpose of the express advocacy standard," they declared, which "was to limit application of the . . . reporting provision to 'spending that is *unambiguously related* to the campaign of a particular federal candidate.'" *Id.* (emphasis in *Statement*) (*quoting Buckley*, 424 U.S. at 80). The Commissioners quoted 424 U.S. at 82: "[u]nder an express advocacy standard, the reporting requirements would 'shed the light of publicity on spending that is *unambiguously campaign related* . . . .'" *Statement* at 2 (emphasis in *Statement*). A January 22, 2009 *Statement of Reasons* in MUR 5541 (November Fund) by Vice Chair Petersen and Commissioners Hunter and McGahn emphasized the need to "fully incorporate important principles in recent judicial decisions," including *WRTL-II*, 551 U.S. 449, "and the Fourth Circuit's persuasive decision in . . . *Leake*[, 525 F.3d 274]." *Id.* at 2 (citations omitted).

the reformers to enact and defend BCRA and by *McConnell* to *expand* the regulation of First Amendment activity to now *limit* regulation of First Amendment activity would be the very sort of bait-and-switch denounced in *WRTL-II*.[9] And it would discount the application of the same principle by *WRTL-II*, and *Buckley*, and *MCFL* to *limit* the scope of regulable First Amendment activity, which applications show the propriety of applying the same analysis here for the same purpose.

By this discussion of the merits of the questions related to the unambiguously-campaign-related principle, Plaintiffs have demonstrated that the issue is non-frivolous, which is all that they are required to show for certification. Of course, they adequately established that with their initial *Memorandum*. Also, although it is not required, they have shown the issue to be substantial and meritorious. And they have highlighted that the FEC has improperly attempted a merits argument and then inadequately dealt with the merits, failing to mention *Leake* (or to tell this Court of the reformers' argument adopted in *McConnell*, of which FEC as defendant was well aware and which it should have dealt with as it was purporting to show on the merits that the question was frivolous). Questions relating to application of the unambiguously-campaign-related principle (Questions 2 and 5) are non-frivolous and should be certified.

B. Whether Government May Treat One's "Own Speech" as a "Contribution" By Reason of Coordination Is a Non-Frivolous Issue.

Just as the FEC improperly took issue *on the merits* with the well-established

[9] This is the sort of bait and switch that Chief Justice Roberts denounced at oral argument in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"): "In McConnell against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and now you're telling us that it's already been decided. It's a classic bait and switch." Transcript of Oral Argument at 25, *WRTL-I*, 546 U.S. 410 (*available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1581.pdf). *See also WRTL-II*, 551 U.S. at 480 (rejecting another bait and switch).

unambiguously-campaign-related principle, it has done the same with the core issue in Questions 3 and 6. That issue is whether coordinated expenditures may constitutionally be deemed "contributions" where the activity "constitutes the party's own speech, as opposed to merely paying the candidate's bills." *Memorandum* at 9.

In its *Response*, the FEC pronounced this issue and these questions "insubstantial" because "[i]f coordinated express advocacy were outside the reach of Section 441a(d), it would render the provision virtually meaningless . . . ." *Response* at 15. Whether that is so is a *merits* question for the en banc appellate court to consider and has no place before this Court. The FEC again erroneously attempted to convert this certification proceeding into the equivalent of a summary judgment proceeding. As to the issue that *is* before this Court, i.e., whether the question is non-frivolous, the FEC did not respond to arguments proving the issue certifiable.

In their *Memorandum*, Plaintiffs set out how "*Colorado I* . . . recognized the distinction between coordinated disbursements for the party's own speech as opposed to merely paying a candidate's bills, but it left the issue of coordinated disbursements for another day, deciding only that the Party Expenditure Provision limits were unconstitutional as to independent party disbursements." *Memorandum* at 10 (*citing Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 625-26 (1996)). Plaintiffs' *Memorandum* also noted that "this case focuses largely on the issue expressly left open in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), . . . ," *Memorandum* at 2, with citation to both majority and dissent opinions leaving the question open, *id.* at 2 n.2. *See also id.* at 10 (same).

