UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

ANH "JOSEPH" CAO, REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF LOUSIANA, PLAINTIFFS,	
V.	CIVIL ACTION NO. 1:08CV4887
FEDERAL ELECTION COMMISSION,	SECTION C, DIVISION 5
DEFENDANT.	JUDGE HELEN G. BERRIGAN CHIEF MAGISTRATE JUDGE ALMA L. CHASEZ

DEFENDANT FEDERAL ELECTION COMMISSION'S RESPONSE TO PLAINTIFFS' MOTION TO CERTIFY QUESTIONS OF CONSTITUTIONALITY TO THE COURT OF APPEALS EN BANC

The complaint in this action challenges certain restrictions on political parties' contributions and "coordinated expenditures" on behalf of federal candidates that have previously been upheld by the Supreme Court. The complaint was filed by Anh "Joseph" Cao, the Republican National Committee (RNC), and the Republican Party of Louisiana (LA-GOP) on November 13, 2008, and amended on December 23, 2008. Although neither complaint relied on 2 U.S.C. § 437h for jurisdiction, plaintiffs Cao and the RNC now invoke that special review provision as to eight complex questions.[1] Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc (Doc. 19) (Mot. To Certify Questions). Section 437h establishes an extraordinary procedure for certification of substantial constitutional challenges to provisions of

[1] Although neither plaintiffs' Motion to Certify Questions nor the accompanying memorandum says so explicitly, LA-GOP does not appear to join this motion because it lacks statutory standing under 2 U.S.C. § 437h. *See infra* section II.B. In addition, because neither complaint relied on Section 437h for jurisdiction, it would appear that plaintiffs must seek permission to file an amended complaint under Fed. R. Civ. P. 15(a)(2).

the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (FECA or Act), to be decided in the first instance by the court of appeals sitting *en banc*, provided that standing and other requirements have been satisfied.

Plaintiffs challenge certain applications of the limits on expenditures that political parties may make in coordination with each of their federal candidates under 2 U.S.C. § 441a(d)(2)-(3). The Supreme Court upheld these limits on their face in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). In the 2008 election cycle, the limits ranged from $41,100 to $84,100 in races for the U.S. House of Representatives, ranged from $84,100 to more than $2.2 million in U.S. Senate races, and were set at more than $19.1 million in the presidential race. *See* 2008 Coordinated Party Expenditure Limits, available at http://www.fec.gov/info/charts_441ad.shtml. Plaintiffs also challenge the application to political parties of the separate $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A), which applies to all multicandidate "political committees," a term which includes, *inter alia*, political party committees. *See* 2 U.S.C. §§ 431(4), 431(16), 441a(a)(4). This provision was upheld on its face in *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976).

Contrary to plaintiffs' claims, certification of their eight questions to the *en banc* Court of Appeals at this time would be premature. A "fully developed factual record" is required before this Court can determine whether several of the questions should be certified under 2 U.S.C. § 437h, and if so, to permit proper adjudication of those claims worthy of certification, particularly in light of the somewhat ill-defined set of claims plaintiffs have made. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). Based on the allegations of the amended complaint, several of the questions plaintiffs raise do not appear to meet the requirement of substantiality because they are foreclosed by Supreme Court precedent, including *Colorado II*

and *Buckley*, or because they are hypothetical. The substantiality requirement is more demanding where, as here, the Supreme Court has already upheld the challenged provisions of the Act on their face. Certifying at this time would also be premature because some questions may involve "unsettled questions of statutory interpretation [whose resolution] may remove the need for constitutional adjudication." *Cal. Med. Ass'n*, 453 U.S. at 192 n.14. The Commission therefore requests a reasonable schedule for discovery, to be followed by the submission of proposed findings of fact and briefing to assist the Court in creating a factual record and determining which questions, if any, should be certified to the Fifth Circuit Court of Appeals sitting *en banc*.

ARGUMENT

I. DISTRICT COURTS PLAY A CRITICAL THRESHOLD ROLE UNDER SECTION 437h AND MUST CERTIFY ONLY SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND CREATE A FULL FACTUAL RECORD

Section 437h, the extraordinary judicial review provision plaintiffs invoke, was added to the Federal Election Campaign Act 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*.[2]

[2] 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

Contrary to plaintiffs' claim[3] that the constitutional questions they raise are "ready for 'immediate' certification," both the Supreme Court and the Fifth Circuit have made clear that a district court presented with a request to certify under Section 437h must conduct several threshold inquiries prior to any certification.

