ORAL ARGUMENT SCHEDULED NOVEMBER 30, 2018

No. 18-5227

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN NATIONAL COMMITTEE, INC.,
Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

On Certification of Constitutional Questions by the
United States District Court for the District of Columbia,
The Hon. Beryl A. Howell, Chief District Judge
Case No. 1:16-cv-121-BAH

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and *Amici*. Libertarian National Committee, Inc. ("LNC") was the plaintiff in the district court and is the plaintiff in this en banc proceeding pursuant to 52 U.S.C. § 30110. The Federal Election Commission ("FEC") was the defendant in the district court and is the defendant in this Court.

No person filed as *amicus curiae* before the district court. The Institute for Free Speech and the Goldwater Institute have filed as *amici* in support of plaintiff before this Court.

(B) Rulings Under Review. The United States District Court for the District of Columbia (Howell, J.) (June 29, 2018) certified the three constitutional questions at issue to this Court sitting en banc under 52 U.S.C. § 30110.

(C) Related Cases. The District Court previously declined to certify the LNC's challenge to the application of the annual contribution limits, 52 U.S.C. § 30116(a)(1)(B), to testamentary bequests, but certified LNC's narrower as-applied constitutional challenge to the imposition of contribution limits against a particular bequest. *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154 (D.D.C.) (Wilkins, J.) ("*LNC I*"), *reconsideration denied*, 950 F. Supp. 2d 58 (D.D.C. 2013) ("*LNC II*"). This Court summarily affirmed. *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5094, 2014 WL 590973, (D.C. Cir. Feb. 7, 2014) (per curiam). It later held

that the certified as-applied challenge had become moot. *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (en banc) (per curiam).

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CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND DEMOCRACY 21

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Campaign Legal Center and Democracy 21 make the following disclosure regarding their corporate status:

Campaign Legal Center ("CLC") is a nonprofit, nonpartisan corporation working in the areas of campaign finance reform, voting rights, and media law. CLC has no parent corporation and no publicly held corporation has any form of ownership interest in CLC.

Democracy 21 is a nonprofit, nonpartisan corporation dedicated to making democracy work for all Americans, including promoting campaign finance reform and other political reforms to accomplish this goal. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21.

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GLOSSARY OF ABBREVIATIONS

BCRA	Bipartisan Campaign Reform Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
LNC	Libertarian National Committee, Inc.
Cromnibus	Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014) (codified at 52 U.S.C. § 30116(a)(d))

STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center and Democracy 21 are organizations dedicated to promoting sound campaign finance reforms and defending the important democratic principles they advance. *Amici* regularly litigate the constitutionality of campaign finance laws, and have participated in several of the Supreme Court cases underlying the claims herein, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *McCutcheon v. FEC*, 572 U.S. 185 (2014).

SUMMARY OF ARGUMENT

The problem with the case brought by the Libertarian National Committee ("LNC") is that it challenges provisions and applications of the Federal Election Campaign Act ("FECA") that have not produced the injury it alleges.

The LNC alleges that it wishes to make greater expenditures for "expressive" activities and to secure access to the ballot for its candidates, LNC Br. at 18, and that it wants to do so by accepting contributions in amounts exceeding FECA's "base" limits on contributions to national party committees, 52 U.S.C. § 30116(a)(1)(B). But it declines to challenge the constitutionality of the base limits directly—presumably because it knows that these limits, along with the related "soft money" restrictions added by the Bipartisan Campaign Reform Act ("BCRA"), were upheld

[1] No party or party's counsel authored this brief in whole or part, and no person, other than *amici*, contributed money to fund its preparation or submission.

in *McConnell*, 540 U.S. at 154, and reaffirmed in *Republican Nat'l Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C.) (three-judge court), *aff'd*, 561 U.S. 1040 (2010) ("*RNC*"). This puts the LNC in the untenable position of turning its fire to provisions and applications of FECA that, if anything, relax the base contribution limits and result in more funds being available for the LNC's desired expenditures.

