Nos. 10-30080 & 10-30146

In the
United States Court of Appeals
For the Fifth Circuit

Anh "Joseph" Cao and the **Republican National Committee,**

Plaintiffs-Appellants

v.

The Federal Election Commission,

Defendant-Appellee.

On Certification and Appeal from the United States District Court for the Eastern District of Louisiana

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Brief of Plaintiffs-Appellants

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Certificate of Interested Persons

Anh "Joseph" Cao and the Republican National Committee,
Plaintiffs-Appellants,
v. Nos. 10-30080 & 10-30146

The Federal Election Commission,
Defendant-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Anh "Joseph" Cao, Plaintiff-Appellant, now the U.S. Representative for the Second Congressional District of Louisiana and a candidate for the same office in 2010;

2. The Republican National Committee, Plaintiff-Appellant;

3. The Louisiana Republican Party, a Plaintiff below but not an Appellant here, is the State committee of the Republican Party for Louisiana, and it has an interest in the outcome of the litigation because it will affect its ability to make expenditures to further its organizational purposes. The Louisiana Republican Party is incorporated under Louisiana law and has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

4. The Federal Election Commission, Defendant-Appellee;

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Statement Regarding Oral Argument

This matter is tentatively scheduled for en banc hearing on May 24, 2010. *See* Letter of Clerk, (Mar. 1, 2010) (Doc. # 00511038066).

Plaintiffs-Appellants, Anh "Joseph" Cao and the Republican National Committee, agree that oral discussion of the facts and applicable precedent would benefit the Court, as this case involves several claims, each claim is itself significant and complex, and Plaintiffs-Appellants advance several theories as to why each of these provisions fail the appropriate constitutional scrutiny.

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Jurisdictional Statement

This Court has original jurisdiction over the certified questions pursuant to 28 U.S.C. § 1331 as a case arising under the First and Fifth Amendments, the Federal Election Campaign Act ("FECA"), the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and 2 U.S.C. § 437h. This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's denial of certification.

Statement of the Issues

I. The district court certified the following questions:

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 of Article III? (Proposed Question 1.)

2. Do the expenditure and contribution limits and contribution provision in 2 U.S.C. §§ 441a(d)(2-3), 441a(a)(2)(A), and 441a(a)(7)(B)(i) violate the First Amendment rights of one or more of plaintiffs as applied to coordinated communications that convey the basis for the expressed support? (Proposed Questions 3 and 6 combined.[1])

3. 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? (Proposed Question 7.)

4. 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 because it is not adjusted for inflation? (Partial Proposed Question 8.)

II. The non-certified Proposed Questions now on appeal are:

5. 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 expendi-

[1] Plaintiffs-Appellants believe the best wording and order of the issues is in the Proposed Questions. (R. 122-45, 434-62.) Moreover, the order in which the complaint and certification motion developed the arguments provides a logical progression that is not evident in the certified questions but will assist this Court's analysis.

tures 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? (Proposed Question 2.)

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 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? (Proposed Question 5.)

7. Do the limits on coordinated expenditures at 2 U.S.C. § 441a(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. § 441a(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? (Proposed Question 4.)

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? (Proposed Question 8.)

Statement of the Case

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 address, inter alia, the "unresolved" question of "the constitutionality of the Party Expenditure Provision [limits, 2 U.S.C. § 441a(d)(2)-(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.). The majority agreed with the dissenters that the constitutionality of the limits in "an as applied challenge" involving "more of the party's own speech," as opposed to "no more than payment of the candidate's bills," was "not reach[ed] in th[at] facial challenge." *Id.* at 456 n.17.

Colorado I "held that spending limits set by the Federal Election Campaign Act ("FECA") 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. 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.*

This case challenges the constitutionality of the Party Expenditure Provision limits, 2 U.S.C. § 441a(d)(2)-(3), as-applied to coordinated expenditures that (Count 1) are not "unambiguously campaign related," *Buckley v. Valeo*, 424 U.S. 1, 81 (1976), or (Count 2) are "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).

This case also (Count 3) challenges the Party Expenditure Provision limits that apply to expenditures in connection with the campaigns of candidates for Senator and Representative because (i) they employ multiple limits for the same office (eliminating the government's anti-corruption interest), (ii) the base amounts are too low to allow parties to fulfill their historic and important role in our democratic republic, *see Randall v. Sorrell*, 548 U.S. 230 (2006), and (iii) there are severability problems.

This case also challenges the $5,000 contribution limit at 2 U.S.C.

§ 441a(a)(2)(A) as applied to "in-kind" contributions (i.e., spending considered coordinated with candidates under 2 U.S.C. § 441a(a)(7)(B)(i) (the "Coordination-Contribution Provision") that are not (Count 4) "unambiguously campaign related," *Buckley*, 424 U.S. at 81, or (Count 5) "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.).

This case also (Count 6) challenges the $5,000 contribution limit—both as to in-kind and direct contributions—as being unconstitutional because the same limits apply to political parties as to political action committees ("PACs"), which fails to provide political parties their specially-favored role required in our system of government. *Randall*, 548 U.S. 230.

Finally, this case (Count 7) challenges the $5,000 contribution limit facially for being too low because it is not indexed for inflation, and consequently is far below what Congress originally said was a sufficient limit to further its anti-corruption interest, and because it fails to provide political parties the means to meaningfully engage in their First Amendment free expression and association and to play their specially-favored role required in our system of government. *See Randall*, 548 U.S. 230.

A. Proceedings Below

Plaintiffs-Appellants filed their initial complaint on November 13, 2008. (R. 13-23.) On December 23, 2008, Plaintiffs-Appellants moved for certification of constitutional questions under FECA's judicial review provision, 2 U.S.C. § 437h. *See Khachaturian v. FEC*, 980 F.2d 330, 332 (5th Cir. 1992) (en banc) (R. 122-45.) The certification motion was first considered on February 4, 2009. (R. 229.) The parties then conferred with the Magistrate Judge to create a discovery plan. (R. 330-31.) After extensive discovery, the parties submitted supplemental briefing on certification. (R. 434-62, 894-951.) FEC also filed a motion for summary judgment, to which Plaintiffs-Appellants objected as being improper. (R. 437-62.) Oral argument on both certification and summary judgment was held on November 9, 2009. (R. 3140-41.)

On January 27, 2010, the district court issued an order certifying Proposed Questions 1, 3, 6, 7, and 8 in whole or in part. (R. 3247-48.) The court also dismissed Proposed Questions 2, 4, 5, and 8. Plaintiffs-Appellants filed a notice of appeal with respect to the non-certified questions on February 17, 2010. (R. Supp. Vol. 1, 16-18.) On March 1, 2010, this Court consolidated consideration of certified questions and non-certified questions. (Doc. # 00511038066.)

B. Statement of Facts

RNC, as the national committee of the Republican Party, supports federal, state, and local candidates. RNC seeks to advance its core principles—a smaller federal government, lower taxes at all levels of government, individual freedom, and a strong national defense—by promoting an issue agenda advocating Republican positions, electing Republican candidates, and encouraging governance in accord with these Republican views.

Anh "Joseph" Cao was the Republican candidate for U.S. Representative for the Second Congressional District of Louisiana, which includes New Orleans. Cao competed for election in the December 6, 2008 general election against incumbent William Jefferson. Cao wanted to participate with RNC to the maximum extent constitutionally permissible in the activities outlined below.

