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.	CIVIL ACTION NO. 2:08CV4887 SECTION C, DIVISION 5 JUDGE HELEN G. BERRIGAN CHIEF MAGISTRATE JUDGE ALMA L. CHASEZ

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY QUESTIONS OF CONSTITUTIONALITY TO THE COURT OF APPEALS EN BANC

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This Court should not certify any questions pursuant to 2 U.S.C. § 437h because none of plaintiffs' claims are substantial, as we explained in the Federal Election Commission's (FEC or Commission) Supplemental Response to Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals *En Banc* and Memorandum in Support of Motion for Summary Judgment (FEC Supplemental Response) (Doc. 65). Plaintiffs' supplemental brief confirms that their proposed "as-applied" exemptions — for what plaintiffs call "unambiguously-campaign-related" activity and the parties' "own speech" — are actually so broad that they amount to facial challenges to limits on party coordinated expenditures that the Supreme Court has already upheld, and accepting plaintiffs' claims would open the door to massive circumvention of contribution limits that Congress long ago enacted to foreclose corruption. *See* Plaintiffs' Supplemental Memorandum in Support of Motion to Certify Questions of Constitutionality to the Court of Appeals En Banc (Plaintiffs' Supplemental Memorandum) (Doc. 62). Moreover, contrary to plaintiffs' apparent view, it is not the responsibility of the federal courts to cure the overbreadth and continuing lack of clarity in plaintiffs' claims. Because those claims lack the substantiality required for certification to the Court of Appeals *en banc*, summary judgment should be granted for the Commission.

I. UNDER 2 U.S.C. § 437h, DISTRICT COURTS SHOULD CERTIFY ONLY ISSUES THAT ARE "NEITHER INSUBSTANTIAL NOR SETTLED," AND THAT THRESHOLD DETERMINATION REQUIRES A REVIEW OF THE MERITS

The Supreme Court has explained that constitutional questions should be certified under 2 U.S.C. § 437h only if they are "neither insubstantial nor settled." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). Because "the Federal Election Campaign Act is not an unlimited fountain of constitutional questions," the Supreme Court believed that fewer Section 437h cases would be certified once the prominent issues had been settled in the years following the passage

of the Act in the 1970s. *Id.* at 192 n.13. *See* Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-55 (FECA or Act). In *California Medical Association*, the Court explained that constitutional claims should not be certified under Section 437h if, *inter alia*, they are "frivolous" or "involve purely hypothetical applications of the statute." 453 U.S. at 192 n.14 (citations omitted). Similarly, in *Khachaturian v. FEC*, the Fifth Circuit stated that constitutional challenges should not be certified if they "are frivolous" or "involve settled principles of law." 980 F.2d 330, 331 (5th Cir. 1992) (*en banc*).

However, plaintiffs' contention that an easy "non-frivolous" showing is all they need to make in order to have their constitutional questions certified to the *en banc* Court of Appeals under Section 437h is incorrect. *See* Plaintiffs' Supplemental Memorandum at 2-4 (Doc. 62). Plaintiffs may focus solely on the term "frivolous" because it appears to offer a lower threshold for certification, but as we explained, courts have used the term in the context of Section 437h to describe a standard that is akin to the determination of whether a case presents a substantial federal question. *See* FEC Supplemental Response at 9-10 n.5 (Doc. 65). The *Khachaturian* court itself noted that "'questions arising under 'blessed' provisions [of the Act] understandably should meet a higher threshold' of frivolousness,'" 980 F.2d at 331 (quoting *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990)), referring to situations where, as here, a challenged provision of the Act has already been upheld on its face. In any event, the term "frivolous" is only one way in which the courts have characterized one part of the Section 437h certification analysis. *See* FEC Supplemental Response at 9-10 n.5; FEC's Response to Plaintiffs' Motion to Certify filed January 27, 2009, at 4-6 (Doc. 28).

Plaintiffs repeatedly fault the Commission for making arguments that are "on the merits," but this Court plainly cannot decide whether a constitutional question is substantial or settled (or

frivolous) without reviewing the merits of plaintiffs' claims. Plaintiffs appear to be confusing a decision "on the merits" with a particular standard of proof or with a final judgment. But even determinations with extremely high or low standards of proof constitute judgments "on the merits." *See, e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'"). Alternatively, plaintiffs appear to suggest that because the *en banc* Court of Appeals will decide any certified constitutional questions, this Court has no role whatsoever in evaluating the merits of plaintiffs' claims. The requirement that this Court certify only substantial and unsettled claims, however, necessarily means that the Court must evaluate the merits of plaintiffs' claims. The Commission has thus explained why those claims are too weak on the merits to warrant certification. Furthermore, the Commission now has pending a motion for summary judgment, which the Court should grant if it determines that plaintiffs' claims are settled or insubstantial, and resolution of that motion clearly calls for a determination on the merits.