First, the LNC challenges the application of the annual base limits to a $235,575 bequest it received from William Shaber in 2015. The FEC has interpreted FECA to allow political parties to receive bequests exceeding the federal base limits provided that any excess funds are placed in escrow and annually withdrawn in amounts equaling the applicable base contribution limits. *See* FEC Advisory Op. 2015-05 (Shaber). In this sense, a bequest donor is advantaged as compared to a living donor who, by contrast, cannot give a party an over-the-limit, lump-sum contribution to be placed in escrow. But according to the LNC, the FEC's relatively permissive approach to testamentary contributions nevertheless violates the LNC's First Amendment rights because—at least with respect to the Shaber bequest—it maintains that the escrow approach is not "closely drawn" to the government's interest in combatting corruption and its appearance. The LNC is thus complaining that the advantage it has been given to receive enormous testamentary contributions is not advantageous enough. *Amici* believe the better reading of FECA would permit a national party committee to accept a bequest only in the amount permitted by the

relevant contribution limits in the year the bequest was made; after all, the donor's First Amendment rights were extinguished upon his death, as the LNC acknowledges, LNC Br. at 34, and the corruptive potential of huge amounts of dedicated contributions, even in escrow, ought to be self-evident. The LNC's real quarrel is thus with the base contribution limits.

Moreover, the LNC's as-applied challenge with respect to the Shaber bequest is improperly framed. It does not proceed on the basis of a legal theory, challenging categorically the application of the annual contribution limits to bequests on grounds that the governmental interest in regulating testamentary contributions is too attenuated or the record insufficient. The LNC did attempt to make this argument in *LNC. v. FEC*, 930 F. Supp. 2d 154 (2013) ("*LNC I*"), but it believes it was rejected there and it has not renewed the argument here. LNC Br. at 35. Instead, the LNC attempts to demonstrate that the Shaber bequest, as a matter of its distinct facts, does not raise the "valid anticorruption concerns" that the "LNC concede[d]" bequests can raise. *Id.* at 166.

But contribution limits are prophylactic; they are meant to apply to *all* contributions to "remove the temptation" of corruption before it arises, *McConnell*, 540 U.S. at 153, not only to those contributions that have already given rise to *quid pro quo* arrangements or are likely do so imminently. If the government has shown that a contribution limit is justified by its compelling interest in preventing

corruption or its appearance, it need not demonstrate, as a matter of fact, that a particular contribution has led or will lead to *quid pro quo* corruption as a prerequisite for the limits' application. Otherwise, the whole regime of contribution limits would be impossible to administer since every contribution would have to be separately litigated to determine if it poses a danger of corruption on its distinct facts.

Similarly misdirected is the LNC's challenge to the 2014 "Cromnibus" legislation that tripled the limits for contributions to political parties made to segregated accounts for three enumerated purposes. 52 U.S.C. § 30116(a)(9) (allowing segregated accounts to cover expenses for presidential nominating conventions, party headquarters buildings, and election-related litigation). Typically, courts do not hold that the *relaxation* of a facially constitutional contribution limit gives rise to any First Amendment injury—absent an invidious or discriminatory purpose. *See Davis v. FEC*, 554 U.S. 724, 737 (2008) (finding "no constitutional basis for attacking contribution limits on the ground that they are too high"). This increase in limits allows the LNC to raise *more* money, not less, for the purposes set forth in section 30116(a)(9). And because money is fungible, this increase allows the LNC to reallocate any funds originally designated for convention expenses or building costs to the expressive expenditures it claims to prioritize. Indeed, as the FEC argues persuasively, the LNC likely lacks standing to challenge the segregated account limits as applied to the Shaber bequest, because the party had

so many "special purpose" expenses in the relevant years that it could have accepted the entire $235,575 bequest by January 1, 2016 under the segregated account limits (and use any money thereby freed up for expressive purposes). FEC Mot. to Dismiss at 8.

To distract from the complete absence of injury shown, the LNC lists a series of purported constitutional defects that it claims nevertheless compel facial invalidation of the segregated account limits. It argues that these limits represent a content-based regulation of speech warranting strict scrutiny review. But the segregated account limits do not prescribe any "content" for the LNC speech—at least no more than do many other provisions of federal campaign finance law. As a second argument for strict scrutiny, the LNC attempts to recast the segregated account limits as expenditure restrictions, even though they, like all other contribution limits, do not "in any way limit[ ] the total amount of money parties can spend," *McConnell*, 540 U.S. at 139, but "merely" require parties "to raise funds from a greater number of persons." *Id*. at 136 (citing *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976)).

Despite failing to articulate either a cognizable injury or a valid as-applied or facial claim, the LNC still demands the broadest of all possible relief. First, it requests that the Court strike down the base party contribution limits enacted in 1976 and allow the national party committees to accept unlimited contributions for the

first time in 40 years. In the alternative, it requests that the Court rewrite the "Cromnibus" legislation to keep the trebled limits the LNC prefers while excising the special-purpose regime upon which such limits were founded. The extraordinary reach of the LNC's requested relief lays bare its true agenda. While it purports to challenge only the application of the annual limits to a single bequest (Mr. Shaber's), and the higher segregated account limits only insofar as they "restrict the purposes" of its spending, the relief it seeks would eviscerate FECA's base limits on party contributions. This Court should not venture down the convoluted legal path the LNC attempts to draw to reach this unwarranted result.

