United States District Court
Eastern District of Louisiana
New Orleans Division

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

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

Since this case challenges provisions of the Federal Election Campaign Act ("FECA"), FECA's "judicial review" provision requires this Court to "immediately . . . certify all questions of constitutionality . . . to the [Fifth Circuit], which shall hear the matter sitting en banc." 2 U.S.C. § 437(h).[1] Plaintiffs move certification as to the questions in *Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc*, which questions are set out below with a discussion showing how each is a proper question for certification.

[1]The provision authorizes review where a case is brought by "the national party of any political committee" (Republican National Committee ("RNC")) "or any individual eligible to vote in any election for the office of President of the United States" (Joseph Cao). *Id.*

The questions involve unresolved issues of constitutional law based on straightforward, verified facts, so there is no need for discovery or further factual development, especially since Plaintiffs have been unable to engage in the activities that they verify a desire to do. Moreover, this case focuses largely on the issue expressly left open in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"),[2] so that the record and six opinions issued by the lower courts and the Supreme Court in the two cases of *Colorado II* and *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), provide an adequate factual context,[3] supplemented by the record and opinions in *McConnell*, 540 U.S. 93. In addition, much of the activity that Plaintiffs want to coordinate is issue advocacy, and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007), held that in as-applied challenges involving issue advocacy there should be "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation," *id.* at 2666.[4] The questions are properly framed and ready for "immediate" certification.

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[2]The majority left open the constitutionality of the Party Expenditure Provision limits as to coordinated activity constituting a political party's own speech, *id.* at 456 n.17, as did the dissent, *id.* at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, J.J.).

[3]A change in the law since *Colorado II* actually eliminates the fundraising by candidates for political parties that resulted in the "tallying" that the Court found contained the "potential for corruption by circumvention" that justified the Party Expenditure Provision limits as to coordinated party expenditures, 533 U.S. at 459-61, 65. Since the prohibition on candidate fundraising of so-called "soft money" in the Bipartisan Campaign Reform Act of 2001 ("BCRA") was upheld in *McConnell v. FEC*, 540 U.S. 93, 181-84 (2003), candidates cannot raise soft money.

[4]This principal opinion ("*WRTL II*") by Chief Justice Roberts (Justice Alito joining) states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

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

As was done in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), a preliminary question deals with standing, *id.* at 898-01. Plaintiffs have standing, of course, because the challenged provisions apply to their intended activities and Plaintiffs are thus are chilled in the exercise of their First Amendment rights. The case is ripe, and any arguable mootness of certain facts relating to the now passed general election is well within the exception to mootness for matters that are capable of repetition yet evading review. *See*, *e.g.*, *WRTL II*, 127 S. Ct. at 2662-63.

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

Count 1of the *Amended Verified Complaint for Declaratory and Injunctive Relief* ("VC") raises the issue of whether the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(2)-(3), which limit political party expenditures "*in connection with* the general election campaign of a candidate," *id.* (emphasis added), are unconstitutionally vague and overbroad, and beyond congressional authority to regulate federal elections, as applied to activities that are not "unambiguously campaign related," *Buckley v. Valeo*, 424 U.S. 1, 81 (1976), i.e., in this context, as applied to activities other than (a) communications containing express advocacy (explicit words expressly advocating the election or defeat of a clearly identified federal candidate), (b) 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), (c) paying a candidate's bills, and (d) distributing a candidate's campaign literature.

Preliminarily, this case is a follow-on to *Colorado I* and *II*. In *Colorado I*, the Supreme Court held the Party Expenditure Provision limits unconstitutional as applied to "independent" ("without coordination with any candidate") expenditures[5] by political parties "in connection with" candidate campaigns. *See* 518 U.S. at 608 (plurality opinion). The Court left open the severability question of "whether or not Congress would have wanted the Party Expenditure Provision's limitations to stand where they only apply to coordinated, and not to independent expenditures." *Id.* at 625. On remand the district court rejected the argument that all limits on *coordinated* expenditures under the Party Expenditure Provision must also fall because Congress would not have intended any limits absent the applicability of the limits to independent expenditures. 41 F. Supp. 2d 1197, 1207 (D. Colo. 1999) (noting strong presumption created by severability clause). *See also Colorado I*, 533 U.S. at 440 n.5 (noting rejection of non-severability argument and that Party dropped argument on appeal). So the challenges to the Party Expenditure Provision limits here involve party expenditures coordinated with a candidate.