Now, if the United States Supreme Court takes notice of an important constitutional question in an important constitutional case and *expressly* declares that it is purposely leaving that question *open* for another case, the question is non-frivolous as a matter of law. To argue otherwise is

to say that the Supreme Court *itself* was frivolous for acknowledging, discussing, and reserving the question. If such a reserved issue is frivolous, "frivolous" has lost all meaning. The FEC's effort to dodge the bedrock fact that the Supreme Court expressly reserved this question by arguing the merits must be disregarded as immaterial to the present proceeding.

While a certification proceeding is not the place to argue the merits, since the FEC has resorted to arguing the merits, Plaintiffs will briefly touch on the merits to show the FEC's error. The difference between what may be deemed a regulable "expenditure" and what may be deemed a regulable "contribution" was set out in the seminal *Buckley* decision. The difference is important because *Buckley* permitted greater regulation of "contributions" than of "expenditures." In its "General Principles" discussion, the unanimous Supreme Court in *Buckley* explained how to make the distinction between expenditures and contributions that is at issue here. As to an expenditure limitation, *Buckley* said this:

> The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except candidates, political parties, and the institutional press [FN19] from any significant use of the most effective modes of communication. [FN20] Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns [FN21] and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

424 U.S. at 19-20. The Court then contrasted expenditures with contributions in ways that inform the meaning of both and provide the means to distinguish them:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a *general expression of support for the candidate and his views*, but does not communicate the *underlying basis for the support*. The quantity of communication by the contributor does not increase perceptibly with the size of his contri-

> bution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. [FN22] A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the *symbolic expression* of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21 (emphasis added). Keys to the Supreme Court's analysis are (a) whether a disbursement is just a "general expression of support" (contribution), i.e., a "symbolic expression of support," or whether it "communicate[s] the underlying basis for the support" (expenditure) and (b) the distinction in the last quoted sentence, which provides a generally-applicable rule for distinguishing between contributions and expenditures, i.e., does a payor's disbursement fund speech to the voters that is attributable to the payor (the payor's own speech), or does the disbursement only fund speech to the voters if another uses the funds to pay for speech attributable to that other person? A political party's "own speech" would be speech attributable to it, even if input on the speech—as to details such as content, media, and timing—were received from others, such as a party's media consultants, script writers, polling services, officials, constituency, ideological allies, and candidates. Regardless who came up with an idea, particular language, or means of communication, if the speaker adopts that idea, language, or means as its own, so that it is attributable to that speaker, it is the speaker's own speech, just as the President's State of the Union Speech is his own, even if his speech writer drafted it and various cabinet members, officials, and confidants made editing recommendations. Central to the concept of "own speech" in *Buckley* is whether the disbursement at issue is for speech expressing the speaker's support in some fashion[10] for a candidate other than by the symbolic act of making a contribution.

[10] Expressions of support include minimal statements, as recognized in *Buckley*, 424 U.S. at

The FEC's own regulations as to disclaimers provide guidance as to who is speaking, following the Supreme Court's *Buckley* focus on who is *paying* for a communication. First, if a political party (e.g., LA-GOP) issues an agency letter to another political party (e.g., RNC) for authorized spending (under 2 U.S.C. § 441a(d)), it is the party actually paying for the communication that is attributed authorship, i.e., paid for by _____," even if the payor is acting as "the designated agent" for the other political party. 11 C.F.R. § 110.11(d)(i). So even though LA-GOP might approve, have input in, or even author an ad paid for by RNC, if RNC pays for it the disclaimer must identify RNC as the source of payment, i.e., it is RNC's own speech, not LA-GOP's. Second, the regulations actually equate "paid for by" and "made by," so that who makes the payment controls whose "own speech" it is. *See* 11 C.F.R. § 110.11(d)(i) ("paid for by"), (ii) ("made by" and "paid for"), (iii) ("paid for by"). Third, the regulations confirm this understanding in the non-political-party context requiring the payor to be listed in the disclaimer, even where a communication is "authorized by a candidate . . . but is paid for by any other person"—authorization is merely approval and does not convert the payor's own speech into the candidate's own speech. 11 C.F.R. § 110.11(b)(1)-(3).

