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.	CIVIL ACTION NO. 2:08CV4887 SECTION C, DIVISION 5 JUDGE HELEN G. BERRIGAN CHIEF MAGISTRATE JUDGE ALMA L. CHASEZ

DEFENDANT FEDERAL ELECTION COMMISSION'S SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION TO CERTIFY QUESTIONS OF CONSTITUTIONALITY TO THE COURT OF APPEALS EN BANC AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiffs describe this case as an as-applied challenge to political party coordinated expenditure limits that the Supreme Court has facially upheld, but plaintiffs' many claims are so broad that judgment in their favor on any claim would be equivalent to overturning *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), and the relevant portion of *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976). Plaintiffs have asked this Court to certify questions to the Fifth Circuit *en banc* pursuant to 2 U.S.C. § 437h, a special review provision for constitutional challenges to the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (FECA or Act). But district courts have a duty to certify only questions that are "neither insubstantial nor settled." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). Because plaintiffs are trying to relitigate what has already been decided by the Supreme Court, and because accepting plaintiffs' sweeping claims would permit circumvention of longstanding contribution limits that Congress enacted to foreclose corruption and its appearance, none of plaintiffs' questions should be certified; rather, summary judgment should be entered for the Federal Election Commission. If plaintiffs seek to have the Supreme Court reconsider *Colorado II* and *Buckley*, they may attempt to pursue their claims through the regular appeals process, not the extraordinary *en banc* proceeding of Section 437h.

I. BACKGROUND

A. Parties

The complaint in this case was filed by Anh "Joseph" Cao, the Republican National Committee (RNC), and the Republican Party of Louisiana (LA-GOP). Cao is the United States Representative for the Second Congressional District of Louisiana. FEC's Proposed Findings of Fact and Statement of Material Facts As to Which There Is No Genuine Dispute (FEC Facts) ¶ 2. The RNC is the national political party committee of the Republican Party. *Id.* at ¶ 3. LA-GOP

is the State Committee of the Republican Party for Louisiana. *Id.* at ¶ 4. The defendant Federal Election Commission (Commission or FEC) is the independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA and other campaign finance statutes. *Id.* at ¶ 1.

B. Statutory and Regulatory Background

FECA limits both direct contributions from parties to federal candidates and spending that parties coordinate with candidates and their campaigns. 2 U.S.C. §§ 431(4), 431(16), 441a(a)(1), 441a(a)(2)(A), 441a(a)(4). Limits on both of these activities have existed since the Act was amended in 1974. *See Buckley*, 424 U.S. at 189, 194 (reprinting then-effective party contribution limit and party expenditure provisions in former 18 U.S.C. § 608(f) (1970 ed., Supp. IV)). Under the Act, individuals, political parties, and other political committees are all limited in the amount that they can contribute to a candidate in a given election cycle. 2 U.S.C. § 441a(a)(1). National and state political parties are multicandidate "political committees" under the Act and therefore are limited to $10,000 in contributions to each candidate in a given election cycle ($5,000 in the primary and $5,000 in the general election). 2 U.S.C. §§ 431(4), 431(16), 441a(a)(2)(A), 441a(a)(4).[1] The contribution limits apply to both direct contributions of money and in-kind contributions of goods or services. 2 U.S.C. § 431(8)(A). Expenditures made in coordination with a candidate or her campaign are considered in-kind contributions to the candidate. 2 U.S.C. § 441a(a)(7)(B); *Buckley*, 424 U.S. at 78.

[1] National parties and their Senatorial Campaign Committees may contribute a larger amount, currently $42,600, to each of their Senate candidates in each election cycle, in place of the $5000 limit. 2 U.S.C. § 441a(h); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009).

A unique provision of the Act permits political parties to make additional expenditures in coordination with candidates far in excess of the direct contribution limits applicable to political committees generally, even though such expenditures are considered in-kind contributions to the candidate. 2 U.S.C. §§ 441a(d)(2)-(3) (Party Expenditure Provision). Currently, national and state parties may each make coordinated expenditures with each candidate for the U.S. House of Representatives up to amounts ranging from $43,700 to $87,300 and with each U.S. Senate candidate up to amounts ranging from $87,300 to $2,392,400, and in the 2012 presidential race, national parties will be able to coordinate expenditures up to an inflation-adjusted figure that will likely be more than the $19.1 million limit that applied in the 2008 election. 2 U.S.C. § 441a(d)(2)-(3); 11 C.F.R. § 109.33; Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435-37 (Feb. 17, 2009); Price Index Increases for Expenditure Limitations, 73 Fed. Reg. 8698 (Feb. 14, 2008).

One type of party coordinated expenditure is a party coordinated communication. 11 C.F.R. § 109.37. Whether a particular communication is considered to be a party coordinated communication under the Act depends upon both the *content* of the communication and the collaborative *conduct* of those involved. *Id.* Party communications satisfy the content prong if they "disseminate[], distribute[], or republish[] . . . campaign materials prepared by a candidate" or "expressly advocate[] the election or defeat of a clearly identified candidate" at any time of year. 11 C.F.R. §§ 109.37(a)(2)(i)-(ii). Communications also satisfy the content prong if, during the 90-day period before a congressional election or the 120-day period before a presidential election, they refer to a clearly identified federal candidate and are disseminated within that candidate's jurisdiction. 11 C.F.R. § 109.37(a)(3). Thus, outside these pre-election windows,

only express advocacy and the distribution of candidate materials can be considered party coordinated communications.

The conduct prong can be satisfied in several ways, *e.g.*, if "[t]he communication is created, produced, or distributed at the request or suggestion of a candidate"; if "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication . . . and the candidate who is clearly identified in the communication"; or if the person paying for the communication hires a candidate's vendor or former employee "to create, produce, or distribute" it and in doing so that vendor/employee uses "material" information about "campaign plans, projects, activities, or needs" or shares such information with the payer. 11 C.F.R. §§ 109.21(d)(1)(i), (3)-(5). A party can avoid having a communication be deemed a coordinated communication by setting up and distributing a written "firewall" policy that prohibits the flow of information between the individuals "providing services for the [party] paying for the communication" and the individuals "currently or previously providing services to the candidate who is clearly identified in the communication [or his or his opponent's committee]." 11 C.F.R. §§ 109.21(h), 109.37(a)(3).

C. The Supreme Court Has Upheld the Party Expenditure Provision

The party coordinated expenditure limits were upheld on their face in *Buckley* and *Colorado II*. In *Buckley*, numerous challenges were brought to the then-newly enacted FECA. In the two primary holdings relevant to this case, the Supreme Court held that limitations on political campaign contributions were generally constitutional, but that limitations on independent expenditures generally infringed political expression in violation of the First Amendment. *Buckley*, 424 U.S. at 58-59. *Buckley* recognized, however, that paying for an

expenditure made in cooperation with a campaign was the equivalent of making a contribution to that campaign. *Id.* at 46-47 & n.53. The Court therefore understood "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee … but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id*. at 78. "So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." *Id.* Among the contribution limits that *Buckley* upheld was the limit applicable to multicandidate political committees, including political parties, of $5,000 per election in contributions to each federal candidate. 2 U.S.C. §§ 441a(a)(2)(A). As noted above, coordinated expenditures are in-kind contributions subject to this limit. 2 U.S.C. § 441a(a)(7)(B).

Since *Buckley*, the Supreme Court has repeatedly explained the "fundamental constitutional difference" between contributions and independent expenditures. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (*NCPAC*). "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) (*MCFL*); *see also McConnell v. FEC*, 540 U.S. 93, 134-40 (2003).

Prior to 1996, the Commission also presumed that, due to the close connection between parties and candidates, "all party expenditures should be treated as if they had been coordinated *as a matter of law*." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 619 (1996) (*Colorado I*). The Commission thus presumed that all expenditure limits imposed on political parties were effectively contribution limits. *Id.* But in *Colorado I*, the Supreme Court held that parties were capable of making independent expenditures, and when they did so, that

spending could not constitutionally be limited. *Colorado I*, 518 U.S. at 617 ("[T]he constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure") (citation omitted). Although the petitioner asked the Court to strike down the Party Expenditure Provision on its face, the Court for prudential reasons remanded the case for consideration of whether limits on expenditures that were actually coordinated between parties and campaigns were constitutional. *Colorado I*, 518 U.S. at 623-24.

After remand, the issue returned to the Supreme Court in *Colorado II*. In that case, the Court applied the "same scrutiny" it had previously "applied to limits on . . . cash contributions," *i.e.*, whether the limit was "closely drawn to match a sufficiently important interest." 533 U.S. at 446 (citations and quotation marks omitted); *see id.* at 456. The Court reaffirmed that the longstanding constitutional distinction between coordinated and independent expenditures applied to spending by political parties. *Id.* at 464. The Court then upheld the limits in 2 U.S.C. § 441a(d) on their face, explaining that "there is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate." 533 U.S. at 464. The Court based its decision largely on an anti-circumvention rationale: Because persons can make much larger contributions to political parties than to candidates, the latter limits could be more easily circumvented if the parties' ability to make coordinated expenditures were unlimited. As the Court explained, "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits," which serve to deter corruption. *Colorado II*, 533 U.S. at 464.[2]

[2] The *Colorado II* decision preceded the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. BCRA prohibits national parties from receiving "soft money" — money that is not subject to the restrictions of the Act — and generally prohibits state parties from using soft money for "[f]ederal election activity." 2 U.S.C. §§ 441i(a); 441i(b)(1). The Supreme Court upheld these prohibitions in *McConnell*. 540 U.S. at

D. Proceedings in This Case

Plaintiffs filed their original complaint on November 13, 2008, and amended it three weeks later. Verified Complaint for Declaratory and Injunctive Relief. (Doc. 1); Amended Verified Complaint for Declaratory and Injunctive Relief. (Doc. 17). Plaintiffs allege that this is an "as-applied" challenge to the Party Expenditure Provision upheld in *Colorado II*. Plaintiffs also challenge the application to political party coordinated expenditures of the separate $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) that was facially upheld in *Buckley*. Plaintiffs claim that the limits are unconstitutional to the extent they restrict speech that plaintiffs claim is the parties' "own speech" or that plaintiffs allege is not "unambiguously campaign related" because it falls outside certain categories of speech. Plaintiffs also claim the limits are unconstitutional because some vary geographically, and because the limits are allegedly too low in any event.