ARGUMENT

I. The LNC's As-Applied Challenge to the Application of the Federal Contribution Limits to the Shaber Bequest Fails

The asserted basis for the LNC's as-applied challenge to the contribution limits is misconceived.

According to the LNC, the FEC has failed to show, as a matter of fact, that the Shaber bequest has led or will lead to "any *quid pro quo* arrangement," LNC Br. at 38, and consequently, has not justified application of FECA's annual contribution limits to the bequest. The LNC also attempts to make the positive case that the Shaber bequest has not and will not give rise to *quid pro quo* corruption, highlighting that Mr. Shaber made only a handful of contributions to the LNC while he was alive, *id*. at 37, that neither Shaber nor his family or associates had any other contacts with

the LNC in the past, *id*. at 38, and that, obviously, he would have no further contact with the LNC after his death, *id*. at 37.

This turns the doctrine on its head. *Amici* are aware of no court that has found that a litigant brings a valid as-applied claim to a facially constitutional contribution limit on the ground that his or her particular contribution, as a matter of fact, has not led to a *quid pro quo* arrangement and is unlikely to do so in the future. Following the logic of the LNC's argument, the party contribution limit at section 30116(a)(1)(B) is unconstitutional as applied to any would-be donor who can show she has contributed only minimally to her chosen political party in the past, has few personal or family connections to the party, and will have no contact with the party following the contribution. Such a test would likely exempt the vast majority of donors in America from these—or any—contribution limits (as well as generate a lawsuit by every such donor who wishes to make an over-the-limit contribution).

Contribution limits are designed to be "preventative," *Citizens United v. FEC*, 558 U.S. 310, 357 (2010), and have been repeatedly upheld on that basis by the Supreme Court. Their validity does not rest on a factual showing that all or even most contributions will give rise to corruption; on the contrary, as the Court has recognized, "few if any contributions to candidates will involve *quid pro quo* arrangements." *Id*. But the Court has nevertheless repeatedly accepted Congress' determination, based on "common sense" and the "ample record" compiled over

time, that contribution limits are a necessary prophylactic to prevent corruption and its appearance. *McConnell*, 540 U.S. at 145. "The best means of prevention is to identify and to remove the temptation." *Id*. at 153.

Indeed, in *Buckley*, the Supreme Court explicitly rejected the LNC's suggestion that contribution limits are only constitutional insofar as they applied to contributions with demonstrated corruptive intent or effect:

> Appellants' first overbreadth challenge to the contribution ceilings rests on the proposition that most large contributors do not seek improper influence . . . . Although the truth of that proposition may be assumed, it does not undercut the validity of the $1,000 contribution limitation. Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.

424 U.S. at 29-30. In other words, the federal contribution limits were not overbroad even though "most" of the contributions they cover in reality are not corruptive in intent or effect. *Id.* at 29. The Court thus upheld the limits not based on a factual showing that they would regulate only demonstrably "suspect" contributions, but rather based on a legal conclusion that the government had demonstrated a sufficiently important interest in eliminating the risk of corruption and its appearance, which is "inherent in the process of raising large monetary contributions." *Id.* at 30. It follows that simply alleging that a particular contribution is not corruptive, as a factual matter, is not sufficient to prevail in an as-applied

challenge to the limits: *Buckley* held that the contribution limits were constitutional even as they applied to such contributions, *id.*, and *Citizens United* accepted the possibility that "few if any" contributions actually lead to *quid pro quo* arrangements. 558 U.S. at 357.

Moreover, the LNC is seeking an as-applied exemption from facially constitutional contribution limits whose application to bequests has already been deemed reasonable in light of "valid anti-corruption concerns." *LNC I*, 930 F. Supp. 2d at 166. The LNC thus does not seek an as-applied exemption in circumstances where the government's anticorruption interest has not already been established.

In an earlier iteration of this case—in which the LNC made substantially the same arguments in the context of a different bequest—Judge Wilkins found that the FEC's account of the corruptive potential of bequests was "sensible and persuasive": if the federal limits were not applied to bequests, "a political committee could feel pressure to continue to ensure that a (potential) donor is happy with the committee's actions lest they revoke the bequest" and the "bequest [could] also help friends or family of the deceased have access to political officeholders and candidates." *Id.* at 166, 167. He also noted that the FEC had proffered evidence to substantiate these concerns even though compiling a such record was undoubtedly impeded by the fact

that "the FECA contribution limit has applied to [bequests] for the last 35 years." *Id.* at 167.