As applied, the *RNC Cao Ad* and *LA-GOP Cao Ad* are clearly RNC's and LA-GOP's own speech, respectively, because the ads would be attributable to them and bear a disclaimer showing that they paid for them. Moreover, the ads, in *Buckley*'s words, communicate the underlying basis for the support and are not merely general expressions of support for the candidate and his views, i.e., they are not merely symbolic expressions of support. Coordination with Rep. Cao as to timing would in no way alter the fact that these ads would be RNC's and LA-GOP's own speech. The ads are plainly more in the nature of a party's own speech than in the nature of

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44 n.52, and 11 C.F.R. § 100.22(a) (e.g., "Mondale!").

merely paying a candidate's bills. Disbursements for them would be expenditures, not contributions. They may not be limited as if they were contributions.

The "own speech" protection of disbursements only arises where there is "speech," so that paying a candidate's bills for rent, polling, utilities, and other activities without a communication element would always be in-kind contributions. Thomas Josefiak identified a door hanger project as being more in the nature of paying a candidate's bills than a party's "own speech," drawing a careful line between the two concepts. *See* Exhibit 1, *Deposition of Thomas J. Josefiak* at 113:6-124:9 ("Josefiak Dep.").[11] Any further drawing of a line would of course be a task on the merits for the en banc appellate court to do, just as the United States Supreme Court did in *MCFL*, when it drew the line marking which corporations were exempt from the ban on corporate "independent expenditures" at 2 U.S.C § 441b. *See MCFL*, 479 U.S. at 263-64.

From the foregoing, it is clear that there is a strong constitutional basis for exempting "own speech" from being treated as a "contribution" by reason of coordination. And contrary to the FEC's argument, there remain large numbers of disbursements under 2 U.S.C. § 441a(d) subject to treatment as contributions by reason of coordination (although this is irrelevant if the Constitution requires the outcome Plaintiffs' seek). The FEC was wrong to argue that such was the case. It was wrong for arguing the merits and on the merits.

The preceding merits discussion, of course, may be disregarded because it is immaterial to the certification proceeding. But to the extent that the FEC's merits argument lends any credibility to its argument that the "own speech" questions should not be certified, the preceding discus-

[11] While the door hanger contained a speech component, it was not a public communication and most of the payment was for people to distribute it. As Josefiak noted, "in this case it would be part of a campaign speech in the sense that door hangers are part and parcel of why these people were hired in the first place. And, therefore, they . . . couldn't be delivering the RNC's speech, they'd be delivering the speech of the campaign." Josefiak Dep. at 121:8-16.

sion refutes such a notion. In sum, questions relating to application of the "own speech" principle (Questions 3 and 6) are non-frivolous and should be certified.

C. "Independent Expenditure" Rules Make "Own Speech" Impossible Without Coordination, So Coordinated "Own Speech" Is Constitutionally Required.

The issue of treating a political party's "own speech" as a "contribution" if coordinated is also non-frivolous because the rules restricting how parties must make independent expenditures strip that option of effectively allowing a political party's "own speech," which is a political party's First Amendment right. The problems were well expressed in depositions in this case.

Representative Cao explained that the National Republican Congressional Committee ("NRCC") had made some "robocalls" as independent expenditures that "were so . . . badly done and . . . counterproductive that we wanted them to stop." Exhibit 2, *Deposition of Anh "Joseph" Cao* (Excerpted) at 34:8-12 ("*Cao Dep.*"). "[W]e wanted them to stop because it was hurting us more than it helped us," he added. *Id.* at 34:17-19. The problem was that then-candidate Cao needed Democratic votes in a heavily Democratic district, and the calls were attacking the Democratic party, which alienated potential Democratic voters for Cao. *Id.* at 35:1-21. Of course, the underlying problem, Cao said, was that "none of them discussed to me those independent expenditures because we were not allowed to." *Id.* at 34:2-4. Had NRCC been able to consult with the Cao campaign, it could have made its "own speech" helpful, not harmful.

This is a bad problem resulting from the lack of ability coordinate, but there is another problem, perhaps worse. A political party may do an "independent expenditure" that is supposed to be its "own speech," for which it is responsible, for which it may take considerable criticism, and yet be surprised and unhappy because, until the communication was released, the political party's officials had no idea what the communication was going to say.

How could one be surprised by and unhappy with "one's own" speech? Thomas Josefiak explained at length how this could happen in his deposition as the RNC's designated representative. The story is worth noting to show that it is not a frivolous question whether the First Amendment requires that political parties be able to coordinate with their candidates in order to fully engage in their "own speech."