Before the Commission filed an answer, plaintiffs filed a Motion to Certify Questions of Constitutionality to the Court of Appeals *En Banc* (Doc. 19) (Mot. To Certify Questions). The motion invoked 2 U.S.C. § 437h, which establishes an extraordinary procedure for certification of substantial constitutional challenges to the Act. *See infra* Part II.[3]

The Commission opposed certification at that time, arguing that it would be premature to certify any constitutional question prior to an opportunity to develop an adequate factual record and where it was unclear which, if any, of plaintiffs' questions would warrant certification. FEC's Response to Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of

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161, 173. Although donors could contribute soft money to national parties when *Colorado II* was decided, that decision did not rely on or even address the use of soft money.

[3] The Complaint was subsequently amended yet again to add Section 437h to plaintiffs' jurisdictional statement. Motion for Leave to File Second Amended Verified Complaint (Doc. 32); Second Amended Verified Complaint (Doc. 35). Citations herein to plaintiffs' Complaint are to this final version.

Appeals *En Banc*, dated Jan. 27, 2009 (Doc. 28) (Response To Mot. To Certify Questions). The Court agreed with the Commission and referred the case to Magistrate Judge Chasez to set a discovery and briefing schedule. Feb. 4, 2009 Minute Entry (Berrigan, J.) (Doc. 30).

The Magistrate Judge set a schedule for discovery, to be followed by the filing of "supplemental briefs on certification and dispositive motions" and "proposed findings of fact." Feb. 26, 2009 Minute Entry (Chasez, M.J.) (Doc. 41). Discovery has concluded, and the Commission now files this Supplemental Response to Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals *En Banc* and Memorandum in Support of Motion for Summary Judgment.

II. DISTRICT COURTS PLAY A CRITICAL THRESHOLD ROLE UNDER SECTION 437h AND MUST CERTIFY ONLY SUBSTANTIAL CONSTITUTIONAL QUESTIONS

Section 437h, the extraordinary judicial review provision plaintiffs invoke, was added to FECA in 1974 to provide expedited consideration of anticipated constitutional challenges to the extensive amendments to the Act that year. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1285-1286 (1974). Section 437h provides:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting *en banc*.[4]

[4] Under the original statutory scheme, certified constitutional questions could be appealed directly from the *en banc* court of appeals to the Supreme Court, and both courts were required "to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified . . . ." 2 U.S.C. § 437h(b), (c) (1974). In 1984, the expedition requirement and similar provisions in other statutes were repealed because "[t]he courts are, in general, in the best position to determine the need for expedition in the circumstances of any particular case, to weigh the relative needs of various cases on their dockets, and to establish an order of hearing

The Supreme Court has made clear that district courts play an important gatekeeper role in determining whether to certify questions to the circuit courts. District courts should only certify questions under § 437h when the issues presented are "neither insubstantial nor settled." *Cal. Med. Ass'n*, 453 U.S. at 192 n.14; *see also Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (437h available "only where a 'serious' constitutional question was presented" (quoting Senator James L. Buckley, the sponsor of the amendment that became Section 437h, 120 Cong. Rec. 10562 (1974))); *Buckley v. Valeo*, 387 F. Supp. 135, 138 (D.D.C. 1975) (437h certification appropriate where "a substantial constitutional question is raised by a complaint"), *remanded on other grounds*, 519 F.2d 817 (D.C. Cir. 1975). Like a single judge who is asked to convene a three-judge court to hear a constitutional challenge, a district court may decline to certify a question under Section 437h. *See Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990); *Mott*, 494 F. Supp. at 131. Even if a question differs slightly from settled law, it may be inappropriate for certification. *See Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (*en banc*) ("not every sophistic twist that arguably presents a 'new' question should be certified" (quoting *Goland*, 903 F.2d at 1257)).[5]

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that treats all litigants most fairly." H.R. Rep. No. 98-985, at 4 (1984). *See* Pub. L. No. 98-620, § 402, 98 Stat. 335 (1984) (repealing section 437h(c)). The provision for direct appeal was removed in 1988. Pub. L. No. 100-352, § 6(a), 102 Stat. 662 (1988).

[5] The Supreme Court and some circuit courts, including the Fifth Circuit, have at times used the term "frivolous" to refer to the sort of questions that should not be certified under Section 437h. *See, e.g., Cal. Med. Ass'n*, 453 U.S. at 192 n.14 ("we do not construe § 437h to require certification of constitutional claims that are frivolous, or that involve purely hypothetical applications of the statute" (citations omitted)); *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (*en banc*) ("A district court need not certify challenges to the Act that are frivolous or involve settled principles of law."). However, the use of the term "frivolous" in this context differs from the term's use in Federal Rule of Civil Procedure 11, which governs sanctionable filings by attorneys. When the Supreme Court used the term "frivolous" in the Section 437h context, it cited a case stating that it is "the duty of a district judge … to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented … .". *Cal. Med. Ass'n*,

The Fifth Circuit has also emphasized the importance of the district court's threshold role in considering certification under Section 437h. *See FEC v. Lance*, 635 F.2d 1132, 1137 (5th Cir. 1981) (*en banc*) ("We agree with the Ninth Circuit that 'delicate questions' such as those raised by section 437h 'are to be decided only when necessary'" (quoting *Cal. Med. Ass'n v. FEC*, 641 F.2d 619, 632 (9th Cir. 1980) (*en banc*))). The Fifth Circuit discussed the standard for certification under Section 437h in *Khachaturian*, which, like the instant case, involved an as-applied challenge to a contribution limit that had earlier been facially upheld in *Buckley*. *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (*en banc*). The *Khachaturian* court noted that a party challenging a statute that has previously been upheld bears a greater burden than a party challenging a statute for the first time. *Id.* ("'questions arising under 'blessed' provisions [of the Act] understandably should meet a higher threshold' of frivolousness" (quoting *Goland*, 903 F.2d at 1257)). The Fifth Circuit explained that "the district court should first determine whether Khachaturian's claim is frivolous in light of *Buckley* …. If no colorable constitutional claims are presented on the facts as found by the district court, it should dismiss the complaint." *Khachaturian*, 980 F.2d at 332.[6]

The district court's role is critical in assuring that Section 437h operates efficiently. If this Court determines that the questions should not be certified, it reduces the substantial

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453 U.S. at 192 n.14 (citing, *inter alia*, *Cal. Water Service Co. v. City of Redding*, 304 U.S. 252, 254 (1938)). Thus, "frivolous" in this context is akin to lacking a substantial federal question.

[6] In addition, as an initial matter the district court must determine whether the plaintiffs "have [Article III] standing to raise the constitutional claim." *Cal. Med. Ass'n*, 453 U.S. at 192 n.14 (citations omitted). The proper inquiry also encompasses the requirements of statutory standing, specifically whether plaintiffs belong to one of the three classes of potential claimants enumerated in Section 437h: "[t]he Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." *See Bread Political Action Comm. v. FEC*, 455 U.S. 577, 581 (1982) (*Bread PAC*). In this case, 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.

disruption to the Court of Appeals that *en banc* consideration involves. Section 437h creates "a class of cases that command the immediate attention of … the courts of appeals sitting *en banc*, displacing existing caseloads and calling court of appeals judges away from their normal duties for expedited *en banc* sittings … ." *Bread PAC*, 455 U.S. at 580. As the Ninth Circuit observed, "if mandatory *en banc* hearings were multiplied, the effect on the calendars of this court as to such matters and as to all other business might be severe and disruptive." *Cal. Med. Ass'n*, 641 F.2d at 632.

Dismissing plaintiffs' case, rather than certifying their questions, would not deny them the opportunity to attempt to overturn *Colorado II* and *Buckley* on the relevant issues. The only result would be to spare the Fifth Circuit the need to consider *en banc* plaintiffs' challenges to statutes that the Supreme Court has facially upheld. This outcome would permit plaintiffs to pursue the relief they seek while conserving precious judicial resources.

III. PLAINTIFFS' BROAD CHALLENGES TO THE PARTY COORDINATED EXPENDITURE LIMITS FAIL TO MEET THE REQUIREMENTS FOR CERTIFICATION TO THE FIFTH CIRCUIT *EN BANC*

A. Plaintiffs' Questions 3 and 6 Fail to Raise an Unsettled or Substantial Question with the Claim That Party-Financed Coordinated Communications That Are the Parties' "Own Speech" Cannot Be Constitutionally Limited

1. Accepting Plaintiffs' Position Would Effectively Require Overturning Settled Law as Established in *Colorado II*

Plaintiffs have asked the Court to certify questions about the Act's limits on party coordinated communications that plaintiffs characterize as parties' "own speech," alleging that the First Amendment prohibits such limits. Plaintiffs' Mot. To Certify Questions, Questions 3

and 6 (Doc 19); Complaint ¶¶ 61-64, 82-85 (Doc. 35).[7] Plaintiffs suggest that they are merely bringing an as-applied challenge left unresolved when the Supreme Court stated in *Colorado II* that it "need not reach [the question of specific types of expenditures] in this facial challenge." *Colorado II*, 533 U.S. at 456 n.17. Although the Complaint identifies one example of a communication that falls within plaintiffs' conception of a party's "own speech" — an advertisement allegedly written without Congressman Cao's involvement, but for which the two party plaintiffs would like to consult with the Congressman as to "the best timing" to run the ad (*see* Complaint ¶¶ 43-44, 46-47 (Doc. 35))[8] — discovery has made it clear that plaintiffs "own speech" claim is so broad that it would swallow the coordinated expenditure rule and, therefore, is essentially a facial challenge.