II. IT IS NOT THE RESPONSIBILITY OF THE FEDERAL COURTS TO TAILOR PLAINTIFFS' BROAD AND VAGUE CLAIMS TO AN APPROPRIATE SIZE

Plaintiffs have asked the Court to certify "as-applied" questions that are so broad that they amount to relitigation of the facial challenges presented in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), and the relevant portion of *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976). Because plaintiffs' claims appear to be broad enough to constitute facial challenges, and some of the claims remain ill-defined despite the Commission's persistent efforts to have plaintiffs explain them, no questions should be certified. *See* FEC Supplemental Response at Parts III.A & III.B. But plaintiffs seek to avoid a determination of insubstantiality partly by arguing that the *en banc* Court of Appeals can always

choose to ascertain for itself which applications of the party coordinated expenditure restrictions are unconstitutional. *See* Plaintiffs' Supplemental Memorandum at 15 ("Any further drawing of a line would of course be a task on the merits for the en banc appellate court to do …."); *id.* at 24 ("And if the en banc appellate court chooses to do so, it is free to mold the scope of these terms").

This argument wrongly shifts the plaintiffs' duty onto the courts. As we have explained, this Court must evaluate the merits in order to make its threshold determination as to certification. *See supra* Section I. Moreover, to enable federal courts to make such determinations, plaintiffs must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiffs must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." *Adams v. McIlhany*, 764 F.2d 294, 299 (5th Cir. 1985) (quoting *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)); *see also Renne v. Geary*, 501 U.S. 312, 324 (1991) (rejecting a First Amendment challenge to state campaign finance laws because "we cannot decide the case based upon the amorphous and ill-defined factual record presented to us.").

The need for a clear statement of the scope of a federal claim is particularly strong when a litigant brings a purported "as-applied" challenge to a statute that has been upheld on its face, since the court's decision depends on a clear statement of how the statute unconstitutionally "applies" to the plaintiff. For example, in *Gonzales v. Carhart*, the Supreme Court held that the federal partial-birth abortion statute was facially constitutional, but that future as-applied

challenges could be successful if a plaintiff could show "that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." 550 U.S. 124, 167 (2007). But when a physician later challenged a virtually identical Virginia statute, the Fourth Circuit refused even to consider the as-applied portion of his challenge because doing so would "require[] a more complete and readily identifiable set of facts that can be evaluated and therefore that draws on a more nuanced application of the Virginia Act." *Richmond Med. Ctr. For Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009).

In *Colorado II*, the Supreme Court upheld 2 U.S.C. § 441a(d) on its face but did not reach the question of whether the statute was unconstitutional "in the context of an as-applied challenge focused on application of the [party-coordinated expenditure] limit to specific expenditures." *Colorado II*, 533 U.S. at 456 n.17. However, plaintiffs in this case have not limited their challenge to "specific expenditures," *id.*, or to "discrete and well-defined instances," *Gonzales*, 550 U.S. at 167. Rather, they have challenged the application of the statute in all or virtually all instances, describing broad categories of activity with their own vague and general terminology. *See* Second Amended Verified Complaint for Declaratory and Injunctive Relief ¶ 40 (Doc. 35); FEC's Supplemental Response Parts III.A & III.B. And plaintiffs have struggled or refused to define the scope of their own claims to the extent they depend on activity that is purportedly plaintiffs' "own speech," "unambiguously campaign related," or "non-targeted." *See*, *e.g.*, Defendant Federal Election Commission's Proposed Findings of Fact and Statement of Material Facts as to Which There is No Genuine Dispute (FEC Facts) (Doc. 66), Parts IV.C & V.B. Congressman Cao admitted at his deposition that he did not believe it was his obligation, but rather the Court's, to define the scope of his own claims. *See* Deposition of Anh "Joseph"

Cao at 64, FEC Facts Exh. 4 ("Q: How would the Court determine the scope of the claim? A: Well, then you ask the Court. You don't ask me.").

However, it is not the responsibility of this Court or the Court of Appeals to separate the wheat from the chaff of plaintiffs' nominally "as-applied" claims, or to investigate and discover exactly which particular factual circumstances might constitute an unconstitutional application of the party coordinated expenditure restrictions. It is the duty of the plaintiffs to present a "discrete and well-defined" claim so that the courts can make reasoned judgments about that claim. Plaintiffs have failed to fulfill this duty.