The requirements that campaign-finance regulations be (1) non-vague and (2) unambiguously campaign related have been recognized and applied in other contexts and should be applied now to this question. The First Amendment mandates that "Congress . . . make no law . . . abridging the freedom of speech," U.S. Const. amend. I, which "guarantee has its fullest and

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[5]To avoid confusion, it should be noted that while the *Colorado I* plurality refers to *independent expenditures*, *see*, *e.g.*, *id.* at 613, 615-16, it does not use the term as a FECA term of art, i.e., an express-advocacy communication, 2 U.S.C. § 431(17)(definition). The ad in *Colorado I* contained no express advocacy, and the district court had held that there could be no coordination absent express advocacy, but the Supreme Court decided the case on a different basis. *See* 518 U.S. at 612-613. However, when *Buckley* spoke of "expenditures" in the coordination context, *see*, *e.g.*, 424 U.S. at 46 n.53, it would have had express advocacy in mind because it construed "expenditure" in a limitation context, *id.* at 44, and a disclosure context, *id.* at 80, to require express advocacy. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("expenditure" in corporate-prohibition context requires express advocacy).

most urgent application precisely to the conduct of campaigns for political office," *Buckley*, 424 U.S. at 15. While the Supreme Court permits limited regulation of free expression arguably related to elections, it requires (a) that the language of any regulation be extraordinarily definite and clear and (b) that the regulation not be overbroad by (i) reaching beyond congressional authority to regulate in the first place (the threshold unambiguously-campaign-related requirement, *see infra*), (ii) not being properly tailored to an appropriately-strong governmental interest (the government's burden to prove under the appropriate level of scrutiny), or (iii) sweeping in a substantial amount of protected activity along with regulable activity (facial invalidity due to substantial overbreadth).

As to vagueness, *Buckley* reaffirmed that "'[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity,'" *id.* at 41 n.48 (citation omitted). "Where First Amendment rights are involved, an even 'greater degree of specificity' is required" than the "adequate notice to a person of ordinary intelligence" that "[d]ue process requires . . . [for] a criminal statute." *Id.* at 77. Accordingly, *Buckley* imposed narrowing constructions on vague language in the Federal Election Campaign Act ("FECA") that restricted speech, including the vague phrases "'expenditure . . . *relative to* a clearly identified candidate,'" *id.* at 39-44 (citation omitted) (emphasis added) (imposing magic-words express-advocacy construction), and "'expenditures' . . . '*for the purpose of* . . . *influencing*' the nomination or election of candidates for federal office," *id.* at 79-80 (emphasis added) (express-advocacy construction). *MCFL* imposed the express-advocacy construction on "*in connection with* any election," 479 U.S. at 248-49 (emphasis added). The Party Expenditure Provision limits employ this same language, i.e., "*in connection with* the general election campaign of a candidate," 2 U.S.C.

§ 441a(d)(2)-(3) (emphasis added), so they also require a narrowing construction to avoid unconstitutional vagueness.[6]

The *Buckley* and *MCFL* narrowing constructions were also to avoid overbreadth, in particular to avoid violating the threshold requirement that government not reach beyond its sole authority to regulate political speech in this context, which is "[t]he constitutional power of Congress to regulate federal elections," *Buckley*, 424 U.S. at 13. *MCFL* put this threshold overbreadth problem succinctly: "Buckley adopted the 'express advocacy' requirement to distinguish *discussion of issues and candidates* from more pointed *exhortations to vote* for particular persons," 479 U.S. at 249 (emphasis added). *Buckley* addressed this overbreadth problem:

> the distinction between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

424 U.S. at 42 (emphasis added). *Buckley* made clear that this dissolving-distinction problem required bright-line, speech-protective laws and that it applied specifically to the context of distinguishing disbursements treatable as "expenditures" (which may not be limited) from those treatable as "contributions" (which may be limited). *Id.* at 21.[7]

Buckley addressed overbreadth in part by providing an overarching requirement for campaign-finance regulations to keep Congress from reaching beyond its power to regulate election campaigns, i.e., regulating "advocacy of election or defeat of candidates," *id.* at 42, to un-

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[6]The vagueness of this phrase is an open question that was raised but not decided in *Colorado I*. *See* 518 U.S. at 613 (plurality opinion).