Plaintiffs' claim does not merely challenge the coordinated spending limits as applied to some narrow subset of "specific expenditures" that the Court was not considering when it decided *Colorado II*. 533 U.S. at 456 n.17. Rather, plaintiffs construe the phrase "own speech" so broadly that it would encompass virtually every type of communication, including express advocacy of the election or defeat of candidates. In particular, although plaintiffs have at times seemed uncertain as to the scope of their own claim, 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

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[7] In *Colorado II*, a similar issue appears to have been raised, *i.e.*, that the Party Expenditure Provision was "facially invalid because of its potential application to expenditures that involve more of the party's own speech." 533 U.S. at 456 n.17. The Supreme Court noted that the plaintiff there had failed to explain "what proportion of the spending falls in one category or the other" and thus did not "lay the groundwork for its facial overbreadth claim." *Id.*

[8] Under Commission regulations, coordination as to the timing of an advertisement is sufficient to meet the "conduct" portion of the requirements for the ad to be a party coordinated communication. *See* 11 C.F.R. §§ 109.21(d)(2)(v), 109.37(a)(3).

facto, the party's "own speech." FEC Facts ¶ 174.[9] Under this theory, neither the electoral content of the message nor the degree of collaboration is relevant; all that matters is whether the party pays for the ultimate communication. For example, plaintiffs assert that a communication is a party's "own speech" even if a candidate chooses which communication to broadcast out of a group of proposals by the party and even if the communication states that it was approved by the candidate. *Id.* at ¶¶ 177, 179. Plaintiffs even assert that a communication can be that party's "own speech" if the candidate actually writes and produces the communication and then gives it to the party to run. RNC 30(b)(6) Dep. at 85-86, FEC Facts ¶ 178 ("initially it would have been the campaign speech, but, then if the RNC approached to ask if they would buy the time, I think then it becomes the RNC's speech."). Because every party coordinated communication is, by definition, "paid for by a political party committee or its agent," 11 C.F.R. § 109.37(a)(1), it is hard to imagine any such expenditure that plaintiffs would *not* consider a party's "own speech." Even so, plaintiffs claim that the very fact that such communications have been paid for by the

[9] *See, e.g.*, Deposition of Anh "Joseph" Cao (Cao Dep.) at 52, FEC Facts Exh. 4 (stating that if a particular communication is paid for by the party, it is the party's "own speech."); Rule 30(b)(6) Deposition of Republican Party of Louisiana by Charles Lee Buckels (LA-GOP 30(b)(6) Dep.) at 124, FEC Facts Exh. 6 (LA-GOP's "own speech" is "any communication that the LA-GOP states through one form or another, that we have issued it, it is paid for by us … ."); *id.* at 133 (it is the party's own speech "if we have taken responsibility, quote, ownership, of it by stating that we have paid for it … ."); Rule 30(b)(6) Deposition of Republican National Committee by Thomas J. Josefiak (RNC 30(b)(6) Dep.) at 124, FEC Facts Exh. 5 (communication becomes a party's "own speech" if the party "[a]pprove[s] it and pay[s] for it."); RNC's 2nd Discovery Resps., Interrog. 1, FEC Facts Exh. 10 (communication is a party's "own speech" whenever it is indicated as such by "a disclaimer, where one is required, or by the speech being otherwise identified as the party's speech."); LA-GOP's 2nd Discovery Resps., Interrog. 1, FEC Facts Exh. 11 (same)).

party places them beyond permissible regulation, at least as long as the party acknowledges that it has paid for the communication, as it is required to do.[10]

Plaintiffs point to only one situation in which a party coordinated communication would not be the party's "own speech" and in which, according to plaintiffs, it could be constitutionally limited: when a candidate's campaign airs a communication and the party merely pays the bill. FEC Facts ¶ 180.[11] But if plaintiffs prevailed on this theory, the coordinated spending limits would be functionally meaningless: Parties could have whatever level of involvement they wished with the candidate and message, and spend without limit, as long as they arranged and paid for the communication's dissemination.

Accepting plaintiffs' "own speech" claim would thus amount to overruling *Colorado II*, which facially upheld the Party Expenditure Provision with full recognition that it applied to conduct ranging from "a donation of money with direct payment of a candidate's media bills" to "a situation in which … the party simply 'consult[s],' … with the candidate on which time slot [a party-developed] advertisement should run for maximum effectiveness." *Colorado II*, 533 U.S. at 467-68 (citation omitted) (Thomas, J., dissenting). Plaintiffs now argue that the constitutionally significant fact has nothing to do with "prearrangement," "coordination," or the danger of *quid pro quo* commitments, but simply whether a party has paid for the

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[10] *See* 11 C.F.R. § 110.11(b)(2) ("If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent").

[11] It is also unclear how this exception to plaintiffs' "own speech" standard would actually work in practice. According to plaintiffs, a disclaimer stating that a communication has been "paid for by the RNC" is one way to identify a particular communication as the RNC's "own speech." FEC Facts ¶ 174. But that same disclaimer must be included on a communication for which a party "merely paid the bill." 11 C.F.R. § 110.11(b)(2); FEC Facts ¶ 194 (RNC's Fed. R. Civ. P. 30(b)(6) witness acknowledged that disclaimer on door hangers that were *not* the party's "own speech" was identical to the disclaimer required for party coordinated expenditures).

communication. *See* Complaint ¶ 64 (Doc. 35) (alleging limits on a party's "own speech" are unconstitutional); *supra* p. 13 n.9 (quoting plaintiffs' definitions stating that a communication is a party's "own speech" if it has paid for it and disclosed publicly that it has done so). The line between independent and coordinated expenditures, however, has always depended upon the absence or presence of "prearrangement and coordination of an expenditure." *Colorado II*, 533 U.S. at 464. *See Colorado I*, 518 U.S. at 617 ("the constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure.").[12]

The facial upholding of a law does not prevent future as-applied challenges, but such challenges can succeed only if they raise a factual circumstance or principle of law that the court did not rely upon in determining that the statute was facially valid. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 354 (1989) (Scalia, J., dissenting) ("While rejection of a facial challenge to a statute does not preclude all as-applied attacks, surely it precludes one resting upon the same asserted principle of law."); *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004) (the only as-applied challenge available to plaintiffs was one for selective enforcement, because the case otherwise presented "the same type of fact situation that was envisioned by this court when the facial challenge was denied in *McGuire I*."). Unlike the claims brought here, an as-applied challenge is one that challenges the constitutionality of a statute "in discrete and well-defined instances." *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). Because plaintiffs' "own speech"

[12] *See also McConnell*, 540 U.S. at 221 (independent expenditures are those that are "wholly independent"); *Buckley*, 424 U.S. at 47 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."); *supra* pp. 5-7.

claim is tantamount to the facial challenge rejected in *Colorado II*, it raises a claim that is settled law and inappropriate for certification to the *en banc* Court of Appeals under section 437h.[13]

2. Plaintiffs' "Own Speech" Claim Does Not Raise a Substantial Federal Question in Light of *Colorado II's* Anti-Circumvention Rationale

Even if plaintiffs' "own speech" claim is not directly settled as a matter of *stare decisis* under *Colorado II*, the exemption plaintiffs seek does not raise a substantial question worthy of *en banc* certification. *Colorado II* rested largely on an anti-circumvention rationale. 533 U.S. at 465 ("a party's coordinated expenditures … may be restricted to minimize circumvention of contribution limits."). Plaintiffs' request for unlimited spending on coordinated communications based on their broad view of what constitutes a party's "own speech" would encourage, not combat, circumvention of contribution limits. Plaintiffs' claim is thus directly contrary to the reasoning of *Colorado II* and fails to raise a substantial question.

At the time of *Colorado II*, donors were limited to "$2,000 in contributions to one candidate in a given election cycle," but could contribute as much as "another $20,000 each year to a national party committee supporting the candidate." *Id.* at 457. A donor wishing to make a contribution to a campaign in excess of $2,000 could attempt to circumvent that limit simply by donating additional funds to the party "with the tacit understanding that the favored candidate will benefit." *Id.* at 458. The party could then spend the money in coordination with the favored candidate. This type of conduct would constitute circumvention because there "is no significant functional difference between a party's coordinated expenditure and a direct party contribution to

[13] Plaintiffs have at times provided different and even inconsistent statements regarding which communications constitute a party's "own speech." FEC Facts ¶¶ 182-196. However, even if some claim based on an "own speech" theory could present a substantial constitutional challenge, *see* FEC's Response To Mot. To Certify Questions at 15-16 (Doc. 28), no such claim has been presented here, and this Court can decide only the case that plaintiffs have presented.

the candidate," and the ease with which it could be done shows why "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." *Id.* at 464.

The potential for circumvention and the resulting risk of political corruption in the absence of meaningful party coordinated expenditure limits is as strong now as it was when the Supreme Court decided *Colorado II* eight years ago. Today, individual donors can contribute up to $30,400 to a national party committee each year, and multicandidate PACs can contribute up to $15,000 to a national party committee each year. 2 U.S.C. §§ 441a(a)(1)-(2); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7436-37 (Feb. 17, 2009).[14] "[S]ubstantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Colorado II*, 533 U.S. at 457.[15] In fact,

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[14] Thus, the potential for circumvention is not diminished by the fact that donors can no longer contribute "soft money" to national parties, and that state party use of soft money is limited. *See* 2 U.S.C. §§ 441i(a); 441i(b)(1). Moreover, in a separate lawsuit, plaintiff RNC now seeks to have many of the soft money restrictions declared unconstitutional. *See RNC v. FEC*, Civ. No. 08-1953 (D.D.C. 2008). *McConnell* upheld BCRA's limits on the receipt and use of soft money. *See* 540 U.S. at 161.

[15] *See also Colorado II*, 533 U.S. at 454 ("why would the Constitution forbid regulation aimed at a party whose very efficiency in channeling benefits to candidates threatens to undermine the contribution (and hence coordinated spending) limits[?]"); *id.* at 455 ("parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits"); *id.* at 457 ("substantial evidence … shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."); *id.* at 460 ("If suddenly every dollar of spending could be coordinated with the candidate … a candidate enjoying the patronage of affluent contributors would have a strong incentive … to promote circumvention … ."); *id.* at 460 n.23 ("The same enhanced value of coordinated spending that could be expected to promote greater circumvention of contribution limits for the benefit of the candidate-fundraiser would probably enhance the power of the fundraiser to use circumvention as a tactic to increase personal power and a claim to party leadership."); *id.* at 461 ("this evidence rules out denying the potential for corruption by circumvention … .").

plaintiffs' proposed "own speech" exception would throw coordinated spending wide open. A wealthy donor who wanted to contribute to a candidate in excess of his contribution limit could contribute to the national party, which could use the money for "own speech" communications benefiting that donor's favored candidate. If the favored candidate could write the party communications and decide when and where they would be disseminated, the donor's contribution to the party would be functionally identical to a donation of that amount to the candidate. As the Supreme Court explained, *id.* at 451-52 (footnote omitted):

> Parties are . . . necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.

Plaintiffs have not alleged or presented any evidence that suggests that any of these conclusions have been undermined since *Colorado II* was decided. By contrast, the Commission is submitting the expert report of Jonathan Krasno, an Associate Professor at Binghamton University, who co-wrote a similar report that was explicitly relied upon by the Supreme Court in *Colorado II*. 533 U.S. at 470 (citing report authored by Professors Krasno and Frank J. Sorauf). Professor Krasno has concluded that removing limits on parties' coordinated spending today would, as before, have "important adverse ramifications for the potential for corruption." Jonathan Krasno, Political Party Committees and Coordinated Expenditures in *Cao v. FEC* (Krasno Rept.) at 11, FEC Facts Exh. 1. Professor Krasno's conclusions are unrebutted by plaintiffs — they did not designate an expert of their own, nor did any of their written discovery or deposition witnesses provide information suggesting that the dangers articulated in *Colorado II* have subsided over the past eight years. Rather, the evidence assembled in this matter and

prior cases amply demonstrates that the danger of actual and apparent corruption arises from the close relationships among major donors, candidates, and parties.