At the time the complaint was filed, RNC had already reached its $5,000 contribution limit and had spent or committed to spend its $42,100 expenditure limits under the Party Expenditure Provision in connection with Cao's campaign. RNC wanted to make more expenditures that would be subject to the $5,000 contribution limit and the $42,100 expenditure limit and would have done so were it legal.

Specifically, the RNC intended to make an express-advocacy radio ad ("*Cao*

Ad"), if legally permitted by the judicial relief sought in this case. (R. 278-79). RNC intended to coordinate *Cao Ad* with Cao as to the best timing for it, but otherwise it would not be coordinated with Cao.

RNC also intended, if legally permitted, to do direct and grassroots lobbying responding to the legislative issues that will arise in Congress immediately by lobbying the incumbent U.S. Representative Jefferson, on those issues, but it was 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 satisfies a coordination content standard under 11 C.F.R. §§ 109.21(c)(4) and 109.37(a)(2)(iii)(A); (**b**) it had already met its $5,000 contribution limit and Party Expenditure Provision limit, *supra*; (**c**) and it had already worked with and had substantial discussions with candidate Cao concerning his campaign plans and needs so that making RNC's intended public communications would put Cao and RNC at risk for a burdensome and intrusive investigation as to whether they have met coordination conduct standards under 11 C.F.R. §§ 109.21(d) and 109.37(a)(3) and so violated the challenged limits.

Moreover, RNC would have liked, if legally permitted, 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. §§ 109.21(d) and 109.37(a)(3) because RNC believes it is constitutionally entitled to do this sort of issue-advocacy, lobbying (direct and grassroots) communication, but it is chilled from doing so for fear of an investigation and penalties.

RNC intends, if legally permitted, to coordinate, both in the near future and in the months and years ahead, expenditures for the following activities with their federal candidates without being limited by the $5,000 contribution limit and the Party Expenditure Provision limits: issue advocacy; grassroots and direct lobbying; non-targeted voter registration, voter identification, get-out-the-vote activity, and generic campaign activity.

Summary of the Argument

This case involves constitutional questions that were certified to this Court under 2 U.S.C. § 437h, and an appeal of the non-certified questions. Regarding the certified questions, first, the Party Expenditure Provision limits are unconstitutional as applied to RNC's "own speech," that is, those communications that are attributable to RNC because RNC paid for them and adopted the content as its own. Second, the $5,000 contribution limit is unconstitutional because it violates important associational freedoms by imposing the same limits on political parties as are on PACs. Third, the above contribution limit is unconstitutional as it is not

adjusted for inflation.

Regarding the non-certified questions, the district court erred when it dismissed the non-certified questions as frivolous. First, the Party Expenditure Provision limits and Coordination-Contribution Provision are unconstitutionally vague and overbroad. Second, the $5,000 contribution limit, standing alone, is constitutionally inadequate to allow parties to fulfill their vital, historic role.

Argument

I. Certified Questions Should Be Decided for Plaintiffs-Appellants.

The district court certified four questions. (R. 3247-48.[2]). Certified questions are questions of law considered de novo. *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990).

A. The Party Expenditure Provision Limits Are Unconstitutional As Applied to a Party's Own Speech.

In Proposed Questions 3 and 6, *see supra* at 2 (Issue 2),[3] Plaintiffs-Appellants challenged whether a party's "own speech" may be deemed a contribution.

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[2] The district court certified Proposed Question 1, *see supra* at 2 (Issue 1), regarding statutory standing, as to Cao and RNC but not as to the Republican Party of Louisiana ("LA-GOP"). Plaintiffs-Appellants request that this Court answer Issue 1 affirmatively.

[3] While the district court phrased Issue 2 as applying to "communications that convey the basis for the expressed support," *supra* at 2, the "own speech" issue is not limited to merely communications speaking positively of an issue, but also includes communications in opposition of an issue. Practically speaking, these communications also convey the basis for the expressed support for one issue through stating their opposition to the alternative.

"Expenditures" may not be limited, "contributions" may be because they are less direct speech and so are subject to lower scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 29, 45 (1976). Coordinated expenditures are treated as contributions. 2 U.S.C. § 441a(a)(7)(B)(i).

The Supreme Court has left open the question of whether one's "own speech" may be treated as a contribution, even if coordinated, because it is more in the nature of a direct-speech expenditure (which may not be limited) than an indirect-speech contribution. *See infra*. This case addresses that open "own speech" question and demonstrates that treating one's own speech as a contribution due to coordination is unconstitutional.

1. A Party's" Own Speech" May Not Be Regulated as a Contribution.

In *Colorado I*, six members of the Court cited *Buckley* as leaving the "own speech" issue open. *See id.* at 624 (1996) (Breyer, J., joined by O'Connor & Souter, J.J.); *id.* at 627-30 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part). *Colorado II* expressly left open the as-applied question of whether parties' own speech may be limited as contributions.[4]

[4] *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, JJ., dissenting) ("To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility

a. *Buckley* Explained How to Distinguish Expenditures From Contributions.

The difference between "expenditure" and "contribution" was set out in *Buckley*'s "General Principles" discussion. "[E]xpenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19-20. The Court then contrasted expenditures with contributions in ways that inform the meaning of both:

> By contrast with a limitation upon expenditures . . . a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a *general expression of support for the candidate and his views*, but does not communicate the *underlying basis for the support*. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the *symbolic expression* of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the *transformation* of contributions *into political debate involves speech by someone other than the*

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that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved.").

contributor.

Id. at 20-21 (emphasis added) (footnote omitted).

Keys to the Supreme Court's analysis are (a) whether a disbursement is just a "general expression of support" (contribution), i.e., a "symbolic expression of support," or whether it "communicate[s] the underlying basis for the support" (expenditure) and (b) the distinction in the last quoted sentence, which provides a generally-applicable rule for distinguishing between contributions and expenditures, i.e., does the disbursement fund speech to the voters that is attributable to the payor (the payor's own speech), or does the disbursement only fund speech to the voters attributable to another person?

b. *Colorado I* and *II* Left Open the "Own Speech" Issue.

In *Colorado I*, the plurality agreed, 518 U.S. at 624 (Breyer, J., joined by O'Connor & Souter, JJ.), 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 and merely paying a candidate's bills, but it left the issue for another day, deciding only that the Party Expenditure Provision limits were unconstitutional as to independent party disbursements, *id.* at 625-26.

Colorado II held that the Party Expenditure Provision limits were not facially unconstitutional, i.e., the limits are not unconstitutional as to *all* coordinated disbursements by a political party, but majority and dissent acknowledged that the Court left open whether limiting coordinated disbursements for parties' own speech was constitutional. *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, JJ., 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 contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved.").

2. RNC's Desired Activities Constitute Its "Own Speech."

A political party's "own speech" is speech that is *attributable* to it, even if input on the speech—as to details such as content, media, and timing—was received from others, such as a party's media consultants, script writers, pollsters,

officials, constituency, ideological allies, and candidates.[5] Regardless who came up with an idea, particular language, or means of communication, if the speaker adopts that idea, language, or means, so that it is attributable to that speaker, it is the speaker's own speech, just as a Presidential speech belong to the President, even if speech writers drafted it and various confidants made recommendations.

RNC's activities at issue here, including *Cao Ad*, are its "own speech" because they are both paid for and adopted by the party as its own. RNC, not the candidate, has the final authority over the content and timing. These activities are not justifiably regulated as contributions.

a. Activities Are Attributable to the Payor and Adopter of the Speech.