> The unusual procedures embodied in this section are, at the very least, circumscribed by the constitutional limitations on the jurisdiction of the federal courts. A party seeking to invoke § 437h must have standing to raise the constitutional claim. Furthermore, § 437h cannot properly be used to compel federal courts to decide constitutional challenges in cases where the resolution of unsettled questions of statutory interpretation may remove the need for constitutional adjudication. Moreover, we do not construe § 437h to require certification of constitutional claims that are frivolous, or that involve purely hypothetical applications of the statute. Finally, as a practical matter, immediate adjudication of constitutional claims through a § 437h proceeding would be improper in cases where the resolution of such questions required a fully developed factual record.

Cal. Med. Ass'n, 453 U.S. at 192 n.14 (citations omitted) (regarding frivolousness, citing, *inter alia*, *Cal. Water Service Co. v. City of Redding*, 304 U.S. 252, 254 (1938) ("[i]t is therefore the duty of a district judge … to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented … ."")). The Supreme Court summarized its discussion of Section 437h by explaining that district courts should certify questions under 437h only when the issues presented are "neither insubstantial nor settled." *Cal. Med. Ass'n*, 453 U.S. at 193-94 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

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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 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).

[3] Memorandum in Support of Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc (Doc. 19-2) (Plaintiffs' Mem.) at 2.

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 the 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 134. 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)).

The Fifth Circuit has 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) ("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*))). Indeed, in *Khachaturian v. FEC*, 980 F.2d 330, 331-32 (5th Cir. 1992) (*en banc*), a district court in this district did exactly what plaintiffs request here, immediately certifying a FECA challenge to the Fifth Circuit *en banc* under Section 437h. The Fifth Circuit remanded the case without even considering the merits because the "district court did not make the requisite threshold inquiry … ." *Id.* at 331. The Court of Appeals instructed the district court on remand to "first determine whether Khachaturian's claim is frivolous … ." *Id.* at 332. The Court explained that "questions arising under 'blessed' provisions [of the Act] understandably should meet a higher threshold of frivolousness." *Id.* at 331 (quoting *Goland*, 903 F.2d at 1257). If the question was determined not to be frivolous, the Fifth Circuit instructed the district court to proceed as follows:

1. Identify constitutional issues in the complaint.
2. Take whatever may be necessary in the form of evidence — over and above submissions that may suitably be handled through judicial notice …
3. Make findings of fact with reference to those issues.
4. Certify to this court constitutional questions arising from [the above].

Id. (citing *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (*en banc*)).

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 193-94 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*).

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

Even when the district court ultimately certifies a question under Section 437h, it must develop a factual record for the court of appeals. In cases construing the FECA, federal courts have long recognized the need for a "concrete factual setting that sharpens the deliberative

process especially demanded for constitutional decision." *United States v. UAW*, 352 U.S. 567, 591 (1957). This is particularly true for cases brought under Section 437h. *See, e.g., Bread PAC*, 455 U.S. at 580 (district court is required to make findings of fact before certifying constitutional question to *en banc* court of appeals); *Cal. Med. Ass'n*, 453 U.S. at 192 n.14; *Khachaturian v. FEC*, 980 F.2d at 331-32; *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 49 (2nd Cir. 1980) (*en banc*); *Buckley*, 519 F.2d at 818.

In *Colorado Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), Justice Breyer pointed out the importance of record evidence in reviewing the constitutionality of the Act's limit on political party expenditures made in coordination with their candidates under 2 U.S.C. § 441a(d). *See* 518 U.S. at 624-25. On remand, the Tenth Circuit remanded the case to the district court and further explained the need for factual development:

> [T]he issues are too important to be resolved in haste. It seems inevitable that not only this court but the Supreme Court itself will have to address these issues. We will both benefit by the parties fleshing out the record with any evidence they and the district court deem relevant to the issues' resolution and by the district court's resolution of the legal issues in the first instance.

Colo. Republican Fed. Campaign Comm. v. FEC, 96 F.3d 471, 473 (10th Cir. 1996). When the case reached the Supreme Court a second time, the Court made ample use of the factual record that had been developed on remand. *See generally Colorado II*, 533 U.S. at 457-60. Given that plaintiffs' complaint raises as-applied challenges to the same provisions at issue in the *Colorado* cases, similar record development is necessary here.