[7]*Buckley* held that a disbursement may be treated as a contribution only if it "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," "does not in any way infringe the contributor's freedom to discuss candidates and issues," and "involves speech by someone other than the contributor." *Id.* at 21.

constitutionally encroach on ordinary political speech, i.e., "discussion of issues and candidates," *id.* That requirement is the unambiguously-campaign-related requirement, which limits government regulation to activity that "is *unambiguously related* to the *campaign* of a particular federal candidate," *id.* at 80 (emphasis added). As the Fourth Circuit aptly put it, to "cabin" the government to its "power to regulate elections" the Supreme Court "demarcat[ed] a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate.'" *North Carolina Right to Life v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) (*quoting Buckley*, 424 U.S. at 80).[8]

The Supreme Court has applied the unambiguously-campaign-related principle through articulated tests or constructions in several contexts. *Buckley* applied the principle as a threshold test to "expenditure" disclosure, *id.* at 78-79 (requiring express-advocacy test; an "expenditure" limit, *id.* at 39 (same); "political committee" status, *id.* at 79 (requiring major-purpose test); and scope of "contributions," *id.* at 23 n.24, 78. In *MCFL*, the Court applied the unambiguously-campaign-related principle as a threshold requirement to limit the scope of corporate "expenditures" that could be prohibited. 479 U.S. at 249 (requiring express-advocacy test). In *McConnell*, the Court implicitly applied the principal to determine that congressional regulation of "election-

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[8] *Leake* also recognized that the unambiguously-campaign-related requirement is implemented through tests, as explained further below:

> Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy, defined as a communication that uses specific election-related words. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

525 F.3d at 282-83.

eering communications" was permissible where the scope of regulated activity was "neither vague nor overbroad," 540 U.S. at 192, and was facially "the functional equivalent of express advocacy," *id.* at 206. And then in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), the controlling opinion and holding of the Court applied an unambiguously-campaign-related principle to narrow the scope of regulable electioneering communications with its "appeal to vote" test, *id.* at 2667,[9] in order to protect "issue advocacy," *id.* at 2667, 2673, or "political speech," *id.* at 2672-73. The Court distinguished this constitutionally-protected "political speech" or "issue advocacy" from "campaign speech," *id.* at 2659, 2673, or "electioneering," *id.* at 2667-69, 2672, and only "*campaign* speech" is unambiguously *campaign* related (i.e., only regulation of "*election*eering" is justified under congressional authority to regulate *elections*).

Not all of a political party's activities are "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80. Parties work to advance their core values in a wide variety of ways, e.g., litigation and direct and grassroots lobbying on issues, that have nothing to do with any particular candidate's campaign and should not properly be considered "in connection with the general election campaign of a candidate," 2 U.S.C. § 441a(d)(2)-(3). The notion that *all* of a parties activities are "in connection with" their candidates was rejected in *Colorado I*, 518 U.S. 604, which held that parties could make expenditures for communications independent of their candidates. Whenever *Buckley* described how FECA treated coordinated "expenditures" as "contributions," it consistently spoke of "*expenditures*," *see*, *e.g.*, 424 U.S. at 24 n.25, 46 n.53 ("expenditures placed in cooperation with . . . candidate"), 78 (same), which term

[9]The appeal-to-vote test requires that an ad that fits the "electioneering communication" definition may only be regulated if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.* at 2667, and all doubts are resolved in favor of free speech, *id.* at 2667, 2669 n.7, 2674. So the test requires that it unambiguously relate to voting and candidacy, i.e., election campaigns.

of art the Court would have understood to be disbursements "for the purpose of . . . influencing" a candidate's nomination or election, *id.* at 147 (statutory definition), and which statutory term the Court had construed, in both a limitation and disclosure context, to require express advocacy, *id.* at 44, 80. This consistent usage indicates that the only disbursements subject to being treated as contributions by reason of coordination are those for activities that are unambiguously campaign related.