National and state parties interact frequently and closely with federal candidates and with one another. National parties are "'inextricably intertwined with federal officeholders and candidates,'" *McConnell*, 540 U.S. at 155, and both party plaintiffs have "constant contact" with candidates at the height of an election, FEC Facts ¶¶ 81, 113. Both state and national parties plan election strategies side-by-side with federal candidates. FEC Facts ¶¶ 79-85, 110.

This close relationship between parties and candidates extends to fundraising. FEC Facts ¶¶ 91-97. Parties, including the plaintiffs in this case, encourage federal candidates to tell their donors — especially those who have already given the maximum to the candidate — to also contribute to their party. FEC Facts ¶¶ 115, 119. Candidates advise donors of this option. Congressman Cao himself suggested to contributors who had given the maximum amount to his 2008 campaign that they could also contribute to the party. *Id.* ¶ 119. Indeed, federal candidates are expected not only to raise money for their own campaigns, but also to raise money for their parties. *Id.* at ¶¶ 92, 107, 115. Candidates who help the party raise large sums of money are often rewarded with party expenditures in return, through a process that has been called "tallying." *Id.* at ¶¶ 101, 120, 124.

In addition to soliciting funds for their parties, candidates learn through a variety of other means who has made large contributions to the party. Parties "go to pains to insure that candidates know exactly who donates to them." Krasno Rept. at 5, FEC Facts Exh. 1; FEC Facts ¶ 99. Officeholders learn of large party donors through joint fundraising committees, in which donors contribute both to candidates and parties. *Id.* at ¶ 100. Candidates also learn about large contributions when donors tell the candidates or campaigns, when the parties share donor

information, or when candidate campaigns simply look at FEC reports. *Id.* at ¶¶ 103-106. "'[F]or a member not to know the identities of [large party] donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves.'" *McConnell*, 540 U.S. at 147 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 487-88 (D.D.C. 2003) (Kollar-Kotelly, J.)). This knowledge about which contributors are going beyond the candidate contribution limits to help parties "is an essential element in any discussion of potential influence." Krasno Rept. at 5, FEC Facts Exh. 1; FEC Facts ¶ 103.

Large party donors, as a result of their contributions, receive access to officeholders that the general public does not receive. Martin Meehan, a Democratic Congressman from Massachusetts from 1993-2007 who has provided a declaration in this case, confirmed that "[p]arty fundraising serves as a mechanism for major donors to get special access to lawmakers." Declaration of Martin Meehan (Meehan Decl.) at ¶¶ 1, 8, FEC Facts Exh. 2. National parties' "fundraising events often feature members of Congress as draws, and they explicitly offer donors the opportunity to meet and get to know various officials." Krasno Rept. at 5, FEC Facts Exh. 1; FEC Facts ¶¶ 92-96. To facilitate its donors' access to federal candidates and officeholders, the RNC organizes "fulfillment" events attended by individuals who have made a large contribution to the RNC and by prominent federal office holders such as the President or Vice-President. *Id.* at ¶¶ 94-96. Such opportunities are offered only to individuals who are "fully contributing" the required amount to the RNC. *Id.* at ¶ 95. State parties also hold or participate in events at which major donors can meet federal candidates and officeholders. *Id.* at ¶¶ 107, 116. And the special access that large donors receive enables them to convey their views and try to influence grateful officeholders to adopt the donors' favored policy position. FEC Facts at ¶¶ 94-97.

In the absence of limits on coordinated expenditures, a large donor wishing to contribute more than the statutory limit to a candidate could "use a party committee to 'launder' the money." Krasno Rept. at 4, FEC Facts Exh. 1; FEC Facts ¶¶ 117-126. "[I]f 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." *Colorado II*, 533 U.S. at 460. As Professor Krasno notes, the limits on coordinated expenditures "serve to instill confidence in the system by minimizing, if not completely preventing, this type of corruption." Krasno Rept. at 3, FEC Facts Exh. 1. But as Congressman Meehan explained, "[t]o remove or weaken the current [coordinated expenditure] limits would provide a strong incentive for parties to expand the use of coordinated expenditures to help candidates. That would encourage at least the appearance of corruption by providing a way for influence-seeking contributors to effectively give favored candidates far more financial support than they can today." Meehan Decl. ¶ 19, FEC Facts Exh. 2.

Any standard that exempts a large category of party coordinated communications from regulation would lead to the same problem of circumvention. Because plaintiffs' proposed "own speech" exception would create such a large exemption, FEC Facts ¶¶ 172-81, it would create the kind of opportunity for circumvention that *Colorado II* makes clear Congress can take reasonable steps to prevent. Therefore, plaintiffs' claims regarding "own speech" are not substantial and should not be certified under Section 437h.

B. Plaintiffs' Questions 2 and 5 Fail to Raise a Substantial Constitutional Question in Claiming That Party Coordinated Spending Can Be Limited Only If It Is for Express Advocacy Communications or a Narrow Range of Other Expenditures Including "Targeted" Federal Election Activity

1. Plaintiffs' Argument That Parties' Coordinated Expenditures Cannot Be Limited Unless They Are "Unambiguously Campaign Related" Is Contrary To Settled Law

Plaintiffs request certification of questions about party coordinated expenditures that plaintiffs claim are not "unambiguously campaign related," alleging that the First Amendment prohibits such limits. Mot. To Certify Questions Questions 2 and 5 (Doc 19); Complaint ¶¶ 59-60, 80-81 (Doc. 35). These claims are too insubstantial to merit certification to the *en banc* Court of Appeals, both because plaintiffs' "unambiguously campaign related" standard has no application to coordinated expenditures and because Congress clearly has constitutional authority to place limits on party coordinated expenditures that extend beyond the extremely limited list of activities which plaintiffs concede are regulable.

Plaintiffs distort *Buckley* by contending that the decision enshrined the phrase "unambiguously campaign related" as a general constitutional test for campaign finance regulation. *Buckley* did no such thing. To avoid vagueness concerns, *Buckley* construed certain of the Act's restrictions on *independent* expenditures by individuals and groups other than political committees to reach only "communications that expressly advocate the election or defeat of a clearly identified candidate," *Buckley*, 424 U.S. at 80, but it made no reference to "express advocacy" or "unambiguously campaign related" when analyzing the constitutionality of the Act's *contribution* limits. *See id.* at 23-38; *see also id. at* 44-45; *MCFL*, 479 U.S. at 249. Instead, the Court construed the term "contribution" quite broadly, encompassing indirect contributions, *all* coordinated expenditures, and money given to organizations other than political committees or non-candidate individuals but "earmarked for political purposes":

> We construed that term to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate. . . . So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.

Buckley, 424 U.S. at 78. Thus, neither the express advocacy requirement nor plaintiffs' "unambiguously campaign related" formulation applies to coordinated expenditures or other kinds of contributions. *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.").

Other decisions have confirmed that express advocacy is not required in the context of coordinated expenditures. In *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), the court rejected the

> argument that the "express advocacy" limitation must apply to expressive coordinated expenditures on both quasi-statutory and constitutional grounds. 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. Indeed, in direct contrast to the Coalition's position in this case, *Orloski* held that the "express advocacy" standard was not constitutionally required for statutory provisions limiting contributions.

Id. at 86-87 (citations and footnotes omitted). *See also id.* at 87 n.50 ("The Coalition advances a fanciful interpretation of *Buckley*. In the context of discussing FECA's disclosure obligations, the *Buckley* Court reaffirmed that the term 'contribution' 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. Because, as the *Buckley* Court had explained earlier in its Opinion, such coordinated expenditures involve a limited amount of speech by the contributor,

the Court found that the First Amendment did not require a narrowing understanding of 'expenditure' as used in the above-quoted sentence."). More recently, in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (*Shays I*), and *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III*), the D.C. Circuit invalidated Commission regulations that define "coordinated communication" because they failed to regulate enough activity by relying too heavily upon the "express advocacy" standard.[16] In particular, the definition did not treat communications as regulable coordinated expenditures under the Act if they were disseminated more than 120 days before an election unless they redistributed a candidate's campaign materials or contained express advocacy. In *Shays I*, the court explained:

> the Commission took the further step of deeming these two categories adequate by themselves to capture the universe of electorally oriented communication outside the 120-day window. That action requires some cogent explanation, not least because by employing a "functionally meaningless" standard outside that period, the FEC has in effect allowed a coordinated communication free-for-all for much of each election cycle.

414 F.3d at 100 (quoting *McConnell*, 540 U.S. at 193). After the Commission modified the pre-election time windows and provided additional explanation for its reliance in part on the express advocacy standard, the D.C. Circuit again invalidated the regulation.

> Thus, the FEC's rule not only makes it eminently possible for soft money to be "used in connection with federal elections," *McConnell*, 540 U.S. at 177 n.69, but also provides a clear roadmap for doing so, directly frustrating BCRA's purpose. Moreover, by allowing soft money a continuing role in the form of coordinated expenditures, the FEC's proposed rule would lead to the exact perception and possibility of corruption Congress sought to stamp out in BCRA, for "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash,'" *id.* at 221 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446 (2001)), and "[i]t is not only

[16] Although the regulation directly at issue in the *Shays* cases, 11 C.F.R. § 109.21, did not define party coordinated communications, which are defined in 11 C.F.R. § 109.37, the applicable "content" standards in the two regulations rely on the express advocacy standard in the same way.

> plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude," *id.* at 145.

Shays III, 528 F.3d at 925.

Although *Buckley* used the phrase "unambiguously campaign related," 424 U.S. at 81, it was merely part of the Court's explanation of its statutory construction of the term "expenditure" in connection with some of the Act's disclosure provisions as applied to independent expenditures. Thus, *Buckley*'s interpretation (424 U.S. at 79-80) of the term independent "expenditure" — when made by individuals or groups *other than political committees* — to mean spending that is "unambiguously related" to the campaign of a candidate has no bearing on the coordinated expenditure limits at issue in this case.[17] Plaintiffs also argue that this alleged "unambiguously campaign related" test was later applied in *MCFL* and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), but neither case based its holding on such a requirement, and neither case involved limits on parties' coordinated expenditures.