In order to be one's "own speech," it must be attributable to the speaker. Attribution belongs to the entity that pays for and adopts the speech. The FEC's regulations as to disclaimers provide guidance for attribution, following *Buckley*'s focus on who is *paying* for a communication. First, if a political party (e.g., LA-GOP) issues an agency letter to another political party (e.g., RNC) for authorized spending (under 2 U.S.C. § 441a(d)), it is the party actually paying for the

[5] The "own speech" concept arises where there is "speech," so that paying a candidate's bills for rent, polling, utilities, and other activities without a communication element would always constitute an in-kind contribution.

communication that is attributed authorship, i.e., paid for by _____," even if the payor is acting as "the designated agent" for the other party. 11 C.F.R. § 110.11(d)(i). Though LA-GOP might approve, have input in, or even author an ad paid for by RNC, if RNC pays for it, the disclaimer must identify RNC as the source of payment, i.e., it is RNC's own speech, not LA-GOP's. Second, the regulations actually equate "paid for by" and "made by," so that who makes the payment controls whose "own speech" it is. *See* 11 C.F.R. § 110.11(d)(i) ("paid for by"), (ii) ("made by" and "paid for"), (iii) ("paid for by"). Third, the regulations confirm this understanding in the non-political-party context requiring the payor to be listed in the disclaimer, even where a communication is "authorized by a candidate . . . but is paid for by any other person"—authorization is merely approval and does not convert the payor's own speech into the candidate's own speech. 11 C.F.R. § 110.11(b)(1)-(3).

b. *Cao Ad* Is Attributable to RNC.

Cao Ad (R. 278-79) is clearly RNC's own speech because it would be attributable to RNC and bear a disclaimer showing that RNC paid for the ad. Moreover, the ad, in *Buckley*'s words, communicates the underlying basis for the support and is not merely general expression of support for the candidate and his views, i.e., it is not merely symbolic expression of support. Coordination with Rep. Cao as to

timing would in no way alter the fact that this ad would be RNC's own speech. The ad is plainly more in the nature of a party's own speech than in the nature of merely paying a candidate's bills. Disbursements for it would be expenditures, not contributions. They may not be limited as if they were contributions.

3. Government Has Not Shown a Sufficient Anti-Corruption Interest to Regulate RNC's "Own Speech."

The only interest justifying limitations on contributions is preventing corruption or its appearance. *Buckley,* 424 U.S. at 26-27.

a. *Citizens United* Limited the Government's Anti-Corruption Interest to Preventing Quid Pro Quo.

In *Citizens United v. FEC*, 130 S.Ct. 876 (2010) ("*Citizens*"), the Supreme Court emphatically dismissed the government's fall-back arguments regarding corruption interests. It rejected *any* corruption interest beyond quid pro quo corruption. *Id* at 909-10. "Ingratiation and access . . . are not corruption." *Id*. at 910. *Citizens* stated that evidence showing "that speakers may have influence over or access to elected officials does not mean these officials are corrupt" and "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Id*. at 910.

And no anti-circumvention argument relying on access and gratitude justifies restriction.

b. Preventing Circumvention Is Not a Justifiable Government Interest.

Colorado II justified the Party Expenditure Provision Limits as a means to prevent circumvention. But if the First Amendment mandates that parties' "own speech" be treated as "expenditures," the circumvention argument fails as a matter of law because only "contributions" may be limited, not expenditures. And the "own speech" issue was expressly left open *despite Colorado II*'s holding "that a party's coordinated expenditures . . . may be restricted to minimize circumvention," 533 U.S. at 465. Thus, potential circumvention did not foreclose the "own speech" question.

Moreover, Plaintiffs-Appellants do not engage in the "tallying" identified as problematic in *Colorado II*, *id.* at 459. (*See* R. 508-09, *Deposition of Thomas Josefiak* (42:11-43:1).) And the *Colorado II* dissenters had strong arguments against any circumvention interest in this context, 533 U.S. at 474-480, and for narrowly-tailored approaches if corruption were proven, *Id*. at 581-82. In this as-applied challenge, the FEC is unable to provide evidence of corruption, as defined in *Citizens*, or even of the type of corruption contemplated by *Colorado II*.

4. Independent Expenditures Are Not a Viable Alternative.

Treating parties' "own speech" as "contributions" is especially problematic

because the rules restricting how *parties* must make independent expenditures makes those not an option that effectively advances parties' "own speech." Representative Cao explained that the National Republican Congressional Committee ("NRCC") had made some "robocalls" as independent expenditures that "were so . . . badly done and . . . counterproductive that we wanted them to stop." (R. 647, *Deposition of Anh "Joseph" Cao* (34:8-12).) "[W]e wanted them to stop because it was hurting us more than it helped us." (R. 647 (34:17-19).) The problem was that then-candidate Cao needed Democratic votes in a heavily Democratic district, and the calls were attacking the Democratic party, which alienated potential Democratic voters for Cao. (R. 648 (35:1-21).) The underlying problem, Cao said, was that "none of them discussed to me those independent expenditures because we were not allowed to." (R. 647 (34:2-4).) Had NRCC been able to consult with the Cao campaign, NRCC could have ensured that its "own speech" was helpful, not harmful. This exemplifies one problem of being unable to coordinate independent expenditures, but there is another, perhaps worse.

a. Because of the Need to Avoid Coordination, RNC's Independent Expenditures Cannot Truly Be Its Own Speech.

A political party may do an "independent expenditure" that is supposed to be its "own speech," for which it is responsible, for which it may be criticized, and

yet be surprised and unhappy because, until the communication was released, the party officials had no idea what it would say. This is because the very nature of the relationship between the party and the candidate forecloses the opportunity for an "independent expenditure" to be a party's "own speech."

Primarily, prior contacts between the party and the candidate ruin the opportunity for independent expenditures. A party must "worry about whether or not a conversation that took place with a member of Congress . . . was actually going to taint their ability to do an independent expenditure." (R. 523-24, *Deposition of Thomas Josefiak* (57:16-58:1).)

Additionally, chairmen "really have no control over what the message is." (R. 524 (58:2-5).) "[T]hrough an [i]ndependent [e]xpenditure [p]rogram, the chairman of the RNC has no control over the message, but, then bears full responsibility for what the message is, even though the first time he sees that message is when everyone else sees it." (R. 524 (58:7-11).) "[T]he idea that the chairman of the RNC cannot control what message the RNC is putting out through an [independent expenditure] [p]rogram has been very troublesome." (R. 524 (58:12-15).)

Under the current system, "the only thing the chairman approves is what the budget is for independent expenditures." (R. 525 (59:1-3).) That money goes to "individual consulting groups that have no connection . . . with [a candidate's]

campaign in order to treat it as truly independent . . . .” (R. 525 (59:4-8).) The chairman would not be independent from the candidate’s campaign because, by nature of the office, he or she “is going to have communications with campaigns, and as a result, could never, never be involved with . . . any sort of [i]ndependent [e]xpenditure [p]rogram.” (R. 525 (59:9-13).) Nor are other RNC officials able to be involved as the program is conducted in “total isolation from any employee of the RNC in any engagement with an independent expenditure operation, save the counsel’s office,” which would only assure legal compliance as to disclaimers and the like. (R. 525 (59:14-22).) So, “no one at the RNC” would have any “control over the content” or “see an independent expenditure until everyone else did when it hit the air waves.” (R. 526 (60:2-5).)