At the same time, Judge Wilkins acknowledged that the LNC might be able to show, as a matter of fact, that the specific bequest from Raymond Burrington at issue there did not "implicate any valid anti-corruption concerns." *Id.* at 170. Judge Howell, in her decision certifying the questions underlying the instant proceedings, similarly found that the LNC raised "non-frivolous arguments" that Mr. Shaber's bequest does not in fact "raise corruption concerns." JA 165-66. *Amici* submit that this type of as-applied challenge does not comport with the relevant doctrine or the logic of *Buckley*. To be sure, Judge Wilkins and Judge Howell did not actually endorse this theory; each merely certified it as a non-frivolous question for this Court's en banc review. This Court should reject the LNC's proposal to adjudicate the corruptive nature of particular contributions on a case-by-case basis, dismiss Question 1, and take this opportunity to clarify the jurisprudence.

Amici do not suggest that an as-applied challenge to the application of contribution limits to bequests can never be mounted. But the LNC cannot bring such a challenge by reciting specific facts about the Shaber bequest and then arguing that it is non-corruptive. That kind of challenge has already been rejected by the Supreme Court in upholding the prophylactic nature of contribution limits on a facial basis. *Cf. RNC*, 698 F. Supp. 2d at 157 ("[A] plaintiff cannot successfully bring an

as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision."). There is no principled way to distinguish the LNC's legal arguments from those expressly considered and rejected in *Buckley* and *McConnell*—and the only relevant factual distinction is that the prospective contributor in this case is dead, and has no First Amendment right to speak or to associate with the LNC from beyond the grave.

Thus, if the LNC is going to bring an as-applied challenge, it must argue something more than merely asserting that the Shaber bequest does not pose any particular threat of corruption or the appearance of corruption.[2] It must show that even though the contribution limits at issue are facially valid, they cannot be applied to a category of contributions with certain common characteristics that distinguish them from the legal rationale used to uphold the facial validity of the limits.

This is how as-applied challenges have been permitted to proceed against facially constitutional contribution limits in past cases. This point is best illustrated

[2] Even here, the LNC's case for why the Shaber bequest is uniquely non-corruptive is tenuous. It bases this conclusion on the fact that Shaber had made minimal contributions to the LNC prior to his bequest, and that neither Shaber nor his family had any past relationship with the LNC. But this says nothing about his family's relationship with the LNC in the future. It may be true that LNC officials had no contacts with the Shabers before his bequest, but after benefiting from their largesse, it is certainly possible, if not predictable, that party officials will demonstrate their gratitude in the future.

by comparing *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), where an as-applied challenge to political committee contribution limits was accepted, with *RNC*, where an as-applied challenge to party contribution limits was rejected.

In *SpeechNow*, plaintiffs brought an "as-applied challenge" to facially valid contribution limits to political committees, and "asserted that it is unconstitutional to require groups making only "independent expenditures" to observe the contribution limits applicable to political committees." *See* 567 F. Supp. 2d 70, 71 (D.D.C. 2008). Plaintiffs based this argument not on whether a particular large contribution to SpeechNow would be corrupting, but rather on the general proposition that the government, as a matter of law, "has *no* anticorruption interest in limiting independent expenditures," and thus had no anti-corruption interest in limiting contributions to independent expenditure-only groups. 599 F.3d at 693. [3]

Conversely, in *RNC*, a three-judge court rejected the RNC's request for an as-applied exemption from the facially valid party contribution limits based upon the

[3] In addition to this Court's ruling in *SpeechNow*, the Supreme Court has recognized two other forms of as-applied relief for minor parties. First, it has affirmed that "a nascent or struggling minor party can bring an as-applied challenge if [Section 441i(a)] prevents it from 'amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 159 (quoting *Buckley*, 424 U.S. at 21). And in the area of disclosure, the Court has allowed an as-applied exemption if a group demonstrates "a reasonable probability that [its] members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370; *Buckley*, 424 U.S. at 74. But neither of these as-applied claims is pertinent here, and the Court has never blessed as-applied relief based on a personal disavowal of corruptive potential in the manner requested here.

