United States District Court
Eastern District of Louisiana
New Orleans Division

Anh "Joseph" Cao, **Republican National Committee**, and **Republican Party of Louisiana**, ***Plaintiffs*,** ***v.*** **Federal Election Commission**, ***Defendant***	**Case No.** _____

Complaint for Declaratory and Injunctive Relief

Anh "Joseph" Cao, Republican National Committee ("RNC"), and Republican Party of Louisiana ("RPL") complain as follows:

INTRODUCTION

1. This case is a successor to *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), and *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), and deals, inter alia, with the "unresolved" question of "the constitutionality of the Party Expenditure Provision [limits, 2 U.S.C. § 441a(d)(3),] as applied to" "coordinated expenditures . . . that would not be functionally identical to direct contributions." *Colorado II*, 533 U.S. at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia and

Kennedy, JJ.).

2. *Colorado I* "held that spending limits set by the Federal Election Campaign Act were unconstitutional as applied to the Colorado Republican Party's independent expenditures in connection with a senatorial campaign." *Colorado II*, 533 U.S. at 437.

3. The case was "remanded for consideration of the party's claim that all limits on expenditures by a political party in connection with congressional campaigns are facially unconstitutional and thus unenforceable even as to spending coordinated with a candidate," and *Colorado II* "reject[ed] that facial challenge to the limits on parties' coordinated expenditures." *Id.*

4. This case challenges the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. § 441a(d)(3), as-applied to spending that (**a**) is not "unambiguously campaign related," *Buckley v. Valeo*, 424 U.S. 1, 81 (1976), or (**b**) is "not functionally identical to contributions," *Colorado 2*, 533 U.S. at 468 n.2, because it is "not a mere 'general expression of support for the candidate and his views,' but a communication of 'the underlying basis for the support,'" not just "symbolic expression,' . . . but a clear manifestation of the party's most fundamental political views," *id.* at 468 (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (*quoting Buckley*, 424 U.S. at 21).

5. This case also challenges the Party Expenditure Provision's imposition of limits based on a formula that creates variable coordinated spending limits, which vitiates any interest in preventing corruption. The alternate fixed amount limit is also challenged as too low.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this case pursuant to pursuant to 28 U.S.C. § 1331 as a case arising under the First and Fifth Amendments, the Federal Election Campaign Act ("FECA"), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(3), because the FEC is an entity of the United States and Plaintiffs reside in this district.

PARTIES

8. Anh "Joseph" Cao is the Republican candidate for U.S. Representative for the 2nd Congressional District of Louisiana, which includes New Orleans. Joseph Cao will compete for election, in the December 6, 2008 general election, against the winner of the Democratic party runoff between the incumbent U.S. Representative, William Jefferson, and former TV anchor Helena Moreno as well as against candidates from the Libertarian, Reform, and Green parties and an independent. Candidate Cao wants to participate with RNC and RPL to the maximum extent constitutionally permissible in the activities outlined below.

9. RNC is the national committee of the Republican Party. Its headquarters are in Washington, District of Columbia.

10. RPL is the State committee of the Republican Party for Louisiana. RPL has a New Orleans Republican Headquarters.

11. FEC is the federal government agency with enforcement authority over FECA. Its headquarters are in Washington, District of Columbia.

FACTS

12. Political party "independent expenditures," 2 U.S.C. § 431(17), may not be limited. *Colorado I*, 518 U.S. 604.

13. Under 2 U.S.C. § 441a, coordinated expenditures are deemed contributions: "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate . . . ." 2 U.S.C. § 441a(a)(7)(B)(i) ("Coordination-Contribu-

tion Provision").

14. If political parties coordinate expenditures with their federal candidates under this Coordination-Contribution Provision, those coordinated expenditures are considered in-kind contributions and are subject to FECA dollar limits on contributions, as set out in § 441a, which are $5,000 for national party committees (per election) and $5,000 for state party committees (per election, combined limit). Of course, direct contributions are subject to the same limit.

15. Under the Party Expenditure Provision, "the national committee of a political party, or a State committee of a political party" may, in addition to what it may contribute to a candidate under other provisions of 2 U.S.C. § 441a, "make an[] expenditure *in connection with the general election campaign of a candidate* for Federal office in a State who is affiliated with such party," 2 U.S.C. § 441a(d)(3) (emphasis added), provided the expenditure does not exceed either a set limit or a limit established by a formula based on voting age population, each adjusted periodically according to the consumer price index. *Id.*

16. Currently, the Party Expenditure Provision limit is $42,100 for Representatives in states with multiple congressional districts and $84,100 for Representatives in states with only one congressional district. 73 Fed. Reg. 8696-87. For Senators, the limit ranges from the set limit of $84,100 up to the highest variable-rate limit of $2,284,900, with Louisiana being at $270,300. *Id.* at 8697.