Under the present interpretation of the law, RNC’s “own speech” in the form of independent expenditures must be written by “outside consultants,” who “are hired to write the scripts, take their own polls, do their own research, and decide on their own what the message is going to be.” (R. 526 (60:15-18).) As a general rule, then, independent expenditures are employed only when there is “no other way” to have an impact on a race, such as when coordinated expenditure limits and contribution limits have been reached. (R. 527 (61:2-16).)

b. RNC's Goals Cannot Be Accomplished Through Independent Expenditures.

Coordinating with candidates not only promotes "efficiency from the ability to raise and spend resources, but, also in getting a message out and giving more information out there to the electorate to make judgment calls." (R. 621, *Deposition of Thomas Josefiak* (155:9-13).) Coordination allows RNC "[t]o be cohesive in the message," and to "get its speech out there . . . in addition to what the candidate may want to say . . . ." (R. 622 (156:5-9).) This is important to assure that public knows that party affiliation "means something." (R. 622 (156:10-15).)

Furthermore, RNC was unable to do the *Cao Ad* as an independent expenditure because "the ability to even do an independent expenditure at that point in time was difficult." (R. 623 (157:9-13).) One reason it was difficult is because the independent expenditure scheme requires "a system that had not been in place," and there was no "time to put it all in place." (R. 623 (157:14-16).) Another reason it was difficult was that RNC couldn't have written the *Cao Ad* if it were an independent expenditure because, to create the necessary independence, "this would have had to have been through an outside consultant that would have had to have written this and we wouldn't have had control of the message and it probably would have looked very different than what our message was." (R. 623 (157:17-

158:3).)

At the time RNC wanted to speak through the *Cao Ad*, it was not practically possible to firewall off RNC staff in order to do an independent expenditure because that "would have had to have started at the beginning of an election cycle." (R. 625 (159:1-12).) "And that person would have no communications whatsoever and you sit around there for a year and a half doing nothing and waiting to do independent expenditures and eating resources up for other employees," so "that, as a practical matter, it just doesn't work that way." (R. 625 (159:13-18).)

Under the current system, RNC cannot even tell a paid outside consultant the topic on which it wants to lobby without violating the way independent expenditures work. (R. 637 (171:1-20).) And even if, for example, one were able to find a consultant that only did lobbying on one issue, "once you hire them . . . , you can't tell them which way to talk about the issue . . . pro or con, or even if they took the same position on pro or con, you wouldn't be able to hone in on what that message was, it would be totally left up to them." (R. 638 (172:2-14).)

Only allowing a party to express its "own speech" through "independent expenditures" is a special burden on free speech. "It's the RNC's speech and if the RNC isn't able to say what it really wants to say, and the way it wants to say it,

that is a burden and that is a problem." (R. 539 (73:18-21).) And it would not be enough to fix the problem, "[i]f coordination regulations were written in such a way to allow the chairman to have control over the script." (R. 539 (73:22-74:2).) This is so because "it would not meet the definition of an independent expenditure because that same chairman will have had conversations with the state parties, with the campaigns." (R. 540 (74:4-10).) The chairman still has a problem even if "the discussion were not about a particular coordinated expenditure," but "about everything but this one particular coordinated expenditure" because "no one is going to believe that they didn't talk about it." (R. 540 (74:16-75:9).) This results in a chill. (R. 541 (75:10-12).)

The First Amendment requires that political parties be able to coordinate with their candidates to fully engage in their "own speech." The "independent expenditure" option is inadequate to protect this right.

Accordingly, this Court should answer Issue 2 affirmatively.

B. The $5,000 Contribution Limit Unconstitutionally Imposes the Same Limits on Political Parties as on PACs.

In Proposed Question 7, *see supra* at 2 (Issue 3), Plaintiffs-Appellants challenge the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) as unconstitutional because it imposes the same limitations on parties as are on PACs. Political parties

have long had a favored status for allowing citizens to advance "common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). A "political party's independent expression . . . reflects its members' views about the philosophical and governmental matters that bind them together." *Id.* at 615 (Breyer, J., joined by O'Connor & Souter, JJ.). So they have a "unique role in serving" the principles of the First Amendment, *Colorado I*, 518 U.S. at 629 (Kennedy, J., concurring, joined by Rehnquist, CJ., & Scalia, J.), and political party expression is protected "'core' political speech." *Id.* at 616 (citation omitted).

The Supreme Court recognized that contribution limits "implicate fundamental First Amendment interests." *Buckley*, 424 U.S. at 23. *See also Randall*, 548 U.S. at 241 (same). *Buckley* identified those freedoms of "political expression" and "political association." *Buckley*, 424 U.S. at 15. Contributions serve as "a general expression of support for the candidate and his views." *Id*. at 21. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id*. at 22. Contribution limits are thus only permissible if the government demonstrates that the limits are "closely drawn" to match a "sufficiently important interest." *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 25).

1. *Randall* Held Contribution Limits Treating Parties and Individuals Alike As Unconstitutional.

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). The $5,000 contribution limit 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. *See infra* at 53-54. Therefore it should be declared unconstitutional.

2. Political Parties Are Key to Our Democracy and Are Now Disadvantaged.

Because political parties bear directly on an individual's right of association, political parties have historically been given special protections. For example, the First Amendment protects a party's primaries, *California Democratic Party v. Jones,* 530 U.S. 567, 574 (2000) (describing constitutional importance of associating in political parties to elect candidates), internal processes, *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 230 (1989) (including how a party chooses to "organize itself, conduct its affairs, and select its leaders"), and rights of association generally, *Tashjian v. Rep. Party of Conn*., 479 U.S. 208, 224

(1986) ("The Party's determination of the . . . structure which best allows it to pursue its political goals, is protected by the Constitution") and *Randall*, 548 U.S. at 256.

Additionally, other entities have recently been afforded more constitutional protection than parties. Despite the unique, vital role of parties, all corporations and unions can now use non-federal funds for independent expenditures, while political parties are limited to federal funds. *See Citizens*, 130 S.Ct. 876. Even beyond the activities *Citizens* permitted, corporations may also solicit and spend non-federal funds for grassroots lobbying, for example, while RNC may not. Political parties are similar to corporations or unions as citizens groups, but unlike them, parties speak directly for members as an embodiment of collective political beliefs. Justice Breyer noted the harm of disadvantaged parties during the *Citizens* oral argument:

> Suppose we overrule these two cases. Would that leave the country in a situation where corporations and trade unions can spend as much as they want in the last 30 days on television ads . . . but political parties couldn't, because political parties can only spend hard money on this kind of expenditure? And therefore, the group that is charged with the responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want?

Tr. Oral Arg. at 22 (available at http://www.supremecourtus.gov/oral_arguments/

argument_transcripts/08-205%5BReargued%5D.pdf.).

Precisely because of this downgrading of the relative power of political parties, the *EMILY's List* decision noted that the remedy would require raising or eliminating contribution limits to political parties, which in turn would require a change in Supreme Court precedent.[6] This case presents a constitutionally-sound opportunity to enhance the power of political parties.