III. PLAINTIFFS' CLAIM THAT PARTY COORDINATED EXPENDITURES CAN BE LIMITED ONLY IF THEY ARE "UNAMBIGUOUSLY CAMPAIGN RELATED" IS INSUBSTANTIAL

The Commission has shown that plaintiffs' claim that party coordinated expenditures cannot be limited unless they are "unambiguously campaign related" — which would purportedly limit regulation to express advocacy and a narrow category of expenditures including "targeted" federal election activity — is contrary to settled law. *See* FEC's Supplemental Response at 22-26. Plaintiffs' supplemental brief relies on a variety of materials from other contexts, primarily dicta from an inapposite Fourth Circuit decision and a distorted and irrelevant reading of a brief filed in *McConnell v. FEC*, 540 U.S. 93 (2003), by certain Members of Congress. *See* Plaintiffs' Supplemental Memorandum at 5-10. But plaintiffs fail to show that these materials make plaintiffs' claims based on an "unambiguously campaign related" standard substantial. And even if such a general standard were to apply in the context of party coordinated expenditures, there is no support for the specific multi-prong exemption (including

elements such as "non-targeted" federal election activity) that plaintiffs claim their standard dictates here.[1]

A. The Mere Existence of the Fourth Circuit's Decision in *North Carolina Right to Life v. Leake* Does Not Make Plaintiffs' "Unambiguously Campaign Related" Claims Substantial

Plaintiffs argue that this Court is required to certify questions regarding their "unambiguously campaign related" theory because, among other things, "the mere presence of [*North Carolina Right to Life v.*] *Leake* [is] sufficient to show that the issue concerning the unambiguously-campaign-related principle [is] *non-frivolous* (and also substantial)." Plaintiffs' Supplemental Memorandum at 6 (citing *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008). However, plaintiffs' reliance on *Leake* is misplaced.

The *Leake* case is irrelevant because it was a Fourth Circuit decision invalidating a broad definition of "express advocacy" in a state statute. *See* 525 F.3d at 280, 283. Thus, the *Leake* court had no reason even to address *Colorado II*, which upheld limits on party coordinated expenditures without any reference to an "unambiguously campaign related" standard. Furthermore, the *Leake* court based its holding not on an "unambiguously campaign related" theory, but on what it found was a "complete lack of notice as to what speech is regulable, and

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[1] Plaintiffs assert that "the FEC did not deal with the vagueness challenge to 'in connection with' language in § 441a(d)(2)-(3) … ." Supplemental Memorandum at 23 (Doc. 62). The Commission understands this challenge to be part of plaintiffs' challenge to limits that are not "unambiguously campaign related." *See* Memorandum in Support of Plaintiffs' Motion to Certify Questions of Constitutionality to the Court of Appeals *En Banc* at 3-9 (Doc. 19-2) (discussing "unambiguously campaign related" theory and vagueness challenge together). The Commission responds to plaintiffs' "unambiguously campaign related" theory here and did so at length in its previous filing. *See* FEC's Supplemental Response, Part III.B. To the extent plaintiffs present their vagueness challenge as a separate argument, the Commission notes that *Colorado II* facially upheld 2 U.S.C. § 441a(d), and that it is not clear how a statute could be vague only in particular applications. In fact, as we have explained, the Commission has promulgated regulations to define more precisely when party communications will be considered coordinated expenditures under the Act. *See* 11 C.F.R. §§ 109.21, 109.37.

the unguided discretion given to the State to decide when it will move against political speech and when it will not." *Id.* at 285. By contrast, the Supreme Court has facially upheld the very statute at issue in this case.

Even if *Leake* could be interpreted to provide support for the idea that *Buckley* intended to make a broad proclamation that all campaign finance laws must adhere to an "unambiguously campaign related" standard, that view of *Buckley* is incorrect. As we have explained, this phrase was merely part of *Buckley's* explanation that its statutory construction of "expenditure" in one part of the Act's disclosure provisions would resolve "serious problems of vagueness … ." FEC Supplemental Response at 22-25 (quoting *Buckley*, 424 U.S. at 76). The Court reaffirmed this point in *McConnell* when it noted that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." 540 U.S. at 191-92. The Supreme Court has never stated that "unambiguously campaign related" is a general constitutional test, and it has certainly never used the phrase in analyzing contribution restrictions like the coordinated expenditure limits at issue here — despite the fact that the Court has cited *Buckley* in dozens of opinions since that case was decided, many of them involving direct constitutional challenges to federal or state campaign finance laws. Of course, this circuit is not bound by opinions of other circuits, and those opinions should be considered only to the extent that they are persuasive. *Peters v. Ashcroft*, 383 F.3d 302, 305 n.2 (5th Cir. 2004).[2]

[2] For the same reasons, plaintiffs' claims are not made substantial by three recent district court cases from other circuits that purportedly adopt an "unambiguously campaign related" standard. *See* Plaintiffs' Supplemental Memorandum at 9 n.7. None of these opinions has anything to do with political parties or coordinated expenditures, and so none addresses *Colorado II*. *See Mexico Youth Organized v Herrera*, No. 08-1156 (D.N.M. Aug. 3, 2009); *Broward Coalition of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 4:08-cv-445, 2009 WL 1457972 (N.D. Fla. May 22, 2009); *Nat'l Right to Work Legal Defense and*

B. A Brief That Six Members of Congress Filed in *McConnell* Does Not Make Plaintiffs' "Unambiguously Campaign Related" Claim Substantial

Plaintiffs argue that their "unambiguously campaign related" claims are not frivolous because six Senators and Representatives, including the co-sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), filed a brief as intervenors in *McConnell* purportedly making the same arguments. *See* Plaintiffs' Supplemental Memorandum at 6-10 (citing Brief for Intervenor-Defendants Senator John McCain et al. in *McConnell*, 540 U.S. 93 (*McConnell* Intervenors' Brief), http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf. Plaintiffs further try to bootstrap their misinterpretation of Intervenors' arguments by suggesting that the Supreme Court "adopted" them. Plaintiffs' arguments have no merit.