The FEC asked Josefiak what "things . . . are considered as to whether [a communication] would be independent or coordinated." Josefiak Dep. at 57:8-10. Josefiak said that "no chairman feels that independent expenditures is a preferable way to spend money." *Id.* at 57:13-15.

One of the problems he explained was the problem with prior contacts ruining the opportunity for an independent expenditure:

> [T]hey would be more comfortable if they could, not necessarily coordinate under the sense of the FEC rules, but, to be able to not worry about whether or not a conversation that took place with a member of Congress . . . was actually going to taint their ability to do an independent expenditure.

Id. at 57:16-58:1.

Another problem he identified was that chairmen "really have no control over what the message is. Every chairman that I've worked for feels very strongly that they know best what the message is." *Id.* at 58:2-5. "[T]hrough an [i]ndependent [e]xpenditure [p]rogram, the chairman of the RNC has no control over the message, but, then bears full responsibility for what the message is, even though the first time he sees that message is when everyone else sees it." *Id.* at 58:7-11. "[T]he idea that the chairman of the RNC cannot control what message the RNC is putting out through an [independent expenditure] [p]rogram has been very troublesome." *Id.* at 58:12-15.

The FEC asked the logical question: "How would the chairman of the RNC not be aware or able to control independent expenditures of the RNC?" *Id.* at 58:19. Josefiak explained that "the

only thing the chairman approves is what the budget is for independent expenditures." *Id.* at 59:1-3. That money goes to "individual consulting groups that have no connection . . . with [a candidate's] campaign in order to treat it as truly independent . . . ." *Id.* at 59:4-8. The chairman would not be independent from the candidate's campaign because, by nature of the office, he or she "is going to have communications with campaigns, and as a result, could never, never be involved with . . . any sort of [i]ndependent [e]xpenditure [p]rogram." *Id.* at 59:9-13. Nor are other RNC officials able to be involved as the program is done in "total isolation from any employee of the RNC in any engagement with an independent expenditure operation, save the counsel's office," which would only assure legal compliance as to disclaimers and the like. *Id.* at 59:14-22. So, Josefiak reiterated, "no one at the RNC" would have any "control over the content" or "see an independent expenditure until everyone else did when it hit the air waves." *Id.* at 60:2-5.

So RNC's "own speech" is written by "outside consultants," who "are hired to write the scripts, take their own polls, do their own research, and decide on their own what the message is going to be." *Id.* at 60:15-18.

As a general rule, then, independent expenditures are employed only when there is "no other way" to have an impact on a race, such as when coordinated expenditure limits and contribution limits were all reached. *Id.* at 61:2-16.

As to the value of coordinating the RNC's speech with candidates, Josefiak said that it not only promoted "efficiency from the ability to raise and spend resources, but, also in getting a message out and giving more information out there to the electorate to make judgment calls." *Id.* at 155:9-13. Coordination allows the RNC "[t]o be cohesive in the message," and to "get its speech out there . . . in addition to what the candidate may want to say . . . ." *Id.* at 156:5-9. This is important to assure that public knows that party affiliation "means something." *Id.* at 10-15.

In the *Second Amended Complaint*, RNC asserted its desire to broadcast the "RNC Cao Ad," to be coordinated as to timing with candidate Cao. *Id.* at 157:2-4. When asked why RNC would not just do the Ad as an independent expenditure, Josefiak explained that "the ability to even do an independent expenditure at that point in time was difficult." *Id.* at 157:9-13. One reason it was difficult was because the independent expenditure scheme "creates a system that had not been in place," and there was no "time to put it all in place." *Id.* at 157:14-16. Another reason it was difficult was that RNC couldn't have written the Ad if it were an independent expenditure because, to create the necessary independence, "this would have had to have been through an outside consultant that would have had to have written this and we wouldn't have had control of the message and it probably would have looked very different than what our message was." *Id.* at 157:17-158:3. "The consultant, God knows, what they would have said based on the same research that they had and it could be totally different." *Id.* at 158:4-8. Josefiak declared: "We have to depend on a consultant to read our minds and come up with this same idea and that never happens." *Id.* at 158:12-20.

Josefiak explained that it was not practically possible to firewall off RNC staff for doing such independent expenditures because that "would have had to have started at the beginning of an election cycle." *Id.* at 159:1-12. "And that person would have no communications whatsoever and you sit around there for a year and a half doing nothing and waiting to do independent expenditures and eating resources up for other employees," so "that, as a practical matter, it just doesn't work that way." *Id.* at 159:13-18.