Moreover, *Colorado II* nowhere suggests that coordinated expenditure limits can be applied only to communications containing express advocacy or conduct that is "unambiguously campaign related," despite the fact that *Colorado II* was decided 26 years after *Buckley*. Such a requirement would be completely inconsistent with the anti-circumvention rationale on which the Court based its holding, because it would allow parties to engage in a wide range of coordinated activities with candidates without any limit. When candidates have an opportunity to collaborate with parties or other entities on communications or other activities that may benefit their campaigns, there is obviously a wide array of spending that would both help

[17] Moreover, to the extent that *Buckley* caused any confusion about whether its express advocacy construction created a constitutional limit on Congress's authority, the Court put that question to rest in *McConnell*, which noted that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-92.

candidates and raise the opportunity for real or apparent corruption — regardless of whether the spending is "unambiguously campaign related." To paraphrase *Buckley*, 424 U.S. at 47, the presence of "prearrangement and coordination" is what increases the value of the expenditure to the candidate and creates the "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."

In sum, *Colorado II* held that a party's coordinated expenditures were functionally indistinguishable from direct party contributions to the candidate, and it upheld the party coordinated expenditure provision based largely on an anti-circumvention rationale. The *Colorado II* decision and other cases are therefore completely inconsistent with the notion that the only coordinated expenditures that can be limited are those few expenditures that plaintiffs claim are "unambiguously campaign related." Thus, plaintiffs' Questions 2 and 5 are foreclosed by Supreme Court precedent and are settled questions that should not be certified to the Fifth Circuit *en banc*.

2. By Inviting Widespread Circumvention of the Act, Plaintiffs' Proposed Exemptions Present Insubstantial Claims

Like plaintiffs' "own speech" claim discussed *supra* Part III.A, plaintiffs' "unambiguously campaign related" claim is so broad that it would create a roadmap for circumventing the coordinated expenditure limits and thus severely undermine the Act's contribution limits. According to plaintiffs, party coordinated communications may be limited only if they contain "explicit words expressly advocating the election or defeat of a clearly identified federal candidate." Complaint ¶¶ 59, 80 (Doc. 35).[18] But "the overwhelming majority of modern campaign advertisements do not use words of express advocacy, whether they are

[18] This claim is different from — though apparently overlaps with — plaintiffs' "own speech" claim, under which even express advocacy communications cannot constitutionally be limited if they are, in plaintiffs' view, the party's "own speech." *See supra* Part III.A.1.

financed by candidates, political parties, or other organizations." *McConnell*, 251 F. Supp. 2d at 529 (Kollar-Kotelly, J.). Plaintiffs' claim would allow parties to pay for unlimited amounts of coordinated electoral advocacy mentioning candidates in the days just before an election, essentially on the grounds that such communications can be characterized as "issue advocacy," "grassroots and direct lobbying," or "public communications of any kind involving support or opposition to state candidates, support or opposition to political parties, or support or opposition to candidates generally of a political party." Complaint ¶¶ 40, 59, 80 (Doc. 35). But prior to BCRA, so-called "issue advocacy" communications that did not contain "magic words" of express advocacy (such as "Vote Against Jane Doe") were routinely used to influence federal elections, and "genuine issue advocacy on the part of political parties [was] a rare occurrence." *McConnell*, 251 F. Supp. 2d at 451 (Kollar-Kotelly, J.). The "conclusion that [issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *McConnell*, 540 U.S. at 127 (footnote omitted). For example, from 1996-2002, the national party committees spent "several hundred million dollars on issue advocacy." Krasno Rept. at 10 & n.14, FEC Facts Exh. 1.

Indeed, in this very case, plaintiffs freely acknowledge that their desire to coordinate with candidates on "issue ads" is for campaign-related purposes. Among the "issue ads" that plaintiffs have indicated they would have liked to run just before the 2008 general election in Louisiana was one addressing former Congressman William Jefferson's "pending trial and alleged corruption." Complaint ¶ 48 (Doc. 35). (Congressman Jefferson, of course, was Mr. Cao's opponent at that time.) There can be no doubt about the electoral nature of a party ad made in coordination with that party's candidate that runs shortly before that candidate's election and discusses his opponent's pending criminal trial. FEC Facts ¶¶ 138-142. More generally,

LA-GOP acknowledges that it would like to coordinate its "grassroots lobbying" with candidates because "it brings the candidate into the message and gives us a greater chance of electing a candidate." FEC Facts ¶ 147. LA-GOP also acknowledges that it would like to "involve Candidate Cao in [issue advocacy] communication[s], because not only [would] it bring up these issues, it [would give] a specific person for them to vote for." *Id.* at ¶ 137. In short, party "issue ads" are "designed to elect or defeat candidates." Meehan Decl. ¶ 27, FEC Facts Exh. 2.

Similarly, although plaintiffs concede that a limited amount of "targeted" federal election activity can be constitutionally regulated as party coordinated expenditures, their definition of "targeted" is so narrow that it, too, is a roadmap for circumvention. *See* Complaint ¶¶ 59, 80 (Doc. 35). In fact, plaintiffs' amorphous descriptions of which activity they consider "targeted" reveal that plaintiffs believe very little of such activity can be constitutionally regulated. FEC Facts ¶¶ 153-171. Although "federal election activity" is defined in the Act, 2 U.S.C. § 431(20), "targeted" and "non-targeted" are not statutory terms, regulatory terms, or any other legal term of art; plaintiffs have invented the terms for this litigation. FEC Facts ¶ 157. Accepting what appears to be plaintiffs' current position, virtually all voter registration, voter identification, get-out-the-vote activity and generic campaign activity is "non-targeted." *Id.* at ¶ 158. According to plaintiffs, if such activity takes place in more than one congressional district, or in only a part of a congressional district, it is "non-targeted." *Id.* at ¶¶ 159-160.[19] If voter registration references multiple candidates, plaintiffs claim it is "non-targeted." *Id.* at ¶ 161; *see* RNC 30(b)(6) Dep. at 153, FEC Facts Exh. 5 ("in the example of the two, two or more candidates being mentioned, the

[19] *See* RNC 30(b)(6) Dep. at 151, FEC Facts Exh. 5 ("[if] you were having a voter registration drive in multiple districts outside of any election, then I don't think that's [] targeted."); *id.* ("If you had a voter registration drive in just one county, I would say that was a non-targeted voter registration drive, because you're not affecting the entire district of that candidate."); *id.* ("Q. So it's only targeted if it's exactly every district, every part of a district and not anything more, does that make sense? A. Right.")).

answer is yes, that would not be targeted")). To meet plaintiffs' definition, "targeted" federal election activity must be coterminous with the candidate's congressional district *and* refer only to that one candidate. But as Congressman Meehan confirmed, conducting such activities in an area greater than or smaller than a single district would still benefit the campaign of a candidate in that district. Meehan Decl. ¶ 25-26, FEC Facts Exh. 2. Indeed, the RNC acknowledges it would like to coordinate "non-targeted" activities with candidates "in an effort to help candidates win elections … ." RNC 30(b)(6) Dep. at 150, FEC Facts Exh. 5.

In fact, what plaintiffs consider "targeted" voter registration rarely happens "because voter registration is usually done statewide, or even if it's done within a district, there are multiple candidates on a ballot within the district." RNC 30(b)(6) Dep. at 150, FEC Facts Exh. 5. Parties could easily accomplish the same goals and circumvent the Act's limits on coordinated expenditures by engaging in "non-targeted" activity instead. For example, under plaintiffs' theory, if a party wished to coordinate voter registration activity with a candidate, it could avoid any limits by simply coordinating with two candidates instead of one, or by conducting the activity in a slightly larger or smaller geographic area, thus avoiding regulation under plaintiffs' extremely narrow conception of "targeting." FEC Facts ¶¶ 154-156, 163.

Despite plaintiffs' claim that they desire to engage in genuine "issue advocacy" and "grassroots lobbying," *see* Complaint (Doc. 35) ¶ 40, plaintiffs have no track record of engaging in the many avenues currently available to them to participate in such activities without restriction. Parties can already conduct all of these activities independently of candidates at any time of the year, but the RNC does not currently engage in any independent "grassroots lobbying" or "direct lobbying," and it has not been engaged in any activities that do not reference federal candidates "in a long time." FEC Facts ¶ 148. Furthermore, parties can coordinate

communications with candidates prior to the 90 or 120 days before an election, as long as such communications do not contain express advocacy or disseminate candidate campaign materials, but the plaintiffs in this case have given no indication that they actually engage in these permissible communications prior to the pre-election windows. FEC Facts ¶¶ 146, 148; 11 C.F.R. § 109.37(a)(2)(i)-(ii).

The fact that political parties generally spend money only on election-related activity is unsurprising given that the primary goal of the major political parties is to win elections. FEC Facts ¶¶ 127-131. Even the party plaintiffs admit that their basic role is "to elect Republican candidates to office." *Id.* at ¶ 129 (quoting LA-GOP 30(b)(6) witness); *see id.* at ¶ 128 (quoting former RNC chair Haley Barbour's statement that "[t]he purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president.... Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures.").

Neither the Constitution nor any case interpreting it gives political parties the right to engage in virtually unfettered coordinated spending in conjunction with candidates. On the contrary, *Colorado II* makes clear that Congress can limit such conduct to prevent the circumvention of contribution limits that deter political corruption. As a result, plaintiffs' questions regarding conduct that is purportedly "unambiguously campaign related" fail to raise a substantial claim and should not be certified under Section 437h.

C. Plaintiffs' Question 4 Fails to Raise a Substantial Question in Claiming That Some or All of the Party Coordinated Expenditure Limits at 2 U.S.C. § 441a(d)(3) Are Unconstitutionally Low

Under 2 U.S.C. § 441a(d)(3), party committees receive special rights to make large expenditures in coordination with their candidates that are unavailable to other political

committees. The expenditure limits are based in part on the voting age population of the states in which the race is held. For the 2008 election cycle, the limits ranged from $42,100 to $84,100 in races for the House of Representatives, and from $84,100 to more than $2 million in Senate races.[20] Plaintiffs argue that the variability of these limits among races renders them unconstitutional; that even the highest limits for House races (now $87,300) are too low; and that because the limits are not severable, all of them "must fall as a unit," so parties must be permitted to make "unlimited" coordinated expenditures. Mot. to Certify Questions at 13. But Congress is entitled to significant deference in balancing competing interests and determining that higher coordinated expenditure limits for certain elections adequately serve the government's interest in preventing corruption. And there is no evidence that these generous party coordinated expenditure limits have prevented candidates from running effective campaigns or parties from supporting those campaigns. Under settled precedent, plaintiffs raise only insubstantial questions that should not be certified to the Court of Appeals *en banc*.