First, plaintiffs' characterization of the Intervenors' Brief is mistaken. The arguments in that brief are directly contrary to the arguments plaintiffs make here. Plaintiffs claim that "the unambiguously-campaign-related principle was precisely the constitutional analysis argued [in the Intervenors' brief]," Supplemental Memorandum at 6, but that is not so. In the same section of the Intervenors' Brief that plaintiffs cite, the *McConnell* Intervenors reject the notion that *Buckley* established any general constitutional test in its discussion of express advocacy:

> Plaintiffs argue that however ineffective the "express advocacy" test may have become, *Buckley* established it as a constitutional limit. The district court properly rejected that argument.… *Buckley* adopted a practical, limiting construction of particular statutory language that was impermissibly vague — not a constitutional standard that would foreclose Congress from redrawing the statutory lines as necessary to reflect experience and to make them effective.… *Buckley* never purported to

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Educ. Found. v. Herbert, 581 F. Supp. 2d 1132 (D. Utah 2008). Furthermore, the most recent decision appears to directly contradict plaintiffs' position here, because it notes that *Buckley* assumed *all* expenditures were "campaign related" if they were made by entities "the major purpose of which is the nomination or election of a candidate," a category that obviously includes the party plaintiffs here. *See Mexico Youth Organized*, No. 08-1156, slip op. at 14.

> render all "issue" speech immune from source or disclosure rules…. It would make no sense to read any of this Court's cases in a way that would disable Congress from acting on the lessons of experience.… To the contrary, *Buckley* is more a roadmap than a constitutional stop sign.

McConnell Intervenors' Brief at 60-62. Of course, the Intervenors' Brief was *defending* the constitutionality of limits on the use of "soft money" and "electioneering communications," not asking the Supreme Court to strike the limits down; there would be no reason for the brief to argue that the Constitution limits Congress's authority to a category of activity as potentially restrictive as "unambiguously campaign related." Indeed, four of those same *McConnell* Intervenors have specifically argued against the "unambiguously campaign related" theory. *See, e.g.*, Memorandum of Points and Authorities of Senators John S. McCain and Russell D. Feingold and Former Representatives Christopher H. Shays and Martin T. Meehan as Amici Curiae in Opposition to Plaintiffs' Motion for Summary Judgment, *RNC v. FEC*, 08-1953 (D.D.C. Mar. 16, 2009) at Part I ("The Phrase 'Unambiguously Campaign Related' Is Not a Constitutional Standard Used by the Supreme Court and It Has No Relevance to the Regulation of Political Committee Activities").

Second, the Supreme Court in *McConnell* did not adopt any "unambiguously campaign related" standard akin to plaintiffs' theory, neither as suggested by Intervenors nor anyone else. As we have explained, the term was merely part of the *Buckley* Court's explanation of its statutory construction of the term "expenditure" in connection with some of the Act's disclosure provisions as applied to independent expenditures. See FEC Supplemental Response at 25; *Buckley*, 424 U.S. at 79-81.

Third, the Intervenors' Brief was not created or filed by the Commission, so contrary to plaintiffs' apparent view, arguments made in that brief cannot be imputed to the Commission. In several cases — including this one — the Commission has unequivocally argued against

plaintiffs' theory that *Buckley* established "unambiguously campaign related" as a stand-alone constitutional test for campaign finance regulation. *See, e.g., Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009) (involving the same plaintiffs' counsel as this case); *Republican Nat'l Comm. v. FEC*, Civ. No. 08-1953 (D.D.C. 2008) (same); *Koerber v. FEC*, 583 F. Supp. 2d 740 (E.D.N.C. 2008) (same).[3]

In sum, there is no reason for this Court to judge the merits of plaintiffs' arguments based upon a brief written by a different party in a different case about a different part of the Act, that actually took a position contrary to that of plaintiffs here, and that was not adopted by the Supreme Court.