The Party Expenditure Provision limits should be subject to the unambiguously-campaign-related requirement, so the limits are unconstitutional as applied to party activities that do not meet this threshold requirement, i.e., activity other than (a) express advocacy, (b) targeted federal election activity, (c) paying a candidate's bills, and (d) distributing a candidate's campaign literature. This is an unresolved question that should be certified to the Fifth Circuit for resolution.

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

Count 2 of the *Amended Verified Complaint* raises the issue of whether the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(2)-(3) are unconstitutional as applied to activity that is "not functionally identical to contributions," *Colorado II*, 533 U.S. at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.), 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 (*quoting Buckley*, 424 U.S. at 21). Under this analysis, a political party's targeted federal election activity or express-advocacy communication that constitutes the party's own speech, as opposed to merely paying the candidate's bills, is an expenditure restriction, not a contribution limit. It is therefore unconstitutional under strict scrutiny because

expenditures may not be limited. Consequently, the Party Expenditure Provision limits would be unconstitutional as applied to unambiguously-campaign-related activity other than (a) paying a candidate's bills and (b) distributing a candidate's campaign literature.

In *Colorado I*, the plurality opinion agreed, 518 U.S. at 624 (Breyer, J., joined by O'Connor & Souter, J.J.), with three other members of the Court, *id.* at 626-29 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part), that (in the words of the plurality) "party coordinated expenditures . . . share some of the constitutionally relevant features of independent expenditures. But many such expenditures are virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills . . . ." *id.* at 624. *Colorado I* thus recognized the distinction between coordinated disbursements for the party's own speech as opposed to merely paying a candidate's bills, but it left the issue of coordinated disbursements for another day, deciding only that the Party Expenditure Provision limits were unconstitutional as to independent party disbursements, *id.* at 625-26.

In *Colorado II*, the Court held that the Party Expenditure Provision limits were not facially unconstitutional, i.e., the limits do not apply to independent disbursements and are not unconstitutional as to *all* coordinated disbursements by a political party, but both the majority and the dissent acknowledged that the Court had left open the question of coordinated disbursement for activities that were more in the nature the party's own speech than just paying the candidate's bills. *See* 533 U.S. at 456 n.17 (majority) ("need not reach in this facial challenge"), 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, J.J., dissenting) ("To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contribu-

tions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved."). This case raises that open question, which should be certified to the Fifth Circuit for resolution.

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

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

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

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

Count 3 of the *Amended Verified Complaint* raises the issue of whether the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(3) are unconstitutional because (a) variable limits for the same office vitiate the anti-corruption interest for rates below the highest; (b) a formula creating variable limits for the same office is substantially overbroad because all created limits below the highest are unsupported by an anti-corruption interest, and they are not severable; (c) the lower limits are not severable, so the higher limits must all fall; and (d) if the higher base limit for candidates for Representative is severable, it is unconstitutionally low.

Where the government employs multiple contribution or coordinated-expenditure limits for the same or similar offices, its acknowledgment that the higher limits accommodate its anti-corruption interest means that lower limits do not advance that interest, so lower limits are unconstitutional. *See California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1296 (9th Cir. 1998) (varied contribution limits make lower unconstitutional).

In 2 U.S.C. § 441a(d)(3), the limit on expenditures coordinated with Senators ranges from $2,284,900 (2¢-per-VAP formula adjusted for inflation) in California down to $84,100 (base limit of $20,000 adjusted for inflation), with Louisiana being at $270,300. VC ¶ 69. Put colloqui-

ally in light of the anti-corruption interest that must justify such limits, Congress says that a Louisiana Senator can be "bought" for a little more that a quarter of a million dollars but that it takes more than two million dollars to "buy" a California Senator. To be sure, Congress probably was not even thinking of the "corruption" rationale that must justify this sort of limit, *Buckley*, 424 U.S. at 25, because it based its formulas on population (and inflation) variables, not cost-of-living variables. But that very failure to recognize the necessary corruption rationale that is required for such a limit and to tailor the limits to that corruption rationale makes variable limits unconstitutional for lack of a sufficient governmental interest. The same is true of the fact that the limit on expenditures coordinated with some Representatives is $42,100, while it is $84,100 for others, VC ¶ 70, i.e., based on the required corruption rationale for limits, Congress is saying that $42,101 tempts a Louisiana congressional candidate, while candidates in Alaska, Delaware, Montana, North Dakota, Vermont, and Wyoming, VC ¶ 29 (listing single-district states), are not tempted to act corruptly until party expenditures of $84,101 are coordinated with them.