Josefiak summed up RNC's desire well: "It's their speech. And if they can't control what the message is, it's not really their speech at that point. It's someone else's speech." *Id.* at 160. "And they may not even agree with it," he continued. *Id.* at 160:22. "We've had chairm[e]n who totally

disagreed with the independent expenditures coming out of the . . . RNC and having to bear responsibility for it." *Id.* at 161:1-4.

Josefiak also discussed the grassroots lobbying advertising that RNC affirmed its desire to do concerning the auto bailout. *Id.* at 170:20-22. Josefiak acknowledged that the RNC couldn't have even told a paid outside consultant the topic on which it wanted to lobby without violating the way that independent expenditures work. *Id.* at 171:1-20. And even if, for example, one were able to find a consultant that only did lobbying on bailouts (if that were possible), "once you hire them . . . , you can't tell them which way to talk about the issue of the bailout, pro or con, or even if they took the same position on pro or con, you wouldn't be able to hone in on what that message was, it would be totally left up to them." *Id.* at 172:2-14.

Given the problems with independent expenditures being one's "own speech, Josefiak noted the special burden on free speech: "It's the RNC's speech and if the RNC isn't able to say what it really wants to say, and the way it wants to say it, that is a burden and that is a problem." *Id.* at 73:18-21. And it would not be enough to fix the problem, as the FEC inquired, "[i]f coordination regulations were written in such a way to allow the chairman to have control over the script." *Id.* at 73:22-74:2. This is so because, as Josefiak put it, "it would meet the definition of an independent expenditure because that same chairman will have had conversations with the state parties, with the campaigns, and, therefore, I don't think that that hypothetical question would be sustainable under the definition of an independent expenditure." *Id.* at 74:4-10. The FEC asked whether the problem would be solved if "the discussion were not about a particular coordinated expenditure," but "about everything but this one particular coordinated expenditure." *Id.* at 74:11-15. Josefiak said that would still not solve the problem because, inter alia, "no one is going to believe that they didn't talk about it" and "there will be an FEC complaint filed and . . . RNC would be

arguing . . . why it was not. And the other side would be saying . . . that's crazy, there's no way they didn't have this conversation." *Id.* at 74:16-75:9. The result, he said was that "there's going to be chilling—there's a chilling effect is the bottom line." *Id.* at 75:10-12.

More could be said on this problem, but briefing on the merits is neither required nor proper in this certification proceeding. But the foregoing is sufficient to show that it is not a frivolous question whether the First Amendment requires that political parties be able to coordinate with their candidates in order to fully engage in their "own speech." The "independent expenditure" option is not adequate to protect a political party's First Amendment right to engage in its "own speech."

D. Each Question Is Non-Frivolous and Should Be Certified.

In the following discussion, each question will be briefly revisited, showing why it is not frivolous.

1. Question 1 Should Be Certified.[12]

In their *Memorandum*, Plaintiffs demonstrated their Article III standing. *See id.* at 3. In its *Response*, *id.* at 11, the FEC did not dispute Article III standing, but rather statutory standing as to one plaintiff.

The FEC argued that LA-GOP "lacks statutory standing because it is not in one of the three classes of persons entitled to invoke 2 U.S.C. § 437h." *Response* at 11. However, the interests that LA-GOP asserts are represented by Rep. Cao, who clearly has statutory standing and seeks to coordinate his activities with LA-GOP and to have LA-GOP be able to engage in all of the First Amendment activity in the *Second Amended Complaint* (Dkt. 35) that relates to him. This is

[12] **Question 1**: "Has each of the plaintiffs alleged sufficient injury to constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power under Article III?"

plainly analogous to the ability of a hearer to assert the same First Amendment free-speech rights as the speaker who wants to communicate to the hearer, *see*, *e.g.*, *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756-57 (1976), so the same principle controls in this First Amendment challenge. The FEC's argument might have some traction if some other state political party without such a coordinating candidate had joined this challenge, but that is not this case.

Moreover, the activities that LA-GOP wishes to do are materially similar to those that the Republican National Committee ("RNC") wishes to do, and the issues raised and constitutional arguments of the two are identical. So RNC also raises the claims that LA-GOP raises.