IV. PLAINTIFFS' CLAIM THAT PARTY-FINANCED COORDINATED COMMUNICATIONS THAT ARE PURPORTEDLY A PARTY'S "OWN SPEECH" CANNOT BE LIMITED IS INSUBSTANTIAL

The Commission has shown that plaintiffs' claim that party coordinated communications cannot be limited if they represent a political party's "own speech" — which plaintiffs appear to define as all speech parties pay for and publicly adopt — does not raise a substantial

[3] Plaintiffs similarly suggest that their "unambiguously-campaign-related" position is not frivolous because of two Statements of Reasons issued by groups of FEC Commissioners. S*ee* Plaintiffs' Supplemental Memorandum at 9 n.8. However, neither of the two Statements of Reasons cited by plaintiffs was issued by a majority of Commissioners, and neither supports plaintiffs' position in this case. One of the statements of FEC Commissioners that Plaintiffs cite relates to a determination regarding political committee status — a determination that is irrelevant in the context of political parties. *See* Statement of Reasons of Vice Chairman Petersen, et. al, In re November Fund, FEC MUR 5541, at 5 n.21, http://eqs.nictusa.com/eqsdocs/29044223819.pdf (Jan. 22, 2009) (distinguishing political parties and citing *McConnell*). The other Commissioner statement on which Plaintiffs rely cites the *Buckley* language only in construing the statutory definition of "expenditure," just as *Buckley* itself did. *See* Statement of Reasons of Chair Weintraub, et al., In re Council for Responsible Gov't, Inc., FEC MURs 5024, 5146, 5154, at 2, http://eqs.nictusa.com/eqsdocs/000006C6.pdf (Dec. 16, 2003). That 2003 Statement of Reasons ultimately reached a conclusion that is contrary to the result plaintiffs seek here, since it stated that the Constitution permits restrictions even on communications without so-called "magic words" such as "vote for" or "elect." *See id.* at 4-10.

constitutional question. *See* FEC's Supplemental Response at 11-12. The arguments made in Plaintiffs' Supplemental Memorandum do not undermine this showing.

A. *Colorado II* Did Not Expressly Reserve Plaintiffs' Questions Regarding Parties' So-Called "Own Speech"

Plaintiffs argue that this Court should certify the questions based on plaintiffs' "own speech" claim because *Colorado II* "expressly reserved this question." *See* Plaintiffs' Supplemental Memorandum at 10-12. This argument distorts what the Supreme Court actually said. As we explained in our opening brief (Supplemental Response at 12 n.7), the Court briskly rejected a facial challenge based on an "own speech" theory, and it did nothing to suggest that plaintiffs' current claim is a substantial one.

Plaintiffs' claim stems from footnote 17 in the *Colorado II* majority opinion, where the Court first stated that it "need not reach" the question of whether "a different type of scrutiny [] could be appropriate in the context of an as-applied challenge focused on application of the [party-coordinated expenditure] limit to specific expenditures." *Colorado II*, 533 U.S. at 456 n.17. In the same footnote, the Court *rejected a facial challenge* the Colorado Republican Party had made based on the party coordinated expenditure provision's potential application to limits on "expenditures that involve more of the party's own speech" because the party did "not tell [the Court] what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial overbreadth claim." *Id.* The plaintiffs here seem to merge these two statements when they suggest that the Court was expressly reserving an "own speech" *as-applied* challenge; in fact, the Court was merely explaining the limits of its decision with regard to the level of scrutiny that might govern an as-applied challenge and explaining its rejection of a *facial* challenge based on an "own speech" theory.

More importantly, even if *Colorado II* can be construed as declining to answer *some* future as-applied challenge to the party coordinated expenditure provision, that does not mean the Court was taking any position on the merits of the particular as-applied challenge brought by plaintiffs in this case. To the contrary, it is difficult to imagine that *Colorado II* could have anticipated the current as-applied challenge, because plaintiffs' "own speech" claims are so broad that they amount to a facial challenge — one that would, if accepted, eviscerate *Colorado II*'s holding that coordinated party expenditures can be constitutionally limited because "prearrangement and coordination" can create a "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Colorado II*, 533 U.S. at 464 (quoting *Buckley*, 424 U.S. at 47).[4]

In fact, plaintiffs' "own speech" challenge proves so much that, if successful, it would threaten to unravel not only *Colorado II*, but much of the Act's core limits on contributions. Although plaintiffs have only challenged the provisions of the Act that apply to political parties, part of *Colorado II's* reasoning is that a party "is in the same position as some individuals and PACs" as to whom coordinated spending limits have already been held valid. 533 U.S. at 455. If a party's "own speech" cannot be constitutionally limited, then it is not clear why the "own speech" of other political committees or individuals would not merit the same treatment. And if a party makes a coordinated communication its "own speech" merely by paying for it, it is unclear why the same would not hold true for an individual or PAC. If this were the law,

[4] The dissent in *Colorado II* did state that "[t]o 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." 533 U.S. at 468 n.2 (Thomas, J., dissenting). But again, plaintiffs' "own speech" claims are so broad that they would plainly encompass expenditures that are "functionally identical to contributions," as Congressman Meehan confirmed. *See* FEC Facts ¶ 183 (Doc. 66).

presumably a candidate could create an advertisement and give it to a wealthy individual, who then would be able to legally spend millions of dollars of his own money to run the communication as his "own speech." This would undermine the Act's contribution limits and the vital anti-corruption interests that the Supreme Court has held justify those limits. *See Buckley*, 424 U.S. at 29.