II. PLAINTIFFS' PROPOSED QUESTIONS REQUIRE CLARIFICATION AND THE DEVELOPMENT OF A FULL FACTUAL RECORD BEFORE A DETERMINATION CAN BE MADE AS TO WHICH, IF ANY, SHOULD BE CERTIFIED TO THE *EN BANC* COURT OF APPEALS

A. Many of Plaintiffs' Questions Require the Development of a Factual Record to Be Considered for Certification Under Section 437h

As we explain below regarding each of plaintiffs' specific questions, it is unclear what specific activities plaintiffs wish to undertake, how likely those activities are to occur, and, despite plaintiffs' concerns, whether their activities would actually be restricted by the challenged provisions. Obtaining evidence about these facts is essential because plaintiffs have stated that this lawsuit is primarily an "as-applied" challenge. *See* Amended Verified Complaint for Declaratory and Injunctive Relief (Docket No. 17) at ¶¶ 3, 5.

Plaintiffs claim that an "adequate factual context" can be supplied by reference to "the record and six opinions issued by the lower courts and the Supreme Court in the two cases of *Colorado II* and [*Colorado I*] … supplemented by the record and opinions in *McConnell [v. FEC*], 540 U.S. 93 [(2003)]." Plaintiffs' Mem. at 2. The Commission agrees that these sources of information are both relevant and useful, but they are insufficient to create an adequate record. For example, some of plaintiffs' questions use novel terms such as "targeted federal election activity" (Plaintiffs' Mem. Questions 2, 3, 5, 6), "own speech" (Plaintiffs' Mem. Questions 3 and 6), and other labels whose contours are ill-defined. Such terms also figure heavily in plaintiffs' Amended Complaint. *See, e.g.*, Am. Compl. ¶¶ 40, 44, 45, 47. It would be impossible for the Fifth Circuit to assess the constitutionality of potential restrictions on "non-targeted federal election activity" without a concrete factual understanding of what such activity would entail.[4]

[4] The Commission recognizes that the principal opinion in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2666 (2007) (*WRTL*) warned against intrusive discovery into the intent of campaign advertising, but intrusive discovery into plaintiffs' proposed advertising will not be

In addition to the party discovery necessary to understand plaintiffs' specific as-applied challenges, the Commission also needs an opportunity to compile a record of legislative facts. Unlike adjudicative facts, which "'relate to the parties, their activities, their properties, [and] their businesses,'" legislative facts are broader in scope and import and may be disputable." Advisory Committee Notes to Fed. R. Evid. 201 (quoting 2 Kenneth Davis, *Administrative Law Treatise* 353 (1958)). They are usually more "general" than adjudicative facts and "help the tribunal decide questions of law and policy." *Friends of the Earth v. Reilly,* 966 F.2d 690, 694 (D.C. Cir. 1992) (internal quotation marks and citation omitted); *see also, e.g., Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) ("questions of law and policy and discretion") (Friendly, C.J.). The Fifth Circuit relied upon legislative facts, for example, in *Dunagin v. City of Oxford, Mississippi,* 718 F.2d 738, 748 n.8 (5th Cir. 1983), a constitutional challenge to a state ban on liquor advertising. The Court observed that

> whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question. It is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning.

Id. Here, although the records and opinions in cases like *McConnell* and *Colorado II* are important, there may well be additional, more recent material regarding political party activities that would aid the courts in deciding the case. And if political parties' operations have changed little since those cases were decided, legislative facts to that effect would support the conclusion that the reasoning and holding of *Colorado II* should not be disturbed.

Federal courts have frequently cited legislative facts (although not always under that label) in determining the constitutionality of campaign finance laws. In the seminal campaign

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necessary. The party discovery in this case would focus on clarifying the nature of the conduct plaintiffs seek to pursue, not the intent behind that conduct.