3. Government Cannot Justify Regulating Parties the Same as PACs Under the Anti-Corruption Interest.

Because contributions are protected First Amendment activity, they may only be limited if the government demonstrates that the limits are "closely drawn" to match a "sufficiently important interest." *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 25); *McConnell v. FEC*, 540 U.S. 93, 231 (2003). However, political parties cannot corrupt their own candidates, vitiating the usual "corruption" basis for contribution limits. *See Colorado II*, 533 U.S. at 465 (not relying on quid pro quo corruption); *Colorado I*, 518 U.S. at 645-48 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring the judgment and dissenting in part) (showing that quid pro quo corruption does not apply between parties and candi-

[6] *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) (noting the long-standing anomaly of other groups' advantages over parties and stressing the need to remedy the problem).

dates). Because there is no evidence of quid pro quo corruption, and because *Citizens United* has foreclosed any other evidence of corruption, *supra*, this regulation cannot stand.

Accordingly, this Court should answer Issue 3 affirmatively.

C. The $5,000 Contribution Limit Is Unconstitutional Because It Is Not Adjusted for Inflation.

In Proposed Question 8, *see supra* at 2 (Issue 4), Plaintiffs-Appellants challenge the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) as unconstitutional. The contribution limit, not adjusted for inflation, creates multiple lower-value contribution limits in subsequent years. When Congress enacted the limit it recognized that the value of the limit then was sufficient to eliminate corruption. So every year in which inflation lowers that value creates a limit below the value at which Congress asserted an interest. Higher contribution limits vitiate any claimed anti-corruption interest in lower limits. *See California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1296 (9th Cir. 1998) (varied contribution limits make lower unconstitutional) ("*CPLC-PAC*").

The analysis of *CPLC-PAC*, addresses *why* there may be contribution limits to begin with—preventing quid pro quo corruption. *See Buckley*, 424 U.S. at 26-27. The principle established in *CPLC-PAC* is that "the adoption of variable limits

reflects a conclusion on the part of the voters [here, read "Congress"] that the $200 limit suffices to address the issue of corruption, even if it is not the lowest amount which would do so. That conclusion requires a finding that the lower limit [$100] is not closely drawn." 989 F. Supp. at 1296 (footnote omitted). Consequently, the challenged variable limits in the present case similarly fail for lack of a justifying interest in limiting corruption in all but the highest rate at which Congress asserted its anti-corruption interest.

Thus, 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% . . . 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).

Inflation already has seriously eroded the value of $5,000 (and will continue to do so), which—most importantly from a constitutional perspective—was the *level* at which Congress decided that its *corruption interest engaged*. Since limits are based on an anti-corruption interest, if Congress says that its interest is satisfied by a $5,000 limit in FECA, 86 Stat. 3 (1971), as amended by the FECA Amendments, 88 Stat. 1263 (1974), then that is the level at which it has established that its interest engages as of 1971 and 1974. To be conservative, consider matters from 1976, when *Buckley* was decided. Using the U.S. Department of Labor's Inflation Calculator (available at http://146.142.4.24/cgi-bin/cpicalc.pl) to calculate the value of $5,000 in 1976, we find that the level at which Congress asserted its anti-corruption interest in current dollars is $19,041.04. That level is the level at which Congress believes that corruption could occur, i.e., someone could be somehow "bought." But instead of $19,000 (the level justified by the anti-corruption interest), the contribution limit is $5,000. This means, at a minimum, that as-applied to any contribution under $19,000 the limit is unconstitutional because the government has neither asserted (nor proven) any anti-corruption interest to justify it. More properly, the limit should be struck as overbroad, and Congress should be required to reenact a proper limit indexed for inflation. Not doing so diminishes a

First Amendment liberty more each year that there is inflation. The difference between $5,000 and $19,000 is substantial, not only in the raw amount of $14,000 but also in that the latter is nearly four times the former, and because Congress *has not acted* for over three decades.

Accordingly, this Court should answer Issue 4 affirmatively.

II. Non-Certified Questions Should be Heard and Decided in Favor of Plaintiffs-Appellants.

The district court erred by dismissing the non-certified questions. Under 2 U.S.C. § 437h, the district court must certify all questions that are not frivolous, i.e. that raise "colorable constitutional issues." *Khachaturian*, 980 F.2d at 332 (citation omitted). The district court had two options for each question: certify or dismiss. Non-frivolous questions must be certified. Frivolous questions must be dismissed. *See Id*.; *Med. Ass'n v. FEC*, 453 U.S. 182, 193-94 n.14 (1981); *Judd v. FEC*, 304 Fed. Appx. 874 (D.C. Cir. 2008). The frivolousness determination resembles a Federal Rule of Civil Procedure 12(b)(6) determination. *See Goland v. U.S.*, 903 F.2d at 1256-1258; R. 3153-56. The district court must certify questions absent a jurisdictional flaw or failure to state a claim. *Id*. *See also*, *International Assn. of Machinists v. FEC*, 678 F.2d 1092, 1095 n. 3 (D.C. Cir. 1982) (certification is form of original jurisdiction).

Despite this limited role, the district court decided that some questions, dealing with the same essential threshold legal considerations as certified questions, did not raise colorable constitutional issues. (R. 3229-30, 3239, 3241, 3246-47.) Whether these claims are frivolous is a question of law that is reviewed de novo. *Goland v. United States*, 903 F.2d at 1252 ("whether the caselaw reviewing and interpreting FECA amendments disposes of [a] constitutional challenge" is a question of law reviewed de novo).[6] As will be shown, the non-certified questions raise colorable issues and should be considered on the merits.

A. Provisions Challenged in Issues 5 and 6 Are Unconstitutionally Vague and Overbroad.

In Proposed Questions 2 and 5, *see supra* at 3 (Issues 5 and 6), Plaintiffs-Appellants challenge the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(2)-(3), 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") as unconstitutionally vague and overbroad "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

[6] The court also found that "any question that the Court finds 'frivolous', is also appropriate for summary judgment," (R. 3156.) A grant of summary judgment is reviewed de novo. *Martco Ltd. Partnership v. Wellons, Inc.*, 588 F.3d 864, 871 (5th Cir. 2009).

candidate's campaign literature." These questions were not certified, but should have been, and this Court should decide the merits.

1. Campaign-Finance Restrictions May Not Be Vague or Overbroad.

The constitutional challenge in Proposed Questions 2 and 5 is based on the constitutional mandate that campaign-finance laws must "avoid problems of vagueness and overbreadth," *McConnell*, 540 U.S. at 192. This constitutional first principle applies to all campaign-finance law.

The principle has particular parameters. *McConnell* cited as authority *Buckley*, the seminal campaign-finance case. *Id.* at 191 (*citing Buckley*, 424 U.S. at 80). *McConnell* relied on the principle in facially upholding the "electioneering communication" definition[7] against the argument that it was unconstitutional for overstepping *Buckley*'s "express advocacy" line. *Id.* at 190. *McConnell* said "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *Id.* Then it stated the first principle on which the express-advocacy test had been based—the mandate that campaign-finance laws be neither vague nor overbroad. *Id.* at 191-92. That is the constitutional first principle on which Plaintiffs-Appellants rely—the principle *behind* the express-advocacy test and other Court-created tests and constructions.

[7] *See* 2 U.S.C. § 434(f)(3) (definition) (targeted broadcast ads naming federal candidates in 30- and 60-day periods before primaries and general elections).

This "overbreadth" that *McConnell* here cited will be called "*Buckley*-overbreadth," which differs from the First Amendment overbreadth doctrine requiring *facial invalidation* of laws sweeping in substantial amounts of protected speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). *Broadrick*-overbreadth involves a primarily *factual* analysis to determine whether an overbroad law sweeps in a "substantial" amount of protected speech. *Buckley*-overbreadth involves a primarily *legal* analysis of how closely a campaign-finance law adheres to constitutional parameters set out in *Buckley*. *See infra*. While the two may overlap in some cases, the distinction between them is seen within *McConnell* and between *McConnell* and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (controlling opinion: "*WRTL-II*").