Consequently, this Court need not even decide the standing issue raised by the FEC here for the same reason that the United States Supreme Court did not reach an Article III standing issue in *McConnell*, 540 U.S. 93. In that case, the standing of the intervening primary sponsors (i.e., Senators McCain, Feingold, et al.) of McCain-Feingold was challenged. *McConnell* held that it need not reach the standing issue because another party had standing to raise the same issues:

> The National Right to Life plaintiffs argue that the District Court's grant of intervention to the intervenor-defendants, pursuant to Federal Rule of Civil Procedure 24(a) and BCRA § 403(b), must be reversed because the intervenor-defendants lack Article III standing. It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's.

Id. at 233 (collecting cases).

In any event, for purpose of the certification proceeding, this question is non-frivolous and ought to be certified for the en banc appellate court to decide the merits of the FEC's claim as to statutory standing.

2. Question 2 Should Be Certified.[13]

In their *Memorandum*, Plaintiffs demonstrated that this question is non-frivolous. *See Memorandum* at 3-9. As established in Part II-A, *supra*, the FEC's merits argument against the unambiguously-campaign-related principle was improper in this certification proceeding and wrong on the merits. In its *Response*, the FEC did not deal with the vagueness challenge to "in connection with" language in § 441a(d)(2)-(3), *Memorandum* at 3-9, which requires a narrowing construction, as does the overbreadth of the language, consistent with precedent employing the unambiguously-campaign-related principle. *Id.* In fact, the FEC conceded that apart from its challenge to the unambiguously-campaign-related principle, which has been refuted, Questions 2 and 5 "may not be insubstantial." *Response* at 13.

However, the FEC argued that the questions "require clarification and the development of a factual record." *Id.* at 13-14. The FEC questioned the concepts of "targeted," "issue advocacy," and "grassroots lobbying."

As to "targeted," the FEC insisted that Plaintiffs "developed [it] out of whole cloth." *Id.* at 14. On the contrary, the concept is a necessary application of the unambiguously-campaign-related principle to the present concept, just as the express-advocacy test was a necessary application of the principle to the term "expenditure" in *Buckley*, 424 U.S. at 80. "Targeted" is a legal construct necessary to distinguish "federal election activity" that complies with the unambiguously-campaign-related principle from such activity that does not. The FEC's quibble

[13] **Question 2:** "Do the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(2)-(3) violate the First and Fifth Amendment rights of one or more plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?"

with this legal construct is part and parcel of its quibble with the unambiguously-campaign-related principle itself. Once the principle is recognized, as it must be, it is necessary to ask in each application what is the constitutionally-permissible scope of regulation of otherwise-protected First Amendment activity. While the FEC has asked questions in discovery as to Plaintiffs' understanding of what would constitute "targeted," ultimately that line drawing will be for the en banc appellate court, just as the United States Supreme Court defined what "express advocacy" means in *Buckley*, 424 U.S. at 44 & n.52, and what constitutes a protected *MCFL*-corporation in *MCFL*, 479 U.S. at 263-64, and what is the scope of regulable "electioneering communications" in *WRTL-II*, 551 U.S. at 449. In fact, Plaintiffs' present counsel were also counsel for WRTL in *WRTL-II* and argued a completely different line to be drawn in *WRTL-II* than what *WRTL-II* adopted, *cf.* 551 U.S. at 449 *with id.* at 483 (Scalia, J., joined by Kennedy & Thomas, J.J., concurring in part and concurring in the judgment) (setting out and discussing WRTL's proposed test, which the Court did not adopt in favor of its own). These are legal questions on which Plaintiffs of course have their opinion, but this is a purely legal question to be argued and settled on the merits before the en banc appellate court, which has the authority to say where the First Amendment requires the line to be drawn as to the scope of a "targeted federal election activity." The FEC's quibble over line-drawing in no way makes this question frivolous.

As to "issue advocacy," that was well defined in *WRTL-II*: "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose-uninvited by the ad-to factor it into their voting decisions." 127 S. Ct. at 2667. And "grassroots lobbying" is a term of art defined in the Internal Revenue Code. *See* 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii). And if the en banc appellate court chooses to do so, it is free to mold the scope of these terms along the lines discussed in the previous para-

graph, and that court determines what the First Amendment mandates on the merits. The FEC's questions about these terms in no way make this question non-frivolous. Nor does the FEC's questions about whether its regulations might be implicated or whether any "narrow reading of the statute or reguation" (*Response* at 15)—which the FEC has failed to propose to date—might fix "any alleged constitutional infirmities," *id.*, mean that this question is frivolous. This Question should be certified.