party's "pledge[]" to "not involv[e] federal candidates or officeholders in its soft-money solicitations" and "not grant[] soft-money donors preferential access to candidates or officeholders based on their large, soft-money contributions." 698 F. Supp. 2d at 158. In essence, the RNC promised, much like the LNC does here, to strip its fundraising for soft money of any specific factors that could lead to *quid pro quo* corruption. The court found, however, that this fact-specific pledge to sanitize individual donations did not undercut Congress' rationale for why unlimited soft-money contributions are inherently corruptive, which is based on Congress' general concern about "the close relationship between federal officeholders and the national parties," *id.* at 159 (citing *McConnell*, 540 U.S. at 154), and how this relationship was "likely to create actual or apparent indebtedness on the part of federal officeholders." *Id*.

As in *RNC*, this Court should not countenance the LNC's request to carve out case-by-case exemptions from facially valid contribution limits whenever a litigant asserts that a *particular* contribution carries no risk of corruption and the government is unable "prove" it has led or will lead to a *quid pro quo* arrangement. *See* LNC Br. at 37-38. This approach is not just contrary to all relevant precedent; it is entirely unworkable as well. Every individual contributor would be able to state a valid as-applied claim by merely alleging that his or her past or intended campaign contributions bore no indicia of corruptive intent or effect. If this manner of as-

applied challenge were permitted, it would reduce contribution limits to no more than criminal bribery statutes, and convert courts into contribution-licensing authorities—at great cost to both electoral integrity and the judiciary.

II. *Increasing* the Contribution Limits for Segregated Accounts Expands, Rather Than Burdens, the LNC's First Amendment Activities.

A. The two-tier contribution limit regime serves valid anticorruption interests while enabling candidates and parties to amass sufficient resources for effective campaign advocacy.

The LNC does not directly challenge either the base limits on contributions to national political party committees or the trebling of those limits for certain special purpose accounts. LNC Br. at 40, 44; JA 170. In other words, LNC does not argue that either the base limit or the special purpose limits are too low, such that they prevent national parties in general or the LNC in particular from "amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21. Nor does the LNC argue that the segregated account limits were adopted with invidious intent, or that they discriminate between similarly situated political actors, *see Davis*, 554 U.S. at 738 (striking down the "Millionaire's Amendment," which quadrupled the contribution limits for candidates facing a wealthy self-financed opponent). Finally, the LNC does not argue that the segregated account limits in any way go beyond the base limits to actually or potentially restrict the LNC's ability to speak on political issues or engage in associative activity. Indeed, the LNC does not allege any injury at all directly arising out of the segregated account limits.

Instead, the LNC argues that there is no anticorruption rationale for Congress' specific decision to triple the base limits for the three purposes enumerated in 52 U.S.C. § 30116(a)(9). LNC Br. at 56-58. This is an odd argument. There is "no constitutional basis for attacking contribution limits on the ground that they are too high," *Davis*, 554 U.S. at 737, and similarly, no basis for challenging Congress' decision to *increase* limits, *see McConnell*, 540 U.S. at 228-29 (finding plaintiffs lacked standing to challenge an increase in the individual base limits from $1,000 to $2,000). At the same time, a limit of $101,700 on contributions to the special accounts (triple the base limit amounts) still inhibits potential *quid pro quo* abuse far more than would *no* contribution limit; the fact that the segregated account limits could have been set lower is of no constitutional import. As the Supreme Court has emphasized, courts do not strike down laws because they "conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015).

The lifting of a contribution limit would raise a constitutional issue only if the enactment of the "Cromnibus" limits rendered the law underinclusive. But this argument is also difficult to make because "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Id*. (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). Consequently, "underinclusiveness claims occupy difficult theoretical terrain." *Ill. Liberty PAC v. Madigan*, No. 16-3585, 2018 WL 4354424,

at *8 (7th Cir. Sept. 13, 2018) (rejecting argument that state's "more generous" contribution limits as to certain groups "fatally undermines the anticorruption rationale" for other, lower contribution limits).

The bar for demonstrating underinclusiveness is high: the LNC must show that the current two-tiered system of contribution limits cannot "fairly be said" to advance the government's anticorruption interest because it provides only "ineffective or remote" support for its assorted goals. *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984). The LNC has not even attempted to make such a showing. Although it hints that Congress may have now set the "line" for corruption "at $339,000 per year," LNC Br. at 57, it does not argue that the trebled segregated account limits render the base contribution limits so "ineffective" that they obviate FECA's anticorruption purpose and effect.