1. Congress Chose Varied Limits for Different Elections to Balance the Interests of Preventing Corruption and Assuring That Candidates Can Amass Sufficient Resources for Effective Advocacy

The different limits that Section 441a(d)(3) sets for different congressional races reflect Congress's judgment as to the best way to balance the competing interests of preventing corruption and the candidates' need to "amass[] the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. *See also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000); *Buckley*, 424 U.S. at 36 (explaining that FECA "provisions [excepting some volunteers'

[20] These limits are indexed for inflation annually. 2 U.S.C. § 441a(c). In 2009, the limits range from $43,700 to $87,300 in races for the House, and from $87,300 to $2,392,400 in Senate races. FEC Facts ¶ 20; Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435, 7436 (Feb. 17, 2009).

expenses from contribution limits] are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates"). Such accommodation of competing interests is the norm in legislation, and "[c]ourts . . . must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002) (citation omitted). As the Supreme Court has explained:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). Here, Congress made a legislative judgment based upon the difference between state-wide elections and elections in a congressional district occupying less than an entire state. Congress was doubtless aware that running campaigns targeting more voters or voters across a larger geographic area would be more costly.

The Supreme Court has recognized that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," and "[t]he initial discretion to determine what is different and what is the same resides in the legislatures … ." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (emphasis and citations omitted). "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Buckley*, 424 U.S. at 97-98. Indeed, in *Buckley* the Court explained that the then-$1,000 limit on individual contributions to House and Senate candidates "might well have been structured to take account of the graduated expenditure limitations for House, Senate and Presidential campaigns." *Id.* at 30 (footnote omitted). In fact, contribution limits that vary by office or by the size of the constituency have been before the Court not only in *Colorado II*, but

also in *Shrink Missouri* and *Randall v. Sorrell*, and in no case has the Court suggested that such variability presents any constitutional problem. *See Colorado II*, 533 U.S. at 438-39 (upholding limits in 2 U.S.C. § 441a(d)); *Randall v. Sorrell*, 548 U.S. 230, 236-38 (2006) (striking down on other grounds state contribution limits that varied based on whether office was statewide, for state senator, or for state representative); *Shrink Missouri*, 528 U.S. at 382-83 (upholding state contribution limits that varied based on whether office was statewide and on the size of the population represented). Plaintiffs are thus wrong to argue that because Congress set higher limits for statewide federal races or relied in part on the size of the voting population, lower limits in other races are "not supported by an anti-corruption interest." Complaint ¶¶ 71-72 (Doc. 35).

In the context of campaign contributions, the task of identifying a specific dollar limit that strikes the best balance between competing objectives should largely be entrusted to Congress. "If [Congress] is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (citation omitted); *accord Shrink Missouri*, 528 U.S. at 397. The Court has typically deferred to the legislative branch's determination of such matters since "[i]n practice, the legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248 (citation omitted); *see also Buckley*, 424 U.S. at 83 ("The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion."). Indeed, "[w]hen contribution limits are challenged as too restrictive, [the Court has] extended a measure of deference to the judgment of the legislative body that enacted the law." *Davis v. FEC*, 554 U.S. __, 128 S. Ct. 2759, 2771 (2008).

Plaintiffs' claim that even the highest coordinated expenditure limit for House races — currently $87,300 — is unconstitutionally low also goes against settled principles of law. Since *Buckley* the Court has acknowledged that there is some lower bound to contribution limits, as "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. However, the Court has consistently applied a constitutional test that analyzes contribution limits from the perspective of the *candidate*, not the donor, and asks whether the limit impairs the candidate's ability to wage an effective campaign:

> We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless. Such being the test, the issue in later cases cannot be truncated to a narrow question about the power of a dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.

Shrink Missouri, 528 U.S. at 397. In *Khachaturian*, the Fifth Circuit emphasized that a Senate candidate challenging the constitutionality of the Act's $1,000 individual contribution limit as applied to him would have to show a "serious adverse effect" on his campaign in light of *Buckley*'s facial upholding of that provision. 980 F.2d at 331.

In this case, there is no indication that the limits in Section 441a(d)(3) could have a "serious adverse effect" on any candidate's ability to wage an effective campaign. In the 2008 election cycle, in addition to party coordinated expenditures under Section 441a(d)(3), congressional candidates were permitted to receive contributions of up to $5,000 from parties and other multicandidate political committees, and contributions from individuals of up to $2,300 per election (*i.e.*, $2,300 for a primary and another $2,300 for a general election). *See* 2 U.S.C. §§ 441a(a)(1)(A), 441a(a)(2)(A). By contrast, in *Shrink Missouri*, the Court declined to second-guess a legislative judgment that contribution limits ranging from $275 to $1,075 were

appropriate for Missouri state campaigns, relying on findings that candidates had been able to raise funds to run effective campaigns with the limits in place. 528 U.S. at 395-97. In *Randall*, the Court did strike down Vermont party contribution limits ranging from $200 to $400 (depending on the office), 548 U.S. at 257-59, but those limits were clearly a far cry from the party limits at issue here, as the Court itself recognized in noting that the federal limits on coordinated expenditures and direct party contributions it had previously upheld "were far less problematic, for they were significantly higher than [Vermont's] limits." *Id.* at 258.[21]

2. The Evidence Shows That These Limits Have Not Prevented Candidates from Waging Effective Campaigns or Parties from Providing Considerable Support to Those Campaigns

As we have explained, the standard in determining if a contribution limit like the party coordinated expenditure limits is too low is whether the limit is "so radical in effect as to . . . drive the sound of a candidate's voice below the level of notice … ." *Shrink Missouri*, 528 U.S. at 397. Plaintiffs have not attempted to provide evidence to meet that standard; in fact, data from recent election cycles amply demonstrates that candidates have had the resources to wage effective campaigns, and that party support has been a key part of those campaigns.

Federal candidates raise and spend considerable sums. During the 2008 cycle, Mr. Cao's campaign received $242,531, including $5,000 in contributions from the RNC and $500 from the

[21] Plaintiffs' reliance upon a Ninth Circuit case that struck down contribution limits that varied based on whether candidates agreed to expenditure limitations is misplaced because those limits varied between candidates *running in the same race*. *See California Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1295-96 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); Mot. To Certify Questions at 11 (Doc. 19). As the Supreme Court subsequently noted, "imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment." *Davis*, 128 S. Ct. at 2774 (striking down system under which Act's limits could vary in same races based on candidates' use of self-financing). But since congressional candidates running against one another are subject to the same party coordinated expenditure limits under the Act, there is no disparity among *competing* candidates, and thus no constitutional defect.

South Carolina Republican Party, and also had the benefit of $83,971 in coordinated expenditures from the RNC (using its own and the LA-GOP's Section 441a(d) authority). FEC Facts ¶ 44. With these resources, Mr. Cao unseated an incumbent member of Congress. Based on FEC reports regarding activity through June 30, 2009, Mr. Cao has already raised $516,957 for his 2010 re-election campaign, including a $4,560 contribution from LA-GOP. *Id.* Plainly, the limits on party coordinated expenditures have not kept Mr. Cao from amassing the resources necessary for effective advocacy.[22] More generally, in the 2008 election cycle alone, congressional candidates spent almost $1.4 billion, with House candidates spending $949.7 million, and Senate candidates spending $444.7 million. FEC Facts ¶ 43.

Party fundraising and spending has also been prodigious in recent election cycles, confirming that "[d]espite decades of limitation on coordinated spending, parties have not been rendered useless." *Colorado II*, 533 U.S. at 455. Data shows that the two major political parties together raised more than $1.4 billion in the 2004 election cycle, more than $1 billion in the 2006 cycle, and more than $1.5 billion in the 2008 cycle. FEC Facts ¶ 32. Because the parties have been able to raise record amounts, they have provided significant financial support to their federal candidates. In the 2008 cycle alone, the Republican party committees (including national, state, and local committees) supported their federal candidates with more than $31 million in coordinated expenditures, and the Democratic party committees supported their federal candidates with more than $37 million in coordinated expenditures. *Id.* ¶ 37. In the 2006 cycle, six candidates in U.S. Senate races each received the benefit of $1 million or more from their parties in coordinated expenditures. *Id.* In addition, in the 2008 cycle, the major parties'

[22] Of course, "[e]ven assuming that the contribution limits affected respondent [candidate]'s ability to wage a competitive campaign, a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*." *Shrink Missouri*, 528 U.S. at 380.

national Senatorial campaign committees together made more than $100 million in independent expenditures in support of their candidates, and the national Congressional committees together made more than $100 million in independent expenditures. *Id.* ¶ 43.

The data also makes clear that the parties approach the maximum coordinated expenditures permitted under the Act only in a small fraction of races—generally the most competitive ones. *See* FEC Facts ¶¶ 72-78. Although there are at least 468 federal elections in each two-year cycle, in the 2008 cycle Republican party committees made coordinated expenditures at 95% or more of the maximum amount permitted on behalf of only 61 candidates, and Democratic party committees did so on behalf of only 30 candidates; by contrast, in the 364 elections deemed to be uncompetitive by the authoritative Cook Report, the two parties each reached the 95% threshold in only 2% of these elections. *Id.* ¶¶ 73-75. This data suggests that, although plaintiffs argue that the coordinated expenditure limits are too low for parties to fulfill their historical role, the limits do not create a constitutionally significant burden.

In sum, plaintiffs cannot show that the limits on party coordinated expenditures have prevented effective campaigns, and Question 4 should not be certified to the Court of Appeals.

D. Plaintiffs' Question 7 Fails to Raise a Substantial Question in Claiming That the $5,000 Contribution Limit at 2 U.S.C. § 441a(a)(2)(A) Violates the Constitution Because It Treats Political Parties the Same As Other Political Committees

Plaintiffs allege that the $5,000 limit for contributions by multicandidate political committees to federal candidates is "per se unconstitutional because it imposes the same limit on parties as on political action committees." Mot. to Certify Questions at 15 (Doc. 19). However, *Buckley* upheld 2 U.S.C. § 441a(a)(2)(A) on its face, 424 U.S. at 35-36, and although political parties differ from other political committees in some ways, there is no constitutional requirement that they have different contribution limits. *See generally Colorado II*, 533 U.S. at

455-56. In fact, parties are treated far more favorably under the current regulatory structure than other political committees are, and the generous coordinated expenditure limits plaintiffs have challenged in this case are just one example. Plaintiffs' claim involves settled questions of law and there is no basis to certify it to the Court of Appeals *en banc*.