Within *McConnell*, both types of overbreadth were considered. First, *McConnell* decided that the electioneering-communication *definition* was neither vague nor overbroad, relying on *Buckley*-overbreadth, 540 U.S. at 190-92, to determine whether the definition reached beyond the *permissible scope of constitutional authority to regulate elections*, as evident from the portion of *Buckley* cited, *id.* at 191 (*citing Buckley*, 424 U.S. 1, 80). *See infra*. Second, *McConnell* facially upheld the electioneering-communication *prohibition* for not violating *Broadrick*-overbreadth, 540 U.S. at 207.

Between *McConnell* and *WRTL-II* the difference in types of constitutional overbreadth is clearly seen. *McConnell* facially upheld the electioneering-communication restrictions under both *Buckley*-overbreadth and *Broadrick*-overbreadth, *see supra*, but in the *as-applied WRTL-II* challenge the Court more carefully scrutinized *Buckley*-overbreadth problems and held the electioneering communication prohibition unconstitutional as applied to "issue advocacy" and any other types of communications that were not unambiguously related to the election campaign of a particular federal candidate. *WRTL-II*, 551 U.S. at 469-70 (Roberts, C.J., joined by Alito, J.) (limiting prohibition to those electioneering communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). The present case is a similar as-applied challenge in which careful *Buckley*-overbreadth scrutiny is required.[8]

Buckley-overbreadth is based on Congress's sole authority for campaign-finance regulation. *Buckley* identified both the *goal* of FECA—"to regulate federal election campaigns," 424 U.S. at 12—and the only *authority* to do so—"[t]he

[8] The FEC's *rejection* of *WRTL-II*'s bright-line, speech-protective test led the Supreme Court to overturn *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell* because the FEC's rule did "precisely what *WRTL* sought to avoid" by converting the Court's "objective 'appeal to vote' test . . . [into] a two-part, 11-factor balancing test," *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010). Noting that *WRTL-II* had been "a careful attempt to accept the essential elements of . . . *McConnell*, while vindicating the First Amendment," *id.* at 894, the Court simply removed the foundation for restricting corporate contributions, *id.* at 913.

constitutional power of Congress to regulate federal elections," *id.* at 13 (*citing* U.S. Const. art. I, § 4). This authority is self-limiting. If government regulates First Amendment activity not *unambiguously* related to *federal elections*, it exceeds its authority. Absent this authority, there may be "no law . . . abridging the freedom of speech." U.S. Const. amend. I. *Buckley*-overbreadth scrutiny protects free speech by cabining Congress to its sole authority in this area.[9]

Buckley-overbreadth is anchored in the constitutional principle that "[i]n a republic . . . the people are sovereign" and "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," *id.* at 14. So bright, speech-protective lines are required to protect the sovereigns in their self-gover-

[9] The Fourth Circuit has identified the need to "cabin" campaign-finance regulations with *Buckley*-overbreadth:

> *Buckley* . . . recognized that legislatures have . . . power to regulate elections . . . and . . . may establish standards that govern the financing of political campaigns. In particular, the Court identified "limit[ing] the actuality and appearance of corruption" as an important governmental interest served by campaign finance regulation. . . . The Court simultaneously noted, however, that campaign finance restrictions "operate in an area of the most fundamental First Amendment activities," and thus threaten to limit ordinary "political expression." . . . *Buckley* . . . recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by demarcating 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." . . . This is because only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable.

North Carolina Right to Life v. Leake, 525 F.3d 274, 281 (4th Cir. 2008).

nance. These are especially vital because of a dissolving-distinction problem:

> [T]he *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.

Id. at 42 (emphasis added). The Court elaborated on the necessity of a bright line between (a) "discussion, laudation, [and] general advocacy" and (b) "solicitation":

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between *discussion, laudation, general advocacy*, and *solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (emphasis added). *WRTL-II* reiterated the need for bright-line speech protection based on this dissolving-distinction problem. *See* 127 S. Ct. at 2659, 2669. Because of this problem, *Buckley* required bright lines distinguishing between issue advocacy and electioneering, between speech that is not unambiguously campaign related and speech that is. *See infra*.[10]

[10] *Buckley* cited this dissolving-distinction problem immediately before its first imposition of the express-advocacy construction, *id.* at 42-44, so its reference to the "vagueness" of the "expenditure" definition, *id.*, includes the *Buckley*-overbreadth. *Buckley* expressly articulated the

Regarding specific problem language, *Buckley* identified the phrase, "for the purpose of influencing" federal elections, in the "contribution" definition. Noting that there was a "general understanding of what constitutes a political contribution," it restricted "contribution" to "[f]unds provided to a candidate or political party or campaign committee . . . [or] given to another . . . [but] earmarked for political purposes." *Id.* at 23 n.24. It observed that "[e]xpenditures by persons and associations that are 'authorized or requested' by the candidate or his agents are treated as contributions under the Act," *id.* at 24 n.25, and held that "authorized or requested" included "expenditures placed in cooperation with or with the consent of a candidate," *id.* at 46 n.53. *Buckley* construed another "contribution" definition with the same phrase to have the same scope as its previous construction of "contribution." *Id.* at 78. "So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign," it concluded. *Id.* In curing vagueness and overbreadth, the Court required an unambiguous, close nexus between what could be deemed a "contribution" and authority to regulate federal election campaigns. There had to be a clear "connect[ion]" between the donation and "a candidate [in his capacity *as* a federal

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overbreadth concern when it imposed the express-advocacy construction a second time "[t]o insure that the reach of [the expenditure disclosure provision] [wa]s not *impermissibly broad*." *Id.* at 80 (emphasis added).

candidate] or his campaign." Earmarked funds had to be for a federal "political purpose," and *Buckley* narrowly construed the federal "political purposes" (i.e., for making "contributions" or "expenditures") in a manner consistent with *Buckley*-overbreadth scrutiny. Disbursements deemed "contributions" by reason of coordination had to first be federal "expenditures," a term of art (which the Court knew) meaning that the disbursements had to be made "for the purpose of influencing" federal elections (which *Buckley* also construed narrowly under *Buckley*-overbreadth scrutiny, *see infra*). *Buckley* was not faced with the as-applied question posed here—whether political party spending that is coordinated with a candidate but has no unambiguous, close nexus to the federal election campaign of any particular federal candidate may be treated as a contribution merely by reason of coordination—but it clearly based its analysis on the authority of Congress to regulate federal elections and required that all campaign-finance regulation be unambiguously, closely related to that authority. That analysis must control this case because absent the authority to control federal elections, Congress has no authority to regulate (either as "contributions" or "expenditures") the people's free speech. This unambiguous, close-nexus requirement is an essential aspect of *Buckley*-overbreadth.