The LNC's underinclusiveness argument also fails to apprehend that Congress must serve two purposes in setting contribution limits: not only the anticorruption goal the LNC exclusively emphasizes, but also the more practical goal of ensuring that candidates and parties operating under the limits can "amass[] the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Arguably, the governmental interest in preventing corruption and its appearance would be best served by setting the contribution limits as low as possible. *Cf.* Answering Brief of Appellees, at 40, *Thompson v. Hebdon*, No. 17-35019 (9th Cir. argued June 11,

2018) (noting record evidence suggesting that some Alaska state legislators were willing to be bought for "as little as $200, or candy"). The Supreme Court has held, however, that Congress must balance its pursuit of the anticorruption interest against the interests of parties and candidates in being able to raise sufficient funds to campaign effectively. *Buckley*, 424 U.S. at 21.

Because this balancing act requires a complex, fact-dependent inquiry, uniquely within the Congress' expertise, the Supreme Court has consistently counseled deference to legislative judgments regarding the structure and monetary threshold of contribution limits. *See Davis*, 554 U.S. at 737; *Randall v. Sorrell*, 548 U.S. 230, 248 (2006); *McConnell*, 540 U.S. at 137; *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391, 397 (2000); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 500 (1985); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 30.

Here, Congress has determined that these dual purposes are best served by preserving the lower base limits while raising the limits on contributions made for certain specific purposes; this two-tier structure ensures that candidates and parties are able to amass the resources necessary to cover certain expenses, such as nominating conventions, without raising the limits wholesale and destabilizing the existing system of contribution limits. The LNC's overwhelming focus on the relative corruptive potential of larger "special purpose" contributions versus smaller

general purpose contributions, LNC Br. at 52-58, thus misses the point. Congress is permitted to—in fact, is required to—balance its anticorruption goals with the need to ensure that candidates and parties can still amass sufficient resources for all of their purposes.

The results of this balancing may be controversial. Indeed, both *amici* groups opposed the "Cromnibus" limits as a matter of policy, and publicly criticized both the congressional process that resulted in the "Cromnibus" and the potential effects of the segregated account limits on the campaign finance system. But it is one thing to object to higher limits on policy grounds, which *amici* do, and quite another for the LNC to maintain that allowing national parties to accept larger contributions contributions for certain special purposes causes constitutional injury or violates the First Amendment. So long as the current two-tiered system can "fairly be said" to advance and balance the government's dual commitments to preventing corruption and ensuring candidates and parties have access to adequate campaign resources, then the law is neither underinclusive nor unconstitutional.

B. The special account limits are not content-based.

The LNC attempts to impose strict scrutiny instead of intermediate scrutiny here by arguing that it is constitutionally suspect to restrict the trebled contribution limits to funds used for certain designated purposes. But that is how many provisions of federal campaign finance law operate. Indeed, the most obvious and fundamental

"purpose restriction" in campaign finance law is that FECA regulates only money received or spent "for the purpose of influencing any election for Federal office." *See* 52 U.S.C. § 30101(8)(A)(i) (defining "contribution"); *id.* § 30101(9)(A) (defining "expenditure"). Yet FECA's many contribution limits—which vary with respect to the source of the contribution, the identity of the recipient, and the purposes to which the funds are allocated—have never been deemed "content-based" regulations subject to strict scrutiny.

One example of an existing contribution restriction with a highly detailed "purpose requirement" is section 323(b) of BCRA, which requires state parties to finance "Federal election activity" with funds raised under federal limits. "Federal election activity" is defined to include (1) voter registration activity during the 120 days before a federal election; (2) voter identification, GOTV, and generic campaign activity in connection with any election where a federal candidate appears on the ballot; and (3) any "public communication" that "refers to a clearly identified [federal] candidate" and "promotes," "supports," "attacks," or "opposes" such a candidate. 52 U.S.C. §§ 30101(20)(A)(i)-(iv), 30125(b)(1). *McConnell* upheld this soft-money restriction. 540 U.S. at 173; *see also Republican Party of La. v. FEC*, 219 F. Supp. 3d 86 (D.D.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2178 (2017) (reaffirming constitutionality of section 323(b)). Moreover, although section 323(b) indisputably applied federal limits only to funds used for certain purposes,

McConnell did not review these "purpose-based" restrictions as "content-based" regulations subject to strict scrutiny, but instead as contribution limits subject to intermediate "closely drawn" scrutiny. 540 U.S. at 167-71 (reviewing section 323(b)'s application to "Federal election activity").