finance case, *Buckley v. Valeo*, the D.C. Circuit cited, among other sources, polling data, 519 F.2d at 838-39, n.34; a report concerning illegal contributions by the dairy industry, *id.* at 839 n.36; congressional floor statements, *id.* at 837 n.23; 838 n.28, and a Senate Committee report, *id.* at 839 n.35; 840 n.38. The Supreme Court explicitly relied on the D.C. Circuit's discussion of these legislative facts. *Buckley*, 424 U.S. at 27 & n.28. In *McConnell*, the Supreme Court also relied extensively on legislative facts. *See, e.g.*, *McConnell*, 540 U.S. at 122, 129-32 (discussing "the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections."); *id.* at 145 ("Both common sense and the ample record . . . confirm Congress's belief [that] large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption."); *id.* ("It is not only plausible, but likely, that candidates would feel grateful for such [large soft-money] donations and that donors would seek to exploit that gratitude." (footnote omitted)); *see also WRTL*, 127 S. Ct. at 2667 n.6 (relying on a national survey for the legislative fact that most citizens could not name their congressional candidates).

This case raises many of the same issues as *Colorado II*, in which the Court concluded:

> 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.

533 U.S. at 451-52 (footnote omitted). That conclusion was based on legislative facts, such as political committees' habit of giving to competing parties or candidates in the same election. In discussing these facts, the Court cited a political scientist's statement submitted in the lawsuit, a former Senator's anecdote about a debate among his colleagues, a book by a political science professor, and FEC disclosure reports. *Id.* at 451-52 & nn.12-13. This Court should not certify plaintiffs' proposed questions without developing a similar factual record.

B. The State Party Plaintiff in This Case Lacks Statutory Standing

Plaintiffs' Question 1 asks whether "each" of the plaintiffs has alleged sufficient injury to support Article III standing. However, 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.

C. Plaintiffs' Questions 2 and 5, Which Claim That Coordinated Expenditures Cannot Be Restricted Unless They Are "Unambiguously Campaign Related," Appear to Be Insubstantial In Part and to Require Factual Development and Statutory Interpretation

Plaintiffs' Questions 2 and 5 concede that the Act's limits on party expenditures coordinated with candidates are constitutional as applied to four kinds of activities, but challenge its application to other kinds of expenditures that, in plaintiffs' view (Plaintiffs' Mem. at 3), are not "unambiguously campaign related." In particular, plaintiffs challenge the expenditure provision limits at 2 U.S.C. § 441a(d)(2)-(3) and the contribution limit at 2 U.S.C. § 441a(a)(2)(A) as applied to coordinated party expenditures for anything beyond express advocacy, "targeted federal election activity," "disbursements equivalent to paying a candidate's bills," and distributing a candidate's campaign literature.

1. Legal Background

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*, 540 U.S. at 134-40. In *Buckley*, the Court 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." *Buckley*, 424 U.S. 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.* *See also 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); 2 U.S.C. § 441a(a)(7)(B). Thus, it has long been clear that coordinated party expenditures are treated as contributions under the Act.

To avoid vagueness concerns, the Court in *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" when analyzing the constitutionality of the Act's *contribution* limits. *See id.* at 24-38. The express advocacy requirement does not apply to coordinated expenditures. *See Buckley*, 424 U.S. at 44; *see also MCFL*, 479 U.S. at 249; *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986).

The party coordinated spending limits in 2 U.S.C. § 441a(d) are a "special provision" that allows political parties to make coordinated expenditures in support of their candidates far greater than the $5,000 limit on contributions applicable to all multicandidate political committees. *See generally Colorado I*, 518 U.S. at 610-12. In *Colorado II*, when the Supreme Court upheld the limits in 2 U.S.C. § 441a(d) on their face, it did not limit its holding to any subset of coordinated expenditures. The Court explained that "there is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," and it upheld the party coordinated expenditure provision based largely on an anti-circumvention rationale: Because individuals 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. 533 U.S. at 464.

2. The Court Should Not Certify Plaintiffs' Questions 2 and 5 at This Time

Both Questions 2 and 5 are insubstantial to the extent they argue that it is unconstitutional to limit any coordinated expenditures that are not "unambiguously campaign related." Plaintiffs distort *Buckley* by contending that the decision enshrined the phrase "unambiguously campaign related" as a general constitutional test for campaign finance regulation. However, this phrase was merely part of the Court's explanation that its statutory construction of the term "expenditure" in connection with some of the Act's disclosure provisions would resolve "serious problems of vagueness," *Buckley*, 424 U.S. at 76. Indeed, to the extent that *Buckley* caused any confusion on this point, the Court put the 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. 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. Plaintiffs argue that this alleged "unambiguously campaign-related" test was later applied in *MCFL* and *WRTL*, but neither case based its holding on such a requirement, and neither case involved limits on parties' coordinated expenditures.