17. The FEC regulation implementing the Party Expenditure Provision limit is at 11 C.F.R. § 109.32, titled "What are the coordinated party expenditure limits?". The operative phrase of the Party Expenditure Provision, i.e., "*in connection with the general election campaign of a candidate* for Federal office," is interpreted in the regulation as a "[c]oordinated party expenditure." *Id.* This "coordination" is undefined, except as follows with respect to a "communication."

18. In 11 C.F.R. § 109.37, the FEC has created a regulation dealing with what it calls a "party coordinated communication," which must be reported either as an "in-kind contribution" under the Coordination-Contribution Provision (subject to the "contribution" limits) or as a "co-ordinated party expenditure" under the Party Expenditure Provision (subject to the limits of that provision).

19. A party coordinated communication is one that is paid for by a political party committee and meets one of three content standards, which are essentially: (1) distributing a candidate's campaign material; (2) expressly advocating; or (3) making public communications that refer-ence a candidate in the candidate's jurisdiction within ninety days before an election. *Id.*

20. RNC and RPL each have already reached their "contribution" limit under the Coordination-Contribution Provision and have expended or committed to expend the permissible limit under the Party Expenditure Provision for candidate Joseph Cao. RNC and RPL each wants to make more such expenditures that would be subject to the Party Expenditure Provision limits and would do so if it were legal to do so.

21. RNC and the RPL want to coordinate with federal candidates without being limited by the Party Expenditure Provision limits the following activities, both in the near future and in the months and years ahead, which they believe they are constitutionally entitled to do:

- issue advocacy, including ads that mention candidates

-grassroots and direct lobbying on pending executive or legislative matters

- grassroots lobbying or other public communications concerning state ballot initiatives

-public communications of any kind involving support or opposition to state candidates, sup-port or opposition to political parties, or support or opposition to candidates generally of a political party

-non-targeted voter registration

-non-targeted voter identification

-non-targeted get-out-the-vote activity

-non-targeted generic campaign activity.

"Non-targeted" means not targeted at any race in particular or targeted at a specific state race.

22. RNC and RPL presently intend to do direct and grassroots lobbying responding to the legislative issues that will arise in Congress immediately by lobbying incumbent U.S. Representative William Jefferson on those issues, but they are chilled from doing so by fear of an investigation and possible penalties because (**a**) merely referencing Rep. Jefferson within 90 days of the general election on December 6 (in which Jefferson and Cao are federal candidates) satisfies a content standard under 11 C.F.R. § 109.37; (**b**) they have already met their contribution and Party Expenditure Provision limits, *supra*; (**c**) and they have already worked with and had substantial discussions with candidate Cao concerning his plans and needs so that if they were to make their intended public communications they would put him and themselves at risk for at least a burdensome and intrusive investigation.

23. Moreover, RNC and RPL would like to have the material involvement and substantial discussion concerning these intended issue-advocacy public communications with candidate Cao that would constitute coordination conduct standards under 11 C.F.R. §§ 109.37 and 109.21, because they believe that they are constitutionally entitled to do so as to this sort of issue-advocacy communication, but they are chilled from doing so for fear of an investigation and penalties.

24. RNC and RPL want to do materially similar activity to that described above in the future, and there is a strong likelihood that the current situation will repeat itself, given the recurring nature of elections, the ongoing existence and intended activities of RNC and RPL, and the regular

recurrence of a broad range of issues in public and congressional debate.

25. The loss of First Amendment rights, even for a moment, is irreparable harm, and there is no adequate remedy at law.

Count 1
Vagueness, Overbreadth, "Unambiguously Campaign Related"

26. Plaintiffs reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

27. The part of the Party Expenditure Provision providing limits describes the regulated activity as party spending "*in connection with the general election campaign of a candidate* for Federal office," 2 U.S.C. § 441a(d)(3) (emphasis added).