B. The Identity of the Supposed "Owner" of Coordinated Communications Does Not Determine Whether They Are the Functional Equivalent of Contributions For Constitutional Purposes

Whether the parties or anyone else might consider a particular coordinated communication to be a political party's "own speech" has no played no role in the Supreme Court's constitutional analysis of the coordinated expenditure limits. *See Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) ("the constitutionally significant fact … is the [presence or] lack of coordination between the candidate and the source of the expenditure."). Party coordinated communications can be limited not because of the attribution of the speech to a particular speaker, but because the very act of coordination presents an opportunity for, or appearance of, corruption: "Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." *Colorado II*, 533 U.S. at 464.

Plaintiffs have offered no support for their suggestion that the corruption concerns that exist when expenditures are coordinated are in any way lessened when the resulting communications are adopted by all the collaborators as their "own speech." In other words, the fact that the Republican National Committee (RNC) may stand by certain coordinated speech as its "own" does not decrease the amount of coordination that preceded it or otherwise change the fact that such coordinated communications are the functional equivalent of contributions.

Similarly, the fact that FEC regulations require parties that pay for communications to disclose their identities to the public does not, contrary to plaintiffs' claims, mean that those communications were created independently by the spender without any collaboration with a candidate or political party. *See* Plaintiffs' Supplemental Memorandum at 14 (Doc. 62). Nor do such disclosure requirements have any bearing on whether the Constitution prohibits restrictions on those communications if they have been coordinated. Commission regulations governing party coordinated communications indeed require that disclaimers indicate both that the communication has been paid for by the party and that it has been authorized by the candidate. 11 C.F.R. § 110.11(b)(2). But that disclosure to the public does not entail a rigid determination of whose speech it is or create a forced and false dichotomy that certain communications can be the speech of one and only one person. Instead, that disclosure simply requires both the party and candidate to provide the public basic information about their roles in the creation and dissemination of the communication.

C. Plaintiffs' "Own Speech" Theory Remains Confusing And Unworkable

In its previous brief, the Commission explained that plaintiffs appeared to have settled upon one theory about what they believe constitutes "own speech" communications, even though plaintiffs' definition of this category had appeared to vary during the course of this litigation. *See* FEC Supplemental Response at 12-13 & n.9 (plaintiffs' current position appears to be that "*every time a political party pays for a communication and discloses publicly that it has done so*, it is, ipso facto, the party's 'own speech.'"); FEC Facts ¶¶ 182-96 (detailing contradictory evidence about what plaintiffs regard as parties' "own speech").

But plaintiffs' supplemental brief has reintroduced uncertainty about the scope of their "own speech" claims. For example, plaintiffs now state that the proposed radio ads advocating

the election of candidate Cao that were included in the Complaint would be the party's "own speech" at least in part because they "communicate the underlying basis for the support and are not merely general expressions of support for the candidate and his views." Plaintiffs' Supplemental Memorandum at 14. Plaintiffs had appeared to abandon that theory during discovery. *See* FEC Facts ¶¶ 174, 183 (discussing how "own speech" was defined using the term "underlying basis of support" in the complaint and first written discovery responses, but not in later discovery). If plaintiffs are again relying on this theory of what constitutes a party's "own speech," it would be so difficult to understand and administer that it could not raise a substantial question under Section 437h. For example, if a party coordinated communication said "Vote for Candidate X, she wants to protect your future," or "he wants to protect your family," it is not clear if those would be considered "general expressions of support for the candidate and his views," or instead would be deemed to "communicate the underlying basis for the [party's] support." Moreover, since many if not most party coordinated communications oppose rather than support candidates, *see infra* p. 19, it is not clear how such a standard would apply to communications that do not overtly support anyone. Even worse, the kind of inquiry plaintiffs suggest would seem to require looking beyond the four corners of a communication to understand the "underlying basis" of the speaker's support. *Cf. FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007) ("Courts need not ignore basic background information that may be necessary to put an ad in context … but the need to consider such background should not become an excuse for discovery or a broader inquiry … .").

D. The Rules Distinguishing Independent and Coordinated Expenditures Create No Unconstitutional Burden on Parties' Ability to Make Unlimited Independent Expenditures

Plaintiffs argue that their questions involving "own speech" should be certified because their ability to make unlimited independent expenditures is so constrained that they must be permitted to make unlimited *coordinated* expenditures. As part of that flawed argument, plaintiffs erroneously suggest that they can effectively engage in their "own speech" only if they are freed from the anti-corruption measures that ensure that candidates are not receiving the benefits of in-kind contributions when expenditure are made in their behalf. *See* Plaintiffs' Supplemental Memorandum at 16-21. But it is the very act of collaboration with a candidate that increases the value of a resulting expenditure and justifies limits on coordinated expenditures. This principle dates back to *Buckley*, where the Supreme Court wrote:

> Unlike contributions, ... independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Buckley, 424 U.S. at 47. *See also Colorado II*, 533 U.S. at 441 (quoting the same language from *Buckley*). Thus, to the extent plaintiffs contend they have a constitutional right to make coordinated expenditures because they are more useful than independent expenditures, that argument has been foreclosed by the Supreme Court.