Further insight into *Buckley*-overbreadth scrutiny is provided in *Buckley*'s

treatment of vagueness and overbreadth regarding two "expenditure" definitions. The first involved a $1,000 limitation on expenditures "relative to" federal candidates. 424 U.S. at 39. In applying the mandate against vagueness, *Buckley* construed "relative to" "to mean 'advocating the election or defeat of' a candidate," *id.* at 42. But that was still too vague because there remained an overbreadth problem (note how the two often intertwine) since the language did not clearly distinguish between issue advocacy and campaign advocacy, *id.* ("distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application"), a dissolving-distinction problem the Court resolved by imposing the express-advocacy test, *id.* at 43-44. Thus, *Buckley*-overbreadth must be understood to involve the problem of, and need to resolve, the dissolving distinction between true electioneering and non-electioneering activity. This must be done by bright, speech-protective lines, such as the express-advocacy test. It is important to note here that *after* resolving *Buckley*-overbreadth scrutiny (by imposing the express-advocacy construction), the Court then struck the $1,000 limitation under strict scrutiny, *id.* at 45-50, indicating that *Buckley*-overbreadth is a threshold scrutiny that must be satisfied before proceeding to other constitutional scrutiny.

Further refinement of *Buckley*-overbreadth is found in the Court's construction

of another vague "expenditure" definition (in the disclosure context), which used "for the purpose of . . . influencing" elections language, which the Court said poses "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. Moreover, the overbreadth problem had to do with whether "the relation of the information sought to the purposes of the Act [regulating federal elections] may be too remote," i.e., whether the statute's "reach . . . [wa]s . . . *impermissibly broad*," *id.* at 80 (emphasis added). To cure this overbreadth problem, *Buckley* imposed the express advocacy construction, providing further insight into the close nexus with federal elections that is required: "This reading is directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*." *Id.* (emphasis added). From this most precise statement of the *Buckley*-overbreadth principle, it is fair to also call the principle the unambiguously-campaign-related principle.[11] And since this is the most specific of the Court's explanations of the principle, it should govern less specific statements.

The *Buckley*-overbreadth principle was also applied in *FEC v. Massachusetts*

[11] The *Buckley*-overbreadth concern was also expressed in *Buckley* with regard to which groups might be subjected to "political committee" burdens. *Id.* at 79. *Buckley* held that the only groups on which that burden could be imposed were "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," because "[t]hey are, by definition, *campaign related*." *Id.* Again, the scope of regulable activity is narrowed to reach only that which is "unambiguously campaign related." *Id.* at 81.

Citizens for Life, 479 U.S. 238 (1986) ("*MCFL*") to a prohibition on corporate and union express-advocacy communications. *Id.* at 249. The Court made clear that it was imposing the construction because of the dissolving-distinction overbreadth problem, *id.*, and the consequent need for a bright line "to distinguish *discussion of issues and candidates* from more pointed *exhortations to vote* for particular persons," *id.* (emphasis added). *MCFL* applied *Buckley*-overbreadth analysis to a definition with the operative language, "in connection with any election," which is at issue here.

The Supreme Court implements this *Buckley*-overbreadth principle primarily through tests: the major-purpose test for political-committee status, *Buckley*, 424 U.S. at 79, the express-advocacy test for regulable "independent expenditures," *id.* at 44, 80, and the appeal-to-vote test for "electioneering communications," *WRTL-II*, 551 U.S. at 470.[12] And as to what may be considered a "contribution," the *Buckley*-overbreadth principle was applied by limiting the scope of what "expenditures" may be considered "contributions." *See supra*.

Which of *Buckley*'s applications of *Buckley*-overbreadth did *McConnell* cite as authority for the principle that campaign-finance regulation must be neither vague nor overbroad? The clearest and strongest one, 540 U.S. at 191 (*quoting and citing*

[12] The appeal-to-vote test was the application of the unambiguously-campaign-related principle to the electioneering-communication prohibition, *see Leake*, 525 F.3d at 283.

Buckley, 424 U.S. at 80), the one that cured a vague, overbroad statute by construing it with the express-advocacy test to reach only activity that is "*unambiguously related to the campaign of a particular federal candidate*," *Buckley*, 424 U.S. at 80 (emphasis added). So campaign-finance regulations must be neither vague nor overbroad, and the specific concern of *Buckley*-overbreadth is that Congress not exceed its authority to regulate federal elections, and the best way to assure that is to require that campaign-finance law only regulate First Amendment activities that are unambiguously related to the election campaign of a particular federal candidate.

2. Proposed Questions 2 and 5 Were Non-Frivolous.

The district court's sole job was to determine whether an as-applied challenge based on vagueness and overbreadth, of the sort established by *Buckley* and affirmed in *McConnell*, *MCFL*, and *WRTL-II, see supra*, and affirmed by the Fourth Circuit and other federal courts, *see supra*, was "frivolous." The foregoing discussion proves the issue non-frivolous.

But the district court agreed with the FEC's arguments that "1) the unambiguously campaign related language and its cousins are reserved for expenditures, and have never been applied to contributions, and 2) the expenditure 'lines' are the product of statutory interpretation, not constitutional limitation." (R. 3226.) It has

been shown above that *behind* the express-advocacy line was the *Buckley*-overbreadth principle. While the express-advocacy line may have been a product of statutory construction, the *Broadrick*-overbreadth principle is a first principle of constitutional jurisprudence as reaffirmed in *McConnell* itself. And the unambiguously-campaign-related language is merely the clearest articulation of a principle that *was* in fact applied to contributions by the narrowed scope of what constitutes a contribution and by the restrictive language *Buckley* employed to describe what may be considered a contribution. *See supra*. So saying that the "unambiguously campaign related" language was not used with respect to contributions is to betray a misunderstanding of the underlying principle that Congress may only regulate First Amendment activity that is clearly and closely related to constitutional authority to regulate federal election campaigns.

The district court's reliance on the fact that "[s]ince *Buckley*, the Court has never applied a limiting 'line' to coordinated campaign expenditures," (R. 3226) misses the points that (a) *Buckley* itself imposed the *Buckley*-overbreadth principle to what may be deemed a "contribution" or an "expenditure" ("for the purpose of influencing" federal elections) that may be deemed a "contribution" by reason of coordination and (b) there has not been an as-applied challenge to draw any further line. To say that there may not be an as-applied challenge to draw a line

because there has not been an as-applied challenge to draw a line is circular.

The mere existence of the Fourth Circuit's analysis in *Leake* that all campaign-finance law is subject to the unambiguously-campaign-related principle to cabin federal regulation, 525 F.3d at 281, 283, readily indicates that this as-applied challenge is not frivolous. The district court's argument that *Leake* was "dicta" and "background explanation," (R. 3228) confuses the question of whether an opinion is binding with whether a question is frivolous. *Leake* went to great length to explain the current state of the law before applying it, obviously considering the unambiguously-campaign-related principle to be central to a proper analysis, not frivolous.

The same is true of the brief of the prime sponsors of the Bipartisan Campaign Reform Act ("BCRA") in *McConnell*, which the district court mentioned. (R. 3225-26, 3228.) That brief's reliance on the unambiguously-campaign-related principle[13] indicates that the principle is not frivolous, but again the district court

[13] The unambiguously-campaign-related principle was argued by Senators McCain and Feingold and other primary sponsors of BCRA to justify regulating electioneering communications. They argued that the electioneering-communication definition was a constitutional "adjustment of the definition of which advertising expenditures are *campaign related*." *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93 (emphasis added) (*available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf). They relied on a *Buckley*-overbreadth analysis:

> Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not 'dissolve in practical application,' 424 U.S. at 42; and they should be 'directed precisely to that spending that is *unambiguously related to the campaign of a particular*

confused whether it was "frivolous" with whether it was "controlling precedent." (R. 3228.) And the district court was simply wrong in asserting that *McConnell* did not adopt the analysis. (R. 3228.) Comparing the twin "precepts" (no vagueness or overbreadth) for regulable speech urged by the reformers, *see supra* note 13, with *McConnell*'s reliance on "avoid[ing] . . . vagueness and overbreadth," 540 U.S. at 192, makes it clear that *McConnell* adopted this analysis.