To the extent Questions 2 and 5 are not dependent on plaintiffs' "unambiguously campaign related" argument, they may not be insubstantial, but they require clarification and the

development of a factual record. *See supra* section II.A. In particular, both questions concede that restrictions on "targeted federal election activity" are constitutional, but this is not a term of art from any case or statute. Instead, it appears to be a concept that plaintiffs have developed out of whole cloth. Plaintiffs provide four examples of "targeted federal election activity": "voter registration, voter identification, get-out-the-vote, and generic campaign activities that are targeted to help elect the federal candidate involved." Plaintiffs' Mem. at 3. But that does not clarify what "targeted" means. For example, in plaintiffs' view, would voter registration activity coordinated with a candidate but conducted partially outside the candidate's own district fall within this category? Would get-out-the-vote activity be non-targeted if it did not explicitly mention the candidate's name? Plaintiffs' complaint also states that they wish to engage in other undefined activities, including "issue advocacy" and "grassroots lobbying." Am. Compl. ¶ 40. It may be that some of these activities plainly fall within the legitimate scope of the Act, or conversely, that some are clearly not restricted by the Act at all; in either case, certification would not be appropriate. Discovery is necessary to determine more precisely which activities plaintiffs plan to undertake and to build a record about the government interest in regulating such activity that is actually covered by the Act.

Lastly, although plaintiffs do not cite the Commission regulation about party coordinated expenditures, their challenge may implicate the regulation. Under 11 C.F.R. § 109.37, party expenditures are subject to the limits in 2 U.S.C. § 441a(d) if they meet certain "conduct" requirements (*i.e.*, sufficient collaboration between the candidate and party to constitute "coordination") and certain "content" requirements. Plaintiffs appear to argue that at least some of the "content" prong of the regulation is unconstitutional, insofar as it reaches some candidate-specific communications that lack express advocacy. If plaintiffs' real quarrel is with the

regulation's interpretation of the Act, then certification should be denied if "resolution of unsettled questions of statutory interpretation may remove the need for constitutional adjudication." *California Med. Ass'n*, 453 U.S. at 192 n.14. Thus, certification will not be appropriate if this Court determines that any alleged constitutional infirmities in 2 U.S.C. § 441a(d) can be rectified by a narrower reading of the statute or regulation.

D. Plaintiffs' Questions 3 and 6, Which Claim That Coordinated Expenditures Cannot Be Restricted If They Are a Party's "Own Speech," Appear to Be Insubstantial In Part and to Require Factual Development And Statutory Interpretation

Plaintiffs' Questions 3 and 6 ask whether the expenditure limits at 2 U.S.C. § 441a(d)(2)-(3) and the contribution limit at 2 U.S.C. § 441a(a)(2)(A) are unconstitutional as applied to coordinated party expenditures for express advocacy and "targeted federal election activity." As written, these questions are plainly insubstantial; under plaintiffs' own theory, coordinated expenditures for such activity are "unambiguously campaign related" and subject to constitutional limits. *See* Plaintiffs' Mem. at 9. If coordinated express advocacy were outside the reach of Section 441a(d), it would render the provision virtually meaningless, as parties would be free to spend unlimited amounts expressly advocating the election of their candidates in ads created and run in close consultation with the candidates, effectively eliminating the Act's contribution limits. *See Colorado II*, 533 U.S. at 464 (noting that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate.").

Plaintiffs' actual claims regarding Questions 3 and 6 (*see* Plaintiffs' Mem. at 9, 15) appear to be that restriction of party communications for such activity is unconstitutional to the extent the communications constitute a party's "own speech." But plaintiffs neither explain how communications that have been coordinated could still be a party's "own speech," nor suggest

how the Court should identify such speech. The complaint identifies only a single example of what plaintiffs believe would constitute a communication that falls within the "own speech" category — an advertisement allegedly written without Congressman Cao's involvement, but for which the party would coordinate with Congressman Cao as to "the best timing" to run the ad. *See* Am. Complaint at ¶¶ 43-44. In the Commission's view, even coordination as to the timing of an advertisement is sufficient to mean that the ad is no longer "independent" for purposes of the Act. *See* 11 C.F.R. §§ 109.37(a)(3); 109.21(d)(2)(v). If there are other types of communications that plaintiffs believe fall within the "own speech" category, those facts need to be developed during the discovery process, so that the courts will have an adequate factual context to determine whether such communications are encompassed by the statutory provisions, and if so, whether such application is constitutional. As explained *supra* section I, if these questions can be resolved through interpretation of the Act and FEC regulations, certification would not be appropriate. *Cal. Med. Ass'n*, 453 U.S. at 192 n.14.[5]