This is likely because the "purpose restrictions" of section 323(b), like the special-purpose regime challenged here, do not actually prescribe any "content" for covered state party expenditures. For instance, the requirement that a state party use federal funds for covered voter registration activities did not in any way limit or restrict the content of the state party's communications or expressive activities in conducting such activities. Similarly, the fact that nominating conventions may be financed under the higher segregated account limits does not in any way dictate the content of a party's expressive activities in conducting the convention: the party can feature any person discussing any subject in any media at the convention, and § 30116(a)(9)(A) does not require otherwise.

Indeed, the purportedly "content-based" segregated account limits impose no burdens on political speech or associative activity that are not already imposed by the base limits themselves, which the LNC presumably deems "content-neutral" and does not challenge here. Permitting larger contributions for specified purposes does not in any way reduce a contributor's capacity to engage in political expression and association by contributing to national parties; on the contrary, the "Cromnibus"

allows contributors to contribute exactly as much in general purpose contributions to the LNC as they could before, but then give an additional $101,700 to each of its special accounts as well. Nor do the purpose restrictions impose any cap on the national parties' overall *spending* for general purposes or expressive activity. In short, the special-purpose regime does not limit the total quantum or content of speech any more than the base contribution limits already do. If anything, raising the limits as to the special purpose accounts enlarges the LNC's capacity to engage in political speech and association by freeing up for expressive purposes funds that it previously might have spent for "special purposes." The party, obviously, is better off.

Finally, the LNC's argument ignores the fact that since *Buckley*, the Supreme Court has adhered to and continually refined a system of intermediate review for campaign contribution limits, and has never required strict scrutiny. *McCutcheon*, 572 U.S. at 189; *Randall*, 548 U.S. at 249-53; *McConnell*, 540 U.S. at 136; *Beaumont*, 539 U.S. at 161; *Shrink Mo.*, 528 U.S. at 387-88; *Buckley*, 424 U.S. at 25, 29. Even if the segregated account limits—or any campaign finance regulation—could be characterized as "content-based," the Supreme Court has accounted for that concern by subjecting such limits to "closely drawn" scrutiny. Otherwise, under the LNC's approach, *every* "purpose" restriction, including the myriad campaign finance regulations routinely upheld under the *Buckley* framework, would be treated

as a content-based restriction subject to strict scrutiny. No campaign finance precedent supports this approach.

C. The special purpose restrictions do not transform the contribution limits into expenditure limits.

In a second bid for strict scrutiny, the LNC argues that by allowing *contributions* above the base limits for certain purposes, Congress imposed an impermissible content-based restriction on parties' *expenditures*. LNC Br. at 54. This misconstrues Supreme Court case law, which has only treated laws that directly "cap" an entity's total spending as "expenditure limits."

As the LNC acknowledges, *McConnell* already rejected exactly the argument it makes here. 540 U.S. at 139. There, the Court upheld the provisions of BCRA that banned national party committees from soliciting, receiving, directing, *or spending* any soft money, *i.e.*, funds not compliant with the federal contribution limits. Even though the law prohibits parties from "spending" non-federal funds, the Court did not treat the law as an expenditure limit, and instead found it "irrelevant that Congress chose . . . to regulate contributions on the demand rather than the supply side." *Id.* at 138. Thus, the Court deemed BCRA's prohibition on spending non-federal money to be, in principle, a contribution limit, not an expenditure limit, because those provisions in no way "limit[] the total amount of money parties can spend." *Id.* at 139. "Rather, they simply limit the source and individual amount of

donations" by requiring the parties to spend federal funds instead of non-federal funds. *Id*.

The LNC fails to distinguish the segregated account limits from the soft-money limits upheld in *McConnell*. *See also Republican Party of La.*, 219 F. Supp. 3d at 94 ("It is not our place, however, to second-guess the Supreme Court's treatment of [BCRA's soft-money limit] as a contribution restriction instead of an expenditure restriction."). The LNC concedes that expenditure limits restrict "'the amount of money a person or group can spend on political communication during a campaign,'" whereas contribution limits restrict "the amount that any one person or group may contribute to a candidate or political committee." LNC Br. at 41-42 (quoting *Buckley*, 424 U.S. at 19, 20). But it fails to explain how limiting the amount an individual may contribute to a political party for a particular purpose "caps" the total amount of money that the party "can spend on political communication during a campaign." Neither the base limits nor the segregated account limits restrict the national parties' spending on political activity; they merely compel parties "to raise funds from a greater number of persons." *Buckley*, 424 U.S. at 22.