Whether the challenged provisions are unconstitutional as applied to activities failing a *Broadrick*-overbreadth analysis is an undecided, non-frivolous question that should be decided by this Court.

3. The Provisions Challenged in Proposed Questions 2 and 5 Are Unconstitutionally Vague and Overbroad Except As Applied to Certain Activities.

Applying the *Buckley* and *McConnell* mandate that campaign-finance laws be neither vague nor overbroad, it is readily apparent that the provisions challenged in Proposed Questions 2 and 5 are unconstitutional as applied with the exception of certain identified activities indicated below.

Count 1 of the *Second Amended Complaint* ("*Complaint*") (R. 281-83) raises the issue of whether the Party Expenditure Provision limits at 2 U.S.C.

> *federal candidate*,' *id*. at 80; *see id*. at 76-82. Those are *precisely the precepts to which Congress adhered in framing Title II*.

Id. at 62 (*quoting Buckley*) (emphasis added).

§ 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*, 424 U.S. at 81, 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.

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 expendi-

tures 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 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.

Count 4 of the *Complaint* (R. 287-88) 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.

For the reasons stated above, this Court should consider Proposed Questions 2 and 5 (Issues 5 and 6) and answer affirmatively.

B. The Provision Challenged in Proposed Question 4 Is Unconstitutionally Overbroad.

In Proposed Question 4, *see supra* at 3 (Issue 7), Plaintiffs-Appellants challenge the Party Expenditure Provision limits at 2 U.S.C. § 441a(d)(3) as unconstitutional because variable limits for the same office vitiate the anti-corruption interest for rates below the highest; 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; and if the higher base limit for candidates for Representative is severable, it is unconstitu-

tionally low.

Contribution limits "operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. The government must demonstrate that the limits are "closely drawn" to match a "sufficiently important interest." *Buckley*, 424 U.S. at 25). The only interest so far found sufficiently important to justify limits on contributions to candidates and their campaigns is the interest in preventing corruption and the appearance of corruption associated with large contributions. *Id*. at 26–27.

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 CPLC-PAC*, 989 F. at 1296 (9th Cir. 1998).

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. (R. 285.) Thus, Congress says that Louisiana Senators can be "bought" for a little more that a quarter million dollars but it takes more than two million dollars to "buy" California Senators. 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, (R. 285), i.e., based on the required corruption rationale for limits, Congress is saying that $42,101 tempts Louisiana congressional candidates, while candidates in Alaska, Delaware, Montana, North Dakota, Vermont, and Wyoming, (R. 274) (listing single-district states), are not tempted to act corruptly until party expenditures of $84,101 are coordinated with them.

The FEC has failed to show that human nature differs between U.S. Senators from Louisiana and California. In short, Congress is not entitled to significant deference in balancing competing interests where First Amendment rights are involved. Its *only* basis for contribution limits is preventing corruption, and absent a legitimate anti-corruption rationale it may not impose limits.

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 situations. 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 Represen-

tative 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.

"Limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders." *Id*. at 249. So too can limits that completely ban contributors and candidates from associating prior to a certain date. While the Court has "no scalpel to probe" each possible contribution level, *Id*. at 248, no scalpel is needed to determine that these limits fail constitutional scrutiny. Even if there were a "sufficiently important interest," they would still be unconstitutional for they are *too* low without the "special" justification the Supreme Court requires. The Court has explained that limits that are too low create "constitutional risks" that are "too great," *Id*. at 248, and "generate suspicion that they are not closely drawn." *Id*. at 249.

In *Randall*, the Supreme Court noted that when limits on what a party may contribute to its own candidates are too severe, the right to associate in a political party is threatened. 548 U.S. at 256. Such limits "severely limit the ability of a party to assist its candidates' campaigns by engaging in coordinated spending . . . .

[a]nd, to an unusual degree[] . . . discourage those who wish to contribute small amounts of money to a party . . . .” *Id*. at 257. Severe limits on the contributions of political parties to their own candidates “reduce the voice of political parties . . . to a whisper.” *Id*. at 259.

In *Randall* the Court noted that Vermont’s imposition on political parties of the “same low contribution limits” that applied to individuals “threatens harm to a particularly important political right, the right to associate in a political party.” 548 U.S. at 256. Citizens have a First Amendment right to associate in political parties in order to elect candidates. *Colorado I*, 518 U.S. at 616. When political parties cannot adequately contribute support to their candidates, that right is threatened. *Randall*, 548 U.S. 256.

The district court was to certify non-frivolous claims. From the foregoing analysis, it is clear that this claim was non-frivolous. The district court distinguished the present case from *CLPC-PAC* based on the fact that the present limits “vary with the office sought and size . . . of the state.” (R. 3238.) Nevertheless, the court asked (and subsequently improperly answered) the question at hand: “whether Congress has discretion within the anti-corruption rationale to set variable limits to coordinated expenditure limits based on these criteria.” (R. 3238.) Because this question raises colorable constitutional issues, it should have

been certified.

For the reasons stated above, this Court should consider Issue 7 and answer affirmatively.

C. The Provision Challenged in Proposed Question 8 Is Unconstitutional.

In Proposed Question 8, *see supra* at 3 (Issue 8), Plaintiffs-Appellants challenged the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A) as unconstitutional (a) for not being adjusted for inflation, (b) for being the *only* contribution limit if the additional $35,000 authority at 2 U.S.C. § 441a(h) were unconstitutional, and (c) for being simply too low to allow parties to fulfill their historic and vital role. The district court certified the issue about inflation adjustment.

This limit, standing alone, is simply 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.

The district court was to certify non-frivolous claims. This claim was non-

frivolous because a $5,000 contribution limit standing alone is patently inadequate for a political party, as recognized by Congress itself by supplying additional funding authority (albeit in an unconstitutional manner).

For the reasons stated above, this Court should consider Issue 8 and answer affirmatively.

Conclusion

In conclusion, Plaintiffs-Appellants respectfully request that this Court find the Party Expenditure Provision limits unconstitutional as applied to RNC's "own speech," and find that the $5,000 contribution limit is unconstitutional in that it imposes the same limits on political parties as on PACs and is not adjusted for inflation.

Plaintiffs-Appellants also request that this Court consider the non-certified questions on the merits and find that the Party Expenditure Provision limits and Coordination-Contribution Provision are unconstitutionally vague and overbroad and that the $5,000 contribution limit at 2 U.S.C. § 441a(a)(2)(A), standing alone, is unconstitutionally low.

Dated March 12, 2010

Respectfully Submitted,

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Certificate of Service

I hereby certify that the foregoing Brief of Plaintiffs-Appellants has been filed in the office of the Clerk for the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on this 12th day of March, 2010. I also certify that this filing complies with 5th Cir. R. 25.2.13 and 5th Cir. R. 25.2.1, and that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ James Bopp Jr

Via Electronic Means (5th Cir. R. 25.2.5):[6]

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[6] Paper copies will be printed and mailed via First Class Mail upon the Clerk's approval of the electronic version.

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Pursuant to 5th CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5th CIR. R. 32.2.7(b).

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Dated: March 12, 2010