1. Parties Are Not Constitutionally Entitled To More Favorable Treatment Than Other Political Committees

Although parties receive more favorable treatment in many respects, it is well-established that this favoritism is not constitutionally required. In *Colorado II*, the Court considered the argument that a political party is in "a different position from other political speakers, giving it a claim to demand a generally higher standard of scrutiny before its coordinated spending can be limited," and held that limits on party coordinated expenditure limits — which are functionally the same as contributions — are subject to the same scrutiny as the limits on individuals and other political committees. 533 U.S. at 445, 456. In so concluding, the Court "reject[ed] the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment," *id.* at 447, 464, and observed that the coordinated spending limits have not rendered parties useless, *id.* at 455 ("In reality, parties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place candidates under obligation…."). Similarly, there is no indication that limits on parties' in-kind and direct contributions to candidates have unduly burdened parties or their candidates. Thus, there is no reason to conclude that the $5,000 limit on contributions by political committees, which the Court upheld in *Buckley*, raises a substantial constitutional issue as applied to political parties.

Plaintiffs argue that parties should be free of the challenged financial restraint because they have a unique historical role in the democratic process, Compl. ¶ 87 (Doc. 35), but an examination of that very role demonstrates both that today's parties are financially strong and

that the party contribution limits Congress established serve vital interests. In the Constitution, the Framers created a systems of checks and balances partly as a way to limit the influence of political parties. FEC Facts ¶¶ 21-25. As George Washington cautioned, "the danger of parties in the State . . . opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion." *Id.* at ¶ 23. In particular, the Framers were concerned that a party "was very likely to become the instrument with which some small and narrow special interest could impose its will upon the whole of society, and hence to become the agent of tyranny." *Id.* at ¶ 25. Nevertheless, parties have prospered. As Professor Krasno explained and recent FEC reports confirm, the major parties have never been financially stronger since their founding in the 19th Century than they are now. *Id.* at ¶¶ 28-36. At the same time, as the Supreme Court has noted, parties today "perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. Echoing the concerns of the Framers, the Court found that the "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players." *Id*. at 455. Thus, parties' distinctive and important role is precisely why the contribution limits Congress established serve as an essential bulwark against potential corruption.

Plaintiffs also argue that *Randall*, in striking down Vermont's contribution limits, relied in part on the fact that the challenged statute applied the same contribution limits to political parties as it did to everyone else, which in that case threatened to harm the right to associate in a party. Mot. to Certify Questions at 15 (Doc. 19); *Randall*, 548 U.S. at 256. But plaintiffs gloss over the Court's underlying concern that the state statute "applie[d] its $200 to $400 limits —

precisely the same limits it applie[d] to an individual — *to virtually all affiliates of a political party taken together* as if they were a single contributor." *Randall*, 548 U.S. at 257 (emphasis added and citation omitted). The $5,000 limit in 2 U.S.C. § 441a(a)(2)(A) is radically different: It does not group together all committees of a political party as if they were a single contributor, so the major parties' three national committees, as well as state and local committees (including state committees outside the state in which the candidate is running), may each contribute $5,000 to every federal candidate in each election. For example, in the 2008 election cycle, one U.S. House candidate received $98,051 in contributions, due to the variety of national, state, and local party committees permitted to contribute $5,000 per election under Section 441a(a)(2(A), and in the 2008 cycle, Mr. Cao himself received contributions from two state parties, including $5,000 from the RNC. FEC Facts ¶¶ 44, 48. Moreover, the Vermont limits at issue in *Randall* did not provide a generous additional limit for coordinated party expenditures, as FECA does. 548 U.S. at 256-257. Rather, the Vermont law subjected to the same low contribution limits all party coordinated expenditures. *Id*. By contrast, as we explain below, FECA permits parties to do far more than other contributors to help candidates.

2. The FECA Actually Treats Parties Far More Favorably Than Other Political Committees, in Part by Providing Much Higher Coordinated Expenditure Limits

The Act provides party committees with many advantages that are not afforded to other committees. First, of course, parties alone are permitted to make the large coordinated expenditures under Section 441a(d)(3) that plaintiffs have challenged, which are functionally equivalent to contributions. As discussed above, the Act permits parties to coordinate spending with congressional and presidential candidates far in excess of the limits that apply to all other entities. FEC Facts ¶ 20. As the Supreme Court observed in *Colorado II*, "a party is better off

[than individuals and other political committees], for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to the limit of the Party Expenditure Provision." 533 U.S. at 455 (footnote omitted). In addition, national parties and their Senatorial campaign committees may together contribute up to $42,600 to each Senate candidate. 2 U.S.C. § 441a(h); FEC Facts ¶ 47. No other entity can benefit federal candidates in these ways.

The Act also permits political parties to raise money in much larger amounts, from more sources, than candidate committees and other political committees. FEC Facts ¶ 7. During the 2010 election cycle, the national committees of a party may receive up to a combined total of $30,400 per year from each individual donor, and state, district, and local party committees may receive up to a combined total of $10,000 per year from an individual donor. 2 U.S.C. § 441a(a)(1); FEC Facts ¶ 9. In contrast, a federal candidate is limited to $2,400 in contributions from each individual for a primary election and $2,400 for a general election. *Id*. Similarly, other multicandidate political committees may receive only $5,000 per year, per individual. 2 U.S.C. § 441a(a)(1)(C); FEC Facts ¶ 11. In addition, a national party committee may receive up to $15,000 per year from another multicandidate committee, but other multicandidate committees are limited to receiving $5,000 per year and candidates are limited to receiving $10,000 per year in contributions from multicandidate committees. 2 U.S.C. § 441a(a)(2); FEC Facts ¶ 11. Moreover, a national party committee, such as the RNC, may receive unlimited transfers from other national party committees, such as the NRSC or NRCC. 2 U.S.C. § 441a(a)(4); FEC Facts ¶ 13. State, district, and local party committees may also transfer unlimited amounts of hard money to the national party committee or to one another. *Id*. This ability to freely transfer money is available only to party committees and committees affiliated with the same corporation, union or other entity. 2 U.S.C. §§ 441a(a)(1); 441a(a)(2); 441a(a)(5).

The major national parties are entitled to public financing for their quadrennial presidential nominating conventions. 26 U.S.C. § 9008(b). For the 2008 conventions, the two major parties each received subsidies of $16,356,000 from the U.S. Treasury. FEC Facts ¶ 16.

The Act provides special exemptions to the definitions of contributions and expenditures for parties. Payment of compensation for legal or accounting services by full-time staff on behalf of any party committee is excluded from these definitions. 2 U.S.C. §§ 431(8)(B)(viii)(I), 431(9)(B)(vi)(I); FEC Facts ¶ 15. The Act also excludes, for parties and candidates, the use of real or personal property, such as a community room, and the costs of invitations, food, and beverages voluntarily provided by an individual, provided that the value of the individual's activity does not exceed $2,000 in any calendar year. 2 U.S.C. § 431(8)(B)(ii); FEC Facts ¶ 15. The Act excludes from the definition of contribution for parties and candidates the payment for travel expenses made by any individual on behalf of the candidate or party, as long as the cumulative value by an individual does not exceed $1,000 to a candidate for an election and $2,000 to a political party for any calendar year. 2 U.S.C. § 431(8)(B)(iv); FEC Facts ¶ 15.[23]

Finally, political parties enjoy substantial non-monetary benefits under the current regulatory structure. Party names appear next to the candidate's name on ballots in most states. FEC Facts ¶ 17. Major party nominees appear automatically on the general election ballot. *Id.* And states often run the primary elections in which parties select a general election candidate, a great benefit for the parties. *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 573-74 (2000); FEC Facts ¶ 17. In fact, as an expert in *McConnell* explained, parties are uniquely

[23] State and local parties may also pay for the costs of some communications, such as slate cards, sample ballots, and other materials distributed by volunteers, without regard to the contribution and expenditure limits, even if those activities are coordinated with candidates. 2 U.S.C. §§ 431(8)(B)(v), 431(9)(B)(iv); FEC Facts ¶ 15. The Act also excludes, for state and local parties, expenditures for certain campaign materials, as well as certain voter registration and get-out-the-vote activities. 2 U.S.C. §§ 431(9)(B)(viii)-(ix); FEC Facts ¶ 15.

situated to influence elections because other entities "are not entitled to organize the slate of candidates presented to voters. Other entities do not organize legislative caucuses, assign committee chairs and members, or elect legislative leadership." FEC Facts ¶ 18.

Plaintiffs' claim of a right to special treatment for parties is analogous to an equal protection challenge to the Act's $5,000 limit on contributions by unincorporated associations to multicandidate political committees that relied on the fact that the ability of corporations and unions to support their "separate segregated funds" is not so limited. *See Cal. Med. Ass'n*, 453 U.S. at 200. The Supreme Court rejected that claim because "the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions." *Id*. Similarly, parties receive far more favorable overall treatment under the Act than other political committees do. As the Court explained in *Cal. Med.*, Congress may choose to treat different organizations differently under FECA, but that "reflect[s] a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id*. at 201.

Given the special benefits parties receive, "[e]ven the largest political action committees cannot begin to approach the political scope, influence, or depth of electoral support characteristic of the Republican or Democratic parties." FEC Facts ¶ 18. As the Supreme Court has noted, it is this heightened efficiency "in generating large sums" of money that "places a party in a position to be used to circumvent contribution limits that apply to individuals and PACs, and thereby to exacerbate the threat of corruption and apparent corruption that those contribution limits are aimed at reducing." *Colorado II*, 533 U.S. at 453. Thus, plaintiffs' Question 7 raises a settled matter that does not merit certification to the Court of Appeals.

E. Plaintiffs' Question 8 Fails To Raise A Substantial Question with Claims That the $5,000 Contribution Limit at 2 U.S.C. § 441a(a)(2)(A) Is Unconstitutionally Low

Plaintiffs' Question 8 consists of three sub-claims, which allege that the $5,000 limit for contributions by multicandidate political committees is unconstitutionally low because it is not indexed for inflation; because 2 U.S.C. § 441a(h) permits certain national committees (including the RNC) to contribute a higher aggregate amount (currently $42,600) to Senate candidates, so all lower contribution limits for congressional candidates are supposedly invalid; and because the $5,000 limit is allegedly too low for parties to "fulfill their historic and important role in our democratic republic." Mot. To Certify Questions at 22 (Doc. 19). None of these claims presents a substantial question sufficient to merit certification to the Court of Appeals *en banc*.

