UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiff-Appellant, v. FEDERAL ELECTION COMMISSION, Defendant-Appellee.	No. 13-5094 REPLY IN SUPPORT OF SUMMARY AFFIRMANCE

APPELLEE FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE

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Appellant Libertarian National Committee, Inc. ("LNC") fails to explain, as it must, why its challenge to the Federal Election Campaign Act's ("FECA") limit on bequests to national parties presents a *non-frivolous* question about FECA's constitutionality that would merit hearing by the *en banc* Court of Appeals under 2 U.S.C. § 437h. The LNC argues repeatedly that its claim is novel, but frivolous claims are often novel. A claim must also present a substantial, non-frivolous question to warrant section 437h certification and survive summary judgment. The LNC fails to refute the district court's analysis of the record, which shows that unlimited bequests to national parties would pose a risk of corruption of federal officeholders. As a result, in light of Supreme Court precedents upholding limits on contributions to national parties where the threat of corruption or its appearance is presented, the LNC's claim is frivolous. And the LNC has given no indication that it would be able to show otherwise through plenary briefing and argument. Thus, this Court should grant appellee Federal Election Commission's ("FEC" or "Commission") motion for summary affirmance.

ARGUMENT

A. The LNC's Claim So Clearly Lacks Merit That Further Briefing and Argument Would Not Benefit the Court

Instead of responding to the FEC's showing that the actual summary affirmance standard is met here, the LNC instead attempts to distort that standard. As the FEC demonstrated, summary affirmance is appropriate where "[t]he merits

of the parties' positions are so clear as to warrant summary action." *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at *1 (D.C. Cir. Mar 11, 2003) (*per curiam*). Where a "sound basis" exists for summary disposition, parties are "particularly encouraged to file dispositive motions," since the "result can be a major savings of time, effort, and resources for the parties, counsel, and the Court." *D.C. Circuit Handbook of Practice and Internal Procedures* 28 (Nov. 12, 2013).

The LNC incorrectly claims that the Commission's burden is "compounded" by what the LNC describes as section 437h's "low standard." (Appellant LNC's Reply in Opp'n to Appellee's Mot. for Summ. Affirmance ("LNC Opp'n") at 8-9 (Doc. No. 1467285).) On the contrary, the LNC's failure to meet even that standard shows why this case is ripe for summary disposition. Just as the district court was correct not to burden the *en banc* Court with the LNC's frivolous claim, this Court does not need further briefing and argument to affirm.

The LNC also wrongly states that the summary affirmance standard cannot be satisfied here because the district court found briefing and argument "helpful." (LNC Opp'n at 8 n.3.) But every district court ruling that is summarily affirmed is likely the product of helpful briefing or argument. The question here is whether *this Court* would find helpful "further briefing and argument." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987). The LNC's

opposition brief shows that further briefing would not affect the Court's decision. *See infra* Parts B-C.

The LNC also suggests that summary affirmance would deny it appellate review and due process of law. (LNC Opp'n at 8.) But summary disposition *is* appellate review by this Court. *See, e.g.*, *Cascade Broad. Grp. Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (*per curiam*). And summary affirmance would not deny the LNC due process. *Cf. United States v. Pajooh*, 143 F.3d 203, 204 (5th Cir. 1998) (determining on a "case by case basis" whether to grant some "form of summary disposition" does not deny due process).

B. The LNC Must Show That Its Claim Is Not Just Novel but Also Non-Frivolous

The LNC's opposition hinges mainly on a single, incorrect assertion: that the district court was required to certify the LNC's claim simply because no court has ever previously addressed the exact question the claim presents. (LNC Opp'n at 2-3, 5, 9, 12-13, 15; *see, e.g.*, *id.* at 15 (claiming that the district court should have "merely determin[ed] if the LNC's question was a novel one").) Under section 437h, however, the LNC is required to show more than just that its claim is novel — the merits of that claim must also be "non-frivolous" or "substantial."[1]

[1] Courts have used the terms "frivolous" and "insubstantial" interchangeably to describe claims that should not be certified. *See, e.g.*, *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). The term "frivolous" in the section 437h context is more akin to lacking a substantial federal question and thus differs sharply from

See Cal. Med. Ass'n v. FEC, 453 U.S. 182, 192 n.14 (1981) (directing district courts to certify only questions that are "neither insubstantial nor settled").[2]

Frivolous claims are often novel. Thus, the permissive standard for which the LNC advocates under section 437h would functionally eliminate the Supreme Court's requirement that certified questions be non-frivolous or substantial in addition to being unsettled. *See Cal. Med. Ass'n*, 453 U.S. at 192 n.14. Because certified questions must be both unsettled and substantial, not every as-applied challenge to FECA that raises a novel issue automatically qualifies for certification. *Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) ("'[N]ot every sophistic twist that arguably presents a 'new' question should be certified.'" (*quoting Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990))).

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the standard for frivolous claims under Federal Rule of Civil Procedure 11, which governs sanctionable filings by attorneys. *See, e.g., Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990) ("For obvious reasons, the court should have a higher threshold for a 'frivolous' finding in the [Rule 11] context[] than in the case where the issue is certification to an en banc appellate court.").

[2] *See also Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) ("[T]he district court must determine whether the constitutional challenges are frivolous or involve settled legal questions."); *Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (finding section 437h available "only where a 'serious' constitutional question was presented" (quoting Senator James L. Buckley, the sponsor of the amendment that became section 437h, 120 Cong. Rec. 10562 