The formula employed in 2 U.S.C. § 441a(d)(3)(A) (for candidates for Senator and Representative in single-district states) creates multiple variable rates that are lower than the highest rate and so are unjustified by any corruption interest. This makes the formula substantially overbroad because all of the rates it creates, but for the top one, are unconstitutional, so the formula itself is unconstitutional.

But the formula is not severable from the remaining base limit of $20,000 (adjusted for inflation) because if Congress thought that $20,000 was adequate in all situations it would not have provided that the higher of that base amount or the amount reached by the formula would apply. Congress did not, and would not have, enacted 2 U.S.C. § 441a(d)(3)(A) with only this base limit because it considered that amount an inadequate coordinated party expenditure in many situa-

tions. Likewise, the higher base limit for candidates for Representative ($20,000 adjusted for inflation) is not severable from the lower limit, because it only applies in single-district states and if the lower amount is struck down then there is no limit in 2 U.S.C. § 441a(d)(3)(B) on multi-district states. Congress would not have intended to impose a limit on the one but not the other. So all of the limits at 2 U.S.C. § 441a(d)(3) must fall as a unit, leaving the authority for parties to make expenditures coordinated with their candidates for Senator and Representative unlimited, just as political parties' independent expenditures under limits at 2 U.S.C. § 441a(d) are unlimited.

If the higher limit for expenditures coordinated with candidates for Representative is somehow deemed to have survived the analysis above, then it is challenged as unconstitutionally low. *Randall v. Sorrell*, 548 U.S. 230 (2006), noted that "[t]he Court has recognized . . . that contribution limits might sometimes work more harm to protected First Amendment interests than their anticorruption objectives could justify." *Id.* at 247-48 (plurality opinion). This is such a case.

This question raises substantial, unresolved issues that should be certified to the Fifth Circuit for resolution.

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

Count 4 of the *Amended Verified Complaint* raises the issue of whether the $5,000 limit on contributions from a "multicandidate political committee" to "any candidate," 2 U.S.C. § 441a(a)(2)(A), and the Coordination-Contribution Provision, 2 U.S.C. § 441a(a)(7)(B)(i)

(which converts coordinated expenditures into "contributions"), are unconstitutionally vague and overbroad, and beyond congressional authority to regulate federal elections, as applied to activity that is not "unambiguously campaign related," *Buckley*, 424 U.S. at 81, i.e., in this context, as applied to activity other than (a) communications containing express advocacy (explicit words expressly advocating the election or defeat of a clearly identified federal candidate) (b) 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), (c) paying a candidate's bills; and (d) distributing a candidate's campaign literature.

Colorado I observed that "[t]he Colorado Party . . . did not challenge . . . [the] provision that imposes a $5,000 limit on any contribution 'multicandidate political committee' (including coordinated expenditures) . . . ." 518 U.S. at 625 (plurality opinion). This case does challenge that provision. For the reasons stated in discussing Question 2, these provisions are also subject to the unambiguously-campaign-related requirement. This is a substantial, unresolved question that should be certified to the Fifth Circuit for resolution.

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

Count 5 of the *Amended Verified Complaint* raises the issue of whether the $5,000 limit on contributions from a "multicandidate political committee" to "any candidate," 2 U.S.C. § 441a(a)(2)(A), and the Coordination-Contribution Provision, 2 U.S.C. § 441a(a)(7)(B)(i) (which converts coordinated expenditures into "contributions"), are unconstitutional as applied to activity that is "not functionally identical to contributions," *Colorado II*, 533 U.S. at 468 n.2 (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.), 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 (*quoting Buckley*, 424 U.S. at 21).