III. The LNC Has No Basis for the Extraordinary Relief It Requests.

Although the LNC struggles throughout this case to identify any injury it has suffered by reason of the laws it challenges, much less an injury of constitutional significance, this does not dissuade it from demanding extraordinary relief.

In terms of testamentary contributions, LNC purports to challenge only the application of the annual limits to the Shaber bequest; in terms of the segregated account limits, the LNC challenges only the three special purpose restrictions enumerated in § 30116(a)(9). Despite the limited nature of the questions certified here, the LNC requests the broadest possible relief: the invalidation of the original base limits on contributions to national party committees, which have been in effect for over 40 years, *see* FECA Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475 (1976) (codified as amended at 52 U.S.C. § 30116(a)(1)(B)), and whose constitutionality has been reaffirmed as recently as 2010, *see RNC*, 698 F. Supp. 2d at 160. The sum total of the LNC's argument in favor of this extreme result is that it would provide the "most straightforward" relief. LNC Br. at 59.[4]

[4] Even if the Court finds the special-purpose regime embedded in the segregated account limits facially unconstitutional, the segregated account limits themselves are severable from the pre-existing base limits. When a particular provision of an otherwise constitutional statute is determined to be unconstitutional, courts should not invalidate the constitutional portions of the statute unless it is evident that Congress would not have independently enacted those provisions. *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). The LNC does not dispute that the base contribution limits are constitutional or that they were enacted independently of the segregated account limits. Nor would eliminating the higher segregated account limits have any effect on the operation or effectiveness of the base limits. As such, there is simply no basis for striking or altering the base limits.

If, instead, the Court finds that the segregated account limits are not facially unconstitutional, but are unconstitutional as applied to the Shaber bequest, there is no need to reach the question of severability. Any injury resulting from the limits as applied to the Shaber bequest may be remedied by an injunction, and would not require the Court to strike down any portion of the law.

The LNC's "fall back" position is to ask that this Court redress its purported injury by "excising the spending purpose restrictions" while "[l]eaving the current [trebled] total contribution limit in place." *Id*. at 62. To put it more plainly, the LNC asks this Court to rewrite the Cromnibus legislation line by line to achieve a result flatly contrary to its language and any expressed intent of the sponsors.

As grounds for this relief, the LNC relies on the allegation that it is "unknowable" what balance Congress would have struck had it been faced with the choice of keeping the pre-existing base limits or allowing unrestricted contributions at three times the existing limits. *Id*. Therefore, faced with the supposed "unknowability" of congressional intent, the LNC suggests that the Court must infer that Congress would have tripled the base limit.[5] But if evidence of congressional intent is indeed absent, the rule is clear: the text of the legislation is the best guide of intent, and here the trebled limits were enacted only for funds to be used for the purposes enumerated in § 30116(a)(9). *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (noting that "best evidence" of statutory purpose "is the statutory text adopted by both Houses of Congress and submitted to the President"). Moreover, the LNC ignores that Congress had before it the same option of simply

[5] The limited legislative record does indicate that Congress adopted the segregated account limits to ensure that national parties had "a means of acquiring additional resources" to fund presidential nominating conventions, because public funding for conventions had been terminated earlier that year. *See* 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014).

tripling the limits across the board in 2014, and it did not do so. This Court should not undo Congress' intended result here.

And if this Court finds the special purpose restrictions unconstitutional on their face, the proper relief is apparent: it should strike the 2014 "Cromnibus" amendments to FECA in their entirety. *See Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 525-46 (1929) (finding that where "the statute, before the amendment, was entirely valid" the unconstitutional amendment becomes a "nullity," and the original statute stands as the "expression of the legislative intent."). This would leave in place the base limits and simply restore § 30116(a)(1)(B) to its pre-2014 structure and amounts. This system is clearly workable, as it governed U.S. elections from FECA's enactment in 1974 until 2014 without significant amendment; and it is clearly constitutional, as *Buckley*, *McConnell* and *RNC* confirm. If indeed the LNC believes the trebled segregated account limits—which allow it to spend significantly more, directly and indirectly, on both special purpose and expressive activity—cause the party such grievous injury, then the LNC should welcome the clean and complete invalidation of those limits.

CONCLUSION

This Court should find in favor of the FEC on the certified questions raised in this proceeding.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point font.

/s/ Tara Malloy
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Dated: October 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I electronically filed the BRIEF *AMICI CURIAE* with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all counsel required to be served.

I further certify that I will also cause the requisite number of paper copies of the brief to be filed with the Clerk on October 12, 2018.

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