3. Question 3 Should Be Certified.[14]

In their *Memorandum*, Plaintiffs demonstrated that this question is non-frivolous. *See Memorandum* at 9-11. As established in Part II-B and II-C, *supra*, the FEC's merits argument against the "own speech" issue was improper in this certification proceeding and wrong on the merits. As noted above, the notion that a question expressly left open by the United States Supreme Court is frivolous is simply wrong as a matter of law.

The FEC's summary assertion that mere coordination of an ad as to timing makes it not "independent," *Response* at 16, is erroneous for going to the merits on a specific example ("timing") on which the question was left open and it is flawed for being merely a conclusion in place of an argument. Moreover, it dodges the issue, which is not about whether the ad would be "independent," but rather whether an admittedly "coordinated" ad could be treated as a "contribution" where it is one's "own speech."

The FEC's argument as to the scope of "one's speech" is like its argument about what constitutes "targeted," which was dealt with in the discussion of the previous question. Plaintiffs have adequately set out their view of what the Supreme Court meant when it left open the ques-

[14] **Question 3:** "Do the expenditure limits at 2 U.S.C. § 441(d)(2)-(3) violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?"

tion concerning "own speech," but as in other line drawing cases, it will be for the court(s) deciding the merits to say where the Constitution requires the line to be drawn. And the FEC's argument that this question might "be resolved through interpretation of the Act and FEC regulations awaits, for credibility, some demonstration of the FEC's ideas about how that might be done and the FEC's willingness to acquiesce in it. Such tossing out of arguments without showing how they might come to fruition does nothing to make this Question frivolous. It should be certified.

4. Question 4 Should Be Certified.[15]

In their *Memorandum*, Plaintiffs demonstrated that this question is non-frivolous. *See Memorandum* at 11-13. The FEC's argument is essentially that plaintiffs can't win on the merits, so this question is frivolous: "plaintiffs cannot demonstrate that the current limits are unconstitutional, so this question should not be certified." *Response* at 17. But the FEC's prediction on the merits does not mean that the question is frivolous. Plaintiffs equally believe that they *can* demonstrate the constitutionality of the limits and have already done so. Studying the FEC's arguments shows that the FEC only continues to argue the merits. *Response* at 17-20. Indeed, the very vigor of the FEC's arguments shows in itself that this question is not frivolous. But the FEC fails to even address the following argument:

> Where the government employs multiple contribution or coordinated-expenditure limits for the same or similar arguments, its acknowledgment that the higher limits accommodate its anti-corruption interest means that lower limits do not advance that interest, so lower limits

[15] **Question 4:** "Do the limits on coordinated expenditures at 2 U.S.C. § 441(d)(3) violate the First Amendment rights of one or more plaintiffs?

(a) Do all but the highest limits violate such rights because any lower rates are unsupported by the necessary anti-corruption interest?

(b) Is 2 U.S.C. § 441(d)(3) facially unconstitutional because lower rates cannot be severed from higher rates and the voting-age-population formula is substantially overbroad and inherently unconstitutional?

(c) Is the highest limit for expenditures coordinated with Representatives unconstitutionally low?"

> are unconstitutional. *See California Prolife Council Political Action Committee v. Skully*, 989 F. Supp. 1282, 1296 (9th Cir. 1998) (varied contribution limits make lower constitutional).

Memorandum at 11. Until it overcomes that argument, it cannot win on the merits, but, at a minimum, there is no doubt that this question is non-frivolous. It should be certified.

5. Question 5 Should Be Certified.[16]

For the reasons set out in the opening *Memorandum*, at 13-14, and in discussing Question 2, *supra*, this Question is non-frivolous and should be certified.

6. Question 6 Should Be Certified.[17]

For the reasons set out in the opening *Memorandum*, at 14-15, and in discussing Question 3, *supra*, this Question is non-frivolous and should be certified.