28. *Buckley* established that all campaign finance regulation is subject to the threshold requirement that it regulate only activity that is "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. *Buckley* applied this "unambiguously campaign related," *id.* at 81, principle to vague and overbroad language in several contexts, including an expenditure limitation, *id.* at 44, and an expenditure disclosure provision, *id.* at 80, that it construed to require that regulated communications contain explicit words expressly advocating the election or defeat of a clearly identified candidate for federal office.

29. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), the Court construed the prohibition on corporate expenditures to require the same express-advocacy construction for the same reasons. *Id.* at 249. "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id.*

30. In *MCFL*, the specific language construed to require express advocacy was "in connec-

tion with," which is the same language employed in the Party Expenditure Provision. The Provision's requirement that the "connection" be with the actual "*campaign*" echoes the "unambiguously *campaign* related" requirement of *Buckley*. 424 U.S. at 81 (emphasis added).

31. The phrase "in connection with the general election campaign of a candidate," when used to limit political party expenditures in 2 U.S.C. § 441a(d)(3), is unconstitutionally vague and overbroad, and beyond congressional authority to regulate federal elections, unless it is limited to activity that is unambiguously campaign related.

32. The only political party activities that are "unambiguously-campaign-related" are: (a) communications containing explicit words expressly advocating the election or defeat of a clearly identified federal candidate; (b) federal election activity (i.e., voter registration, voter identification, get-out-the vote, and generic campaign activity) that is targeted to elect the federal candidate involved; (c) paying a candidate's bills; and (d) distributing a candidate's campaign literature. The activities identified in ¶ 21, *supra*, are not unambiguously campaign related and may not be regulated or restricted.

33. To the extent that the Party Expenditure Provision limit is not limited as described above, it is vague, overbroad, and beyond the authority of Congress to regulate elections, all in violation of the First and Fifth Amendments.

Count 2
"Not Functionally Identical to Contributions"

34. Plaintiffs reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

35. Plaintiffs challenge the Party Expenditure Provision limits as applied to activity that is "not functionally identical to contributions," *Colorado 2*, 533 U.S. at 468 n.2, because it is "not a

mere 'general expression of support for the candidate and his views,' but a communication of 'the underlying basis for the support,'" not just "symbolic expression,' . . . but a clear manifestation of the party's most fundamental political views," *id.* at 468 (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (*quoting Buckley*, 424 U.S. at 21).

36. While an express-advocacy communication may pass the initial unambiguously-campaign-related requirement, it may not be treated as a coordinated expenditure under the Party Expenditure Provision limit if it constitutes the party's own speech, as opposed to merely paying the candidate's bills. If it is the party's own speech, then the Party Expenditure Provision limit is restricting an expenditure, not a contribution and strict scrutiny applies. Expenditure limits are unconstitutional. *See Randall v. Sorrell*, 548 U.S. 230, 126 S. Ct. 2479 (2006).

37. To the extent that the Partly Expenditure Provision limit is applied to restrict a party's own speech, it fails strict scrutiny and is in violation of the First Amendment.

Count 3
Variable Limits and Too Low Fixed Limit

38. Plaintiffs reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

39. Plaintiffs challenge the limits of the Party Expenditure Provision. The Provision employs either a flat limit or a variable limit, permitting whichever is higher.

40. Where the government employs variable coordinated spending limits, the government's acknowledgment that the higher limits are sufficient to accommodate any interest in preventing corruption means that any lower limits are unnecessary to advance that interest. Because the Provision employs a formula that mandates variable limits, the formula must be declared unconstitutional under the First Amendment because it fails any level of scrutiny for lacking an interest to

justify it. *See California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1296 (9th Cir. 1998).

41. If the formula is eliminated, all that remains is the flat-rate limit, which still suffers the variable rate problem because in states with a single congressional district the limit is $84,100, while in states with multiple congressional districts the limit is only $42,100. So the flat rate is unconstitutional as applied to congressional races.

42. Moreover, the rates are too low for parties to achieve their historic and valuable role in our system of government of allowing citizens to associate to amplify their speech. *Randall*, 548 U.S. at ___, 126 S. Ct. at 2496-98.

43. The Party Expenditure Provision's limits, therefore, violate the free speech and association rights of political parties, their members, and their candidates under the First Amendment.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for the following relief:

1. a declaratory judgment as to all challenged provisions;

2. a permanent injunction enjoining the FEC from enforcing the challenged provision as applied to Plaintiffs, their intended activities, and all other entities similarly situated;

3. costs and attorneys fees pursuant to any applicable statute or authority; and

4. any other relief this Court in its discretion deems just and appropriate.

Respectfully submitted,

/s/

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