E. Plaintiffs' Question 4, Regarding the Constitutionality of the Specific Limits on Party Coordinated Expenditures under 2 U.S.C. § 441a(d)(3), Involves Settled Principles of Law and Does Not Merit Certification Under 2 U.S.C. § 437h

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

[5] The Colorado party committee appeared to raise a similar claim in *Colorado II*, *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 Court noted that the party 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.*

than $2 million in Senate races. The gist of plaintiffs' argument is that the variability of these limits renders them unconstitutional. Congress is entitled to significant deference, however, in balancing competing interests and determining that higher coordinated expenditure limits for certain elections adequately serve the government's interest in preventing corruption. Under the applicable, settled precedent, plaintiffs cannot demonstrate that the current limits are unconstitutional, so this question should not be certified to the *en banc* Court of Appeals.

The different limits 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 with the candidates' need to "amass[] the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000); *Buckley*, 424 U.S. at 36 (explaining that FECA "provisions [excepting some volunteers' expenses from contribution limits] are a constitutionally acceptable accommodation of Congress's 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 rather than the exception 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 congres-

sional 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 that 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 Congressional and Presidential campaigns." *Id.* at 30. Plaintiffs are thus wrong to suggest that because Congress set higher limits for statewide races, lower limits in other races are "not supported by an anti-corruption interest." Am. Compl. ¶ 71-72.

The Supreme Court has also recognized that, in the context of campaign contributions, the task of identifying a specific dollar limit that strikes the most appropriate balance between competing objectives is largely 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 v. Sorrell*, 548 U.S. 230, 248 (2006) (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).[6]

Plaintiffs' claim that even the highest coordinated expenditure limit for races for the House of Representatives — in the 2008 election cycle, a limit of $84,100 — 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 affects 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 $1000 individual contribution limit as applied to him would have to show a "serious adverse effect" on his campaign in light of

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[6] Furthermore, since candidates running against one another compete under the same party coordinated expenditure limits, the limits do not put any candidate at a competitive disadvantage. *See Davis v. FEC*, 128 S. Ct. at 2774 ("imposing different contribution and coordinated party expenditure limits *on candidates vying for the same seat* is antithetical to the First Amendment") (emphasis added). Unlike the provision at issue in *Davis*, which allowed some candidates to use relaxed contribution limits based upon an opponent's use of self-financing, the difference in limits at issue in this case does not create a disparity between competing candidates.

Buckley's facial upholding of that provision. 980 F.2d at 331. In this case, the RNC contends that the party expenditure limits are too low, but there is no indication that the limits in Section 441a(d)(3) have had any "serious adverse effect" on any candidate's ability to wage an effective campaign. In the 2008 election cycle, in addition to party contributions and coordinated expenditures, congressional candidates were permitted to receive contributions of up to $5,000 from any other multicandidate political committee, and contributions from individuals of up to $2,300 per election (*i.e.*, $2,300 for a primary and $2,300 for a general election). *See* 2 U.S.C. §§ 441a(a)(1)(A), 441a(a)(2)(A). In fact, during the 2008 cycle, Mr. Cao received campaign contributions of $242,279, and with these contributions he unseated an incumbent member of Congress. Plainly, the limits on party coordinated expenditures did not keep Mr. Cao from amassing the resources necessary for effective advocacy. 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 statewide Missouri 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. In sum, plaintiffs cannot show that the limits on party coordinated expenditures have prevented effective campaigns, and Question 4 does not meet the standards to be certified to the Court of Appeals.

F. Plaintiffs' Question 7, Whether the $5,000 Contribution Limit at 2 U.S.C. § 441a(a)(2)(A) Violates the Constitution by Setting the Same Limits on Political Parties As It Does on Other Political Committees, Does Not Merit Certification under 2 U.S.C. § 437h

This question involves settled principles of law. Although political parties differ from other political committees in certain respects, there is no constitutional requirement that they have different contribution limits. In *Colorado II*, the Supreme Court addressed this very issue in the context of party coordinated expenditures, which are functionally the same as direct party contributions, and 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." 533 U.S. at 447, 464. 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 party coordinated expenditure limits are subject to the same scrutiny as the limits on individuals and other political committees. *Id*. at 445, 456. In so concluding, the Court 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.