7. Question 7 Should Be Certified.[18]

In their *Memorandum*, Plaintiffs demonstrated that this question is non-frivolous. *See Memorandum* at 15. The FEC's argument, as with its previous arguments, erroneously argues the merits. While arguing the merits is inappropriate, four observations will be made. First, the FEC

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[16] **Question 5:** "Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and the Coordination-Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as in-kind "contributions") violate the First and Fifth Amendment rights of one or more plaintiffs in that they are excessively vague, overbroad, and beyond the authority of Congress to regulate elections as applied to coordinated expenditures other than (a) communications containing express advocacy, (b) targeted federal election activity, (c) disbursements equivalent to paying a candidate's bills, and (d) distributing a candidate's campaign literature?"

[17] **Question 6:** "Do the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and the Coordination-Contribution Provision at 2 U.S.C. § 441a(a)(7)(B)(i) (treating coordinated expenditures as "contributions") violate the First Amendment rights of one or more plaintiffs as applied to coordinated expenditures for (a) communications containing express advocacy and (b) targeted federal election activity?"

[18] **Question 7:** "Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) violate the First Amendment rights of one or more plaintiffs as applied to a political party's in-kind and direct contributions because it imposes the same limits on parties as on political action committees ('PACs')?"

completely ignores Plaintiffs' argument based on the *Randall v. Sorrell*, 548 U.S. 230 (2006), decision. *See Memorandum* at 15. Second, the FEC ignores the fact that political parties cannot corrupt their own candidates, vitiating the usual "corruption" basis for contribution limits. *See Colorado II*, 533 U.S. at 465 (not relying on quid pro quo corruption); *Colorado I*, 518 U.S. at 645-48 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring the judgment and dissenting in part) (showing that quid pro quo corruption does not apply between parties and candidates). Third, the FEC argues that political parties enjoy higher limits than other political committees, *Response* at 21, but this might not be true in this litigation if other provisions are struck down. Fourth, the FEC's argument from *Colorado II* as "address[ing] this very issue," *id.*, is erroneous because it neither addressed nor decided the present Question. The question remains open. This question is non-frivolous. It should be certified.

8. Question 8 Should Be Certified.[19]

In their *Memorandum*, Plaintiffs demonstrated that this question is non-frivolous. *See Memorandum* at 16-18. The FEC's argument, as throughout its *Response*, goes immediately to arguments on the merits. While it is certainly entitled to make those to the en banc appellate court, they have no place here. Although Plaintiffs are not required to argue the merits here, they would note the following about the FEC's argument.

As to sub-claim (a), the FEC concedes that "[i]f and when inflation seriously erodes the value of a $5,000 contribution and Congress does not act to increase the limit, plaintiffs might then be able to raise a substantial question . . . ." *Response* at 23. Of course, the FEC totally ignores the skepticism with which the *Randall* decision viewed the lack of indexing, *see Memoran-*

[19] **Question 8:** "Does the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) facially violate the First Amendment rights of one or more plaintiffs?"

dum at 17, which also saw the needed future action of the legislature as central to the seriousness of the problem, not something which, as the FEC argues here, makes the problem less serious, *see id.* And inflation already has seriously eroded the value of $5,000 (and will continue to do so), which—most importantly from a constitutional perspective—was the *level* at which Congress decided that it's *corruption interest engaged*. The FEC ignores this non-frivolous constitutional analysis in favor of a promise that someday it *might* agree that the creeping ravages of inflation might cause it to recognize a substantial constitutional issue.

As to sub-claim (b), the FEC simply asserts that higher contribution limits do not vitiate lower limits, *Response* at 23, ignoring the constitutional argument, developed in the *Memorandum* at 11-12, and *supra* at 26, to the effect that the corruption interest disappears as to lower limits where the government concedes that it is met at higher limits.

As to sub-claim (c), the FEC's argument that *Buckley* approved the $5,000 limit is telling because *Buckley* was decided in 1976 and much inflation has occurred since then. And the argument that parties are not limited to the $5,000 contribution limit fails if some of the challenged provisions in this case fall.

But in any event, these arguments are merits arguments. The questions themselves are not frivolous and should be certified.

Conclusion

For the foregoing reasons, this Court should "immediately . . . certify [the identified] questions of constitutionality . . . to the [Fifth Circuit] . . . [to] hear the matter sitting en banc." 2 U.S.C. § 437(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be delivered through the ECF electronic filing system on the 31st day of August 2009 to the following CM/ECF participants:

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