Moreover, plaintiffs appear to be taking the argument a step further by claiming that "the First Amendment requires that political parties be able to coordinate with their candidates in order to fully engage in their 'own speech.'" Plaintiffs' Supplemental Memorandum at 17. Plaintiffs essentially argue that, as a practical matter, parties are so closely aligned with their

candidates that the parties simply cannot speak without either risking a determination that their speech is coordinated or ceding control to outside consultants to such an extent that the speech is really no longer the party's speech at all. *Id.* at 19-20. However, the Supreme Court has rejected this contention as well. "The assertion that the party is so joined at the hip to candidates that most of its spending must necessarily be coordinated spending is a statement at odds with the history of nearly 30 years under the Act." *Colorado II*, 533 U.S. at 449.

Plaintiffs' complaints about independent expenditures are also belied by the evidence and the relevant regulatory structure. Plaintiffs argue that independent expenditures are a last resort for party spending because parties have "no control over the message," and that a party that wants to spend on "grassroots lobbying" independent communications cannot "even [tell] a paid outside consultant the topic on which it want[s] to lobby without violating the way that independent expenditures work." Plaintiffs' Supplemental Memorandum at 17, 20. But in fact, the parties spend hundreds of millions of dollars on independent expenditures and can do so without ceding control to the extent plaintiffs claim. In addition, FECA contains no limits on parties' non-candidate issue speech.

Plaintiffs assert that "independent expenditures are employed only when there is 'no other way' to have an impact on a race," but political parties made $280,873,688 in independent expenditures in the 2008 election cycle alone. *See* Plaintiffs' Supplemental Memorandum at 18; FEC Facts ¶ 41; Declaration of Robert W. Biersack, Tables 7, 9, 15, FEC Exh. 3 (data on party independent expenditures in recent campaign cycles). Parties would not spend such vast sums of money on independent expenditures if they did not believe the communications were valuable. In fact, the majority of independent expenditures appear to be attacks on candidates' opponents, and there may actually be an electoral advantage in running such an advertisement

independently, rather than as a coordinated expenditure that could taint the image of the party's favored candidate. *See, e.g.,* Independent Expenditures in the 2008 Presidential Election, http://www.fec.gov/press/press2008/2008indexp/2008iebycommittee.pdf (showing that in the 2008 election cycle the RNC made $53,349,753.41 in independent expenditures opposing Barack Obama, and no independent expenditures supporting John McCain). Similarly, many party "issue ads" run before BCRA were attack ads that helped candidates avoid accusations of negative campaigning. *See* Expert Report of David B. Magleby in *McConnell v. FEC*, Report Concerning Interest Group Election Advocacy and Party Soft Money Activity at 45 [DEV 4-Tab 8], FEC Facts Exh. 55 ("Most soft money funded communications attack the candidate of the opposite party.").

Plaintiffs' suggestion that a political party must use a paid consultant cut off from all contact with the party to conduct independent expenditures is incorrect, and it ignores the many other avenues available to political parties. *See generally* FEC Facts ¶¶ 60-64. Up until the 90 days before a Congressional or Senate election, or 120 days before a Presidential election, a party communication is not subject to the coordinated expenditure limits unless it "disseminates, distributes, or republishes . . . campaign materials prepared by a candidate," or "expressly advocates the election or defeat of a clearly identified candidate." 11 C.F.R. § 109.37(a)(2)(i)-(ii). Therefore, prior to those time windows — that is, during the great majority of each election cycle — a party can engage in unlimited "grassroots lobbying" in collaboration with its candidates. Even within the 90 or 120 day windows, a party need not resort to using an outside consultant to make independent expenditures identifying candidates if it creates a written "firewall" policy that prohibits the flow of information between the individuals "providing services for the [party] paying for the communication" and the individuals who are "currently or

[were] previously providing services to the candidate who is clearly identified in the communication [or his or his opponent's committee]." 11 C.F.R. §§ 109.21(h), 109.37(a)(3). Of course, if a political party wants to engage in independent issue speech without identifying federal candidates, it faces no restrictions whatsoever under these regulations, even during the pre-election time windows.

Plaintiffs argue that setting up internal firewalls to conduct independent expenditures is "not practically possible," Plaintiffs' Supplemental Memorandum at 19, but committees have successfully implemented firewalls through practices where "specific employees are placed on separate teams (or 'silos') within the organization, so that information does not pass between the employees who work on independent expenditures and the employees who work with candidates and their agents." Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006). The Commission has noted that:

> [C]ommon leadership or overlapping administrative personnel does not defeat the use of a firewall. Moreover, mere contact or communications between persons on either side of a firewall does not compromise the firewall, as long as the firewall prevents information about the candidate's or political party committee's campaign plans, projects, activities or needs from passing between persons on either side of the firewall.