Of course, parties actually enjoy limits that are far more generous than those that apply to other political committees, in large part because parties are able to make large coordinated expenditures under Section 441a(d)(3) that are functionally equivalent to contributions. 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." *Id.* at 455. Indeed, parties enjoy several special benefits. These include higher limits for contributions by national party committees like the RNC to Senate candidates under 2 U.S.C. § 441a(h) ($39,900 in the 2008 cycle, *see* 73 Fed. Reg. 8698), and — for some national parties including the RNC — multi-million dollar public subsidies for their quadrennial conventions under 26 U.S.C. § 9008. Analogously, the Court has upheld the limits on contributions by *unincorporated* associations to multicandidate political committees under 2 U.S.C. § 441a(a)(1)(C), even though the ability of corporations and unions to support their "separate segregated funds" under 2 U.S.C. § 441b(b)(2) is not so limited, because the Act as a whole imposes far greater restrictions on corporations and unions. *Cal. Med. Ass'n*, 453 U.S. at 200-01. Thus, given the Act's generous overall treatment of political parties, Question 7 raises a settled question of law that does not merit certification to the Court of Appeals.

G. Plaintiffs' Question 8, Whether the $5,000 Contribution Limit in 2 U.S.C. § 441a(a)(2)(A) Is Unconstitutionally Low as Applied to Political Parties, Does Not Merit Certification Under 2 U.S.C. § 437h

Plaintiffs divide their Question 8 into three sub-claims, none of which presents a substantial or unresolved question sufficient to merit certification to the Court of Appeals. Plaintiffs' sub-claim (a), based on the fact that the $5,000 limit at 2 U.S.C. § 441a(a)(2)(A) is not indexed for inflation, is meritless because the Supreme Court upheld this and other limits, *see Buckley*, 424 U.S. at 35-36, when they were not indexed for inflation. Indeed, the Court has never struck down a federal contribution limit based on a lack of indexing. In *Randall*, the Court identified Vermont's failure to index its contribution limits to inflation as one of the factors leading it to conclude that the contribution limits in that case were unconstitutional. 548 U.S. at

261. However, the Court noted that the $200 to $400 contribution limits in Vermont were already "suspiciously low," so without indexing the limits would "almost inevitably become too low over time." *Id.* By contrast, the $5,000 limit on multicandidate political committee contributions to federal candidates is not suspiciously low, and in any event, is only one of the avenues the Act provides for political parties to assist federal candidates. *See supra* section II.E. 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.

Plaintiffs' sub-claim (b) also fails to raise a substantial question. It argues 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, 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 with the candidates' need to amass the resources necessary for effective advocacy. *See supra* section II.E; *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 to run effective campaigns. Moreover, like the coordinated expenditure limits, the limits in Section 441a(h) put no candidate at a competitive disadvantage, since candidates running against one another are subject to the same limits. *See supra* p. 19 n.6.

Plaintiffs' sub-claim (c), 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. 21; *Colorado II*, 533 U.S. at 447. Of course, parties are not actually limited to the $5,000 contribution limit, since they can make large coordinated expenditures on behalf of their candidates that other political committees cannot, and they enjoy other special benefits in supporting their candidates. *See supra* section II.E.

In any event, as we explained *supra* p. 19, 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." On the contrary, Congressman Cao won his 2008 race. In sum, none of the arguments plaintiffs offer in support of certifying Question 8 meets the criteria for certification to the Court of Appeals.

CONCLUSION

As we have shown, many of the questions plaintiffs have proposed for certification to the *en banc* Court of Appeals under 2 U.S.C. § 437h are not sufficiently substantial for that extraordinary procedure. In any event, certification of any question is premature, because several of plaintiffs' constitutional claims first require clarification, statutory or regulatory interpretation, and the development of an adequate factual record. Accordingly, this Court should set a discovery schedule to be followed by the submission of proposed factual findings,

briefing on those proposed findings, and subsequent legal briefing as to the certification of the questions plaintiffs have raised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be delivered through the ECF electronic filing system on the 27th day of January, 2009, to:

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