1. Plaintiffs' Claim That the $5,000 Contribution Limit Is Unconstitutional Solely Because It Is Not Indexed For Inflation Is Foreclosed by Precedent

The Supreme Court upheld against a facial challenge the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) and other limits that were not indexed for inflation. *Buckley*, 424 U.S. at 35-36. The Court has never struck down a federal contribution limit based solely on a lack of indexing, and there is no basis to do so here.

Plaintiffs rely on *Randall*, in which the Supreme Court struck down contribution limits varying between $200 to $400, and noted that the fact that the Vermont limits were "substantially lower" than limits upheld in *Buckley* and comparable limits in other states presented "danger signs" that the limits under consideration were too low. 548 U.S. at 253. The Court analyzed five factors to determine whether the limits were unconstitutionally low. *Id*. at 253. One of those factors was the lack of indexing; the Court noted that because the $200-$400 limits were already "suspiciously low," they "will almost inevitably become too low over time."

Id. at 261. By contrast, the $5,000 limit on multicandidate political committee contributions to federal candidates that plaintiffs challenge here is more than 10 times higher, and in any event, is only one of the avenues the Act provides for political committees to assist federal candidates. *See supra* Sections III.C.2, III.D.2. If 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; speculating now about what Congress might not do in the future, however, is not sufficient to raise a substantial claim under Section 437h.

In interpreting *Randall*, a federal district court recently noted that the lack of indexing was but one factor in the Supreme Court's analysis. *Ognibene v. Parkes*, 599 F. Supp. 2d 434, 449-50 (S.D.N.Y. 2009). *Ognibene* upheld a New York City law setting lower contribution limits, from $250 to $400, for lobbyists and persons "doing business" in the city, prohibiting matching funds for contributions from those persons, and banning contributions from corporations entirely. *Id.* Plaintiffs argued that under *Randall*, the lack of indexing for such low limits required a special justification and meant that the statute was not "closely drawn." The district court rejected this interpretation of *Randall*, explaining that indexing is just one of several factors to be considered in determining if a contribution limit prevents candidates from amassing the funds necessary to run for office, and that the absence of indexing alone does not make the limit facially unconstitutional. *Id.* at 449.[24]

[24] Indeed, courts have only struck down campaign finance restrictions in reliance upon *Randall* where the regulation amounted to a complete ban on contributions in certain instances or by particular individuals. *See Free Market Foundation v. Reisman*, 573 F. Supp. 2d 952, 954 (W.D. Tex. 2008) (statute prohibiting any coordinated expenditures and independent expenditures for a House Speaker election was unconstitutional, as it gave no outlet for political speech); *Kermani v. New York State Bd. Of Elections*, 487 F. Supp. 2d 101, 111-12 (N.D.N.Y. 2006) (staying the statute and calling upon the legislature to change a prohibition on party contributions or coordinated spending at the primary stage in state elections); *DePaul v.*

In view of *Buckley*'s upholding of the unindexed $5,000 contribution limit, and the other ways the Act provides parties to help their candidates, including the coordinated expenditure provisions at 2 U.S.C. § 441a(d), plaintiffs have failed to raise a substantial question.

2. Allowing National Party Committees To Contribute More To Senatorial Candidates Does Not Render the $5,000 Contribution Limit at 2 U.S.C. § 441a(a)(2)(A) Unconstitutional

Plaintiffs argue that because 2 U.S.C. § 441a(h) extends a special benefit to national party committees like RNC to contribute higher amounts to Senate candidates, *see* FEC Facts ¶ 47, all lower contribution limits for Senate and House candidates are invalid. However, the higher limit in 2 U.S.C. § 441a(h) does not vitiate the anti-corruption interest that supports the $5,000 limit in 2 U.S.C. § 441a(a)(2)(A). The Supreme Court has recognized that the Constitution does not require that different things be treated as though they were the same, and the higher limits simply reflect Congress's judgment as to the best way to balance the competing interests of preventing corruption and the candidates' need to amass the resources necessary for effective advocacy. *See supra* Sections III.C, D; *Buckley*, 424 U.S. at 36, 97-98; *Plyler*, 457 U.S. at 216. In enacting 2 U.S.C. § 441a(h), Congress was simply acknowledging the special role of national parties and the fact that candidates running for Senate may need more funds than House candidates to run effective campaigns. Moreover, like the coordinated expenditure limits, the limits in Section 441a(h) put no candidate at a competitive disadvantage. *See supra* n. 21; *Davis*, 128 S. Ct. at 2774. This claim fails to raise a substantial constitutional question.

Commonwealth, 969 A.2d 536, 542 (Penn. 2009) (relying in part on *Randall* to strike down a ban on all contributions from individuals affiliated with licensed gaming in the state).

3. Parties Can Fulfill Their Historic Role While Abiding by 2 U.S.C. § 441a(a)(2)(A)

Plaintiffs' claim that the $5,000 limit in Section 441a(a)(2)(A) is "simply too low to allow political parties to fulfill their historic and important role in our democratic republic" is also insubstantial. In *Buckley*, the Supreme Court upheld the $5,000 limit on contributions to candidates by political committees. 424 U.S. at 35-36. As explained above, the Supreme Court has also held that a party is not entitled to a higher standard of scrutiny before its coordinated expenditures, which are functionally the same as contributions, may constitutionally be limited. *See supra* p. 6; *Colorado II*, 533 U.S. at 447, 464. Of course, parties are not actually limited to the $5,000 contribution limit, since they enjoy far higher coordinated expenditure limits and other special advantages in supporting their candidates. *See supra* Section III.D.2.

As we explained above, the Court has evaluated whether contribution limits are too low from the perspective of the recipient, not the contributor. In this case, there is no indication that the limit on party contributions to candidates has hindered any candidate's ability to wage an effective campaign or "render[ed] contributions pointless." *Shrink Missouri*, 528 U.S. at 397. *See supra* Section III.C.2. On the contrary, Congressman Cao won his 2008 race and has already raised significant amounts for his 2010 campaign. FEC Facts ¶ 44.

Nor has the challenged contribution limit prevented parties from supporting candidates. The parties' primary purpose is to elect their candidates. FEC Facts ¶¶ 127-131. As Senator McCain testified in *McConnell*: "[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." *Id*. at ¶ 128. FECA has not inhibited the parties' ability to support to candidates; in fact, the parties are raising and spending more money than ever before. FEC Facts ¶¶ 31-33. In the two-year 2008 election cycle, the Democratic and

Republican parties together (including national, state, and local committees) raised more than $1.5 billion. FEC Facts ¶ 32. This continuing fundraising prowess has allowed the parties to provide considerable support to their federal candidates. *See supra* Section III.C.2.

Although plaintiffs claim that the $5,000 contribution limit prevents parties from fulfilling their important historical role, plaintiffs fail to describe in any detail what they perceive this role to be and how this limit is interfering with it. Plaintiffs cite *Randall*, which found that reducing the amount a political party could contribute to a candidate from $3,000 to $400 for both the primary and general election "would reduce the voice of political parties in Vermont to a whisper," 548 U.S. at 259 (internal quotation marks omitted). But here, plaintiffs challenge a $5,000 per election contribution limit that the Supreme Court has upheld, and that is only one part of a menu of options the Act offers parties to support their candidates. Moreover, in assessing the constitutionality of the "suspiciously low" contribution limits in *Randall*, the Supreme Court observed that "the critical question concerns . . . the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*." 548 U.S. at 255 (emphasis in original). In the 2008 election cycle, most incumbent Senators in highly competitive races received significantly more party contributions than did their challengers.[25] FEC Facts ¶ 49. Indeed, parties often provide special support to at-risk officeholders to ensure they win reelection. FEC Facts ¶¶ 86-90.[26] Thus, under the existing $5,000 limit, incumbents

[25] In the 2008 cycle, where an incumbent U.S. Senator either lost the election or won with less than 60% of the vote (a standard *Randall* used to identify the most competitive elections, 548 U.S. at 255-56), the incumbent candidates generally received much more in party contributions than their challengers did. In 30% of the elections, the challenger received no party contributions at all. FEC Facts ¶ 49.

[26] For instance, the NRCC recently created the "Patriot Program," explaining that "to expand [the party's] numbers in the House and reclaim the majority, it is imperative that every single incumbent House Republican seeking re-election is victorious." FEC Facts ¶ 86. The Program allows officeholders to take advantage of the national party's fundraising prowess and

have been able to raise far more in contributions from parties than have their challengers in the most competitive races. Permitting parties to make unlimited contributions or coordinated expenditures would provide an opportunity for incumbents to greatly increase this disparity, to the detriment of challengers.

In sum, plaintiffs have failed to raise a substantial constitutional issue with any of the claims in Question 8.

IV. BECAUSE PLAINTIFFS HAVE FAILED TO RAISE ANY SUBSTANTIAL CONSTITUTIONAL QUESTION, THEIR CLAIMS SHOULD BE DISMISSED

Because plaintiffs have failed to raise a substantial constitutional question, this Court should not only deny certification under Section 437h, but also grant summary judgment to the Commission. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[T]he party moving for summary judgment must 'demonstrate the absence of a genuine issue of material fact,' but need not *negate* the elements of the nonmovant's case." *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) (quoting *Celotex Corp*. 477 U.S. at 323). The nonmovant must "go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006) (internal quotation marks and footnote omitted). The nonmovant's

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to participate in joint fundraisers. *Id.* at ¶¶ 86-87. The Program's inaugural event was "a single-day fundraising blitz that brought in almost $100,000 in contributions for each of the 10 original Patriot program members when it debuted in June." *Id.* at ¶ 88. Congressman Cao is a member of the Program, and he has already received more than $500,000 for his 2010 campaign. *Id.* at ¶ 89.

burden is not satisfied "with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007) (citation omitted).

Because the evidence and the law show that plaintiffs have failed to raise a substantial constitutional question, and because no material facts are in dispute, the Commission is entitled to judgment on each of plaintiffs' claims. For the same reasons that the court should not certify any questions under Section 437h, it should grant summary judgment to the Commission.[27]

Respectfully submitted,

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[27] Even if any of plaintiffs' questions were determined to be worthy of certification to the Fifth Circuit, the insubstantial remaining questions cannot be certified and must be dismissed. *See Mariani*, 212 F.3d at 769 (court analyzes certification of each question separately).