Id. at 33207. Furthermore, to the extent plaintiffs' challenge is really a challenge to the FEC regulations that describe how parties can avoid a finding that their activities are coordinated, that regulatory challenge is not certifiable under Section 437h. *See* 2 U.S.C. § 437h (reserving procedure solely for actions "to construe the constitutionality of any provision of this Act.").

Whether a political party chooses to use an outside vendor or its own employees with a firewall in place, it hardly means that a party must simply hope that the content of resulting communications will help its candidates, as plaintiffs suggest. Firewalled employees and outside vendors would have little difficulty in ascertaining the candidate's views and campaign tactics by

consulting publicly available materials. For example, today many candidate ads and other candidate videos quickly become available for public viewing on the Internet. *See, e.g.*, Joseph Cao for U.S. Congress (LA-02), http://www.youtube.com/watch?v=XwLt_VPHjcc (last visited Sept. 28, 2009); Anh Joseph Cao's Channel, http://www.youtube.com/anhjosephcao (last visited Sept. 28, 2009).

Plaintiffs' assertion that parties are unable to speak in a meaningful way without using coordinated communications is therefore unsupportable.

V. LA-GOP LACKS STATUTORY STANDING AND THEREFORE CANNOT INVOKE THE PROCEDURES OF 2 U.S.C. § 437h

Plaintiffs appear to argue that the Republican Party of Louisiana (LA-GOP) should be involved as a plaintiff if any part of this case is certified to the Fifth Circuit *en banc* under Section 437h. *See* Plaintiffs' Supplemental Memorandum at 21-22. Although the issue may not be of great practical significance in the current case because the other two plaintiffs have statutory standing, the Act's plain meaning is clear. The statute provides that the only parties that can take advantage of the special procedures in Section 437h are "[t]he Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." 2 U.S.C. § 437h.[5] The Supreme Court has held unequivocally "that only parties meeting the express requirements of § 437h(a) may invoke its procedures." *See Bread Political Action Comm. v. FEC (BreadPAC)*, 455 U.S. 577, 583 (1982). A court should not

[5] It is the duty of this Court to determine whether LA-GOP has statutory standing under Section 437h. Questions regarding statutory standing are, by definition, not constitutional questions, and Section 437h's special review procedure is solely "to construe the constitutionality of any provision of this Act." *See* 2 U.S.C. § 437h. For that reason, plaintiffs are wrong to suggest that this Court can simply certify "for the en banc appellate court to decide the merits of the FEC's claim as to statutory standing." Plaintiffs' Supplemental Memorandum at 22.

certify any questions from parties other than those enumerated in the statute because "[a] party seeking to invoke § 437h must have standing to raise the constitutional claim." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981).

Although LA-GOP does not belong to one of the three classes of potential plaintiffs under the statute, plaintiffs insist that LA-GOP should be part of any Fifth Circuit *en banc* proceedings because the interests the state party asserts "are represented by Rep. Cao" and the activities it wishes to conduct are "materially similar to those that the [RNC] wishes to do, and the issues raised and constitutional arguments of the two are identical." Plaintiffs' Supplemental Memorandum at 21-22. There is no support for this approach to statutory standing under Section 437h. To the contrary, when courts have considered cases involving multiple plaintiffs seeking to invoke Section 437h, they have granted certification of questions for plaintiffs in the enumerated classes, while denying certification for plaintiffs outside those classes. *See, e.g., Athens Lumber Co., Inc. v. FEC*, 689 F.2d 1006, 1010 (11th Cir. 1982) (holding that a corporate plaintiff could not bring claims to the *en banc* court under Section 437h, but an individual plaintiff could); *Int'l Ass'n of Machinists and Aerospace Workers v. FEC*, 678 F.2d 1092, 1097 (D.C. Cir. 1982) (*en banc*) (dismissing union appellant from Section 437h proceeding for lack of statutory standing, but proceeding to the merits of the constitutional questions brought by individual plaintiffs). If Congress had wanted to allow a broader class of plaintiffs to avail themselves of Section 437h, "it could easily have achieved it by expressly granting standing to the limits of Art. III." *BreadPAC*, 455 U.S. at 584.

In the event the Court decides to certify any questions to the Fifth Circuit, LA-GOP should not be a party to those proceedings. But because LA-GOP's claims duplicate those of the other plaintiffs, it would not promote judicial economy for this Court to consider the same claims

that the Court of Appeals is considering. Therefore, the Court should stay proceedings in this Court as to LA-GOP's claims regarding any certified questions until the Court of Appeals has resolved them.

VI. CONCLUSION

Plaintiffs have failed to raise any substantial constitutional questions, as they must to invoke the extraordinary certification procedures of 2 U.S.C. § 437h. *See* FEC's Supplemental Response at 8-11. Because plaintiffs' claims are foreclosed by the holdings and rationales of Supreme Court decisions, and because those claims would, if accepted, allow widespread circumvention of contribution limits Congress enacted to prevent corruption in the federal political system, the Court should deny certification to the *en banc* Court of Appeals and grant summary judgment to the Commission.

Respectfully submitted,

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