For the reasons stated in discussing Question 3, an expenditure for political activity that is more in the nature of a political party's own speech than paying a candidate's bills may not be treated as a contribution by reason of coordination and therefore limited. This is a substantial, unresolved question that should be certified to the Fifth Circuit for resolution.

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

Count 6 of the *Amended Verified Complaint* raises the issue of whether the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) is per se unconstitutional because it imposes the same limit on parties as on political action committees ("PACs").

Randall struck down state contribution limits in part because Vermont's "insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party." 548 U.S. at 256 (plurality opinion). This provision does the same, and its negative effects on political parties are especially profound if severability issues cause the entire Party Expenditure Provision to be struck down, as opposed to the permission for expenditures remaining without the limits on those expenditures. Therefore it should be declared unconstitutional. This is a substantial, unresolved question that should be certified to the Fifth Circuit for resolution.

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

Count 7 of the *Amended Verified Complaint* raises the issue of whether the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) is unconstitutional because:

(a) the limit is not adjusted for inflation, creating multiple lower contribution limits in years after passage of the statute and thereby vitiating any anti-corruption interest in all but the highest limit;

(b) the additional $35,000 that may be contributed to candidates for Senator, 2 U.S.C. § 441a(h) (adjusted for inflation to $39,900, 73 Fed. Reg. 8698), creates disparate limits so that (i) the higher limit as to candidates for Senator vitiates the anti-corruption interest as to any lower amount for candidates for Senator and (ii) the higher limit as to candidates for Senator also vitiates the anti-corruption interest as to any lower amount for candidates for Representative; and

(c) the limit is simply too low to allow political parties to fulfill their historic and important role in our democratic republic.

Plaintiffs challenge the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) as applied to a political party's in-kind and direct contributions because the limit is per se unconstitutional because it is not adjusted for inflation. When Congress enacted the limit it recognized that the value of the limit was sufficient to eliminate corruption. Every year in which inflation lowers the value of the dollar amount of the limit amounts to another lower contribution limit. As noted above, higher contribution limits vitiate any claimed anti-corruption interest in lower limits. So failure to index a contribution limit for inflation makes it per se unconstitutional if inflation effectively creates lower contribution limits in subsequent years. *Randall* identified failure to index a limit

for inflation as an important part of its conclusion that Vermont's "contribution limits are not narrowly tailored," 548 U.S. at 261:

> unlike the contribution limits we upheld in [*Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000)], Act 64's contribution limits are not adjusted for inflation. Its limits decline in real value each year. Indeed, in real dollars the Act's limits have already declined by about 20% ($200 in 2006 dollars has a real value of $160.66 in 1997 dollars). A failure to index limits means that limits which are already suspiciously low . . . will almost inevitably become too low over time. It means that future legislation will be necessary to stop that almost inevitable decline, and it thereby imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to assure the adequate financing of electoral challenges.

Randall, 548 U.S. at 261 (plurality opinion).

In addition, Plaintiffs challenge the $5,000 limit on a party's in-kind and direct contributions as applied both to candidates for Representative and Senator because the additional $35,000 that may be contributed to candidates for Senator, 2 U.S.C. § 441a(h) (adjusted for inflation to $39,900, 73 Fed. Reg. 8698), creates disparate limits so that (a) the higher limit as to candidates for Senator vitiates the anti-corruption interest as to any lower amount for candidates for Senator and (b) the higher limit as to candidates for Senator also vitiates the anti-corruption interest as to any lower amount for candidates for Representative.

In addition, Plaintiffs challenge the $5,000 limit on a party's in-kind and direct contributions as simply being too low to allow political parties to fulfill their historic and important role in our democratic republic. *See Randall*, 548 U.S. at 257 (plurality opinion) (low limits "severely limit the ability of a party to assist its candidate's campaigns by engaging in coordinated spending" and hinder "the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates"). So this low contribution limit is facially unconstitutional for violating political parties' and their candidates' rights to free expression and association under the First Amendment.

This question raises substantial, unresolved issues that should be certified to the Fifth Circuit for resolution.

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Memorandum in Support of Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc* was served upon the following by U.S. Mail on the 23rd day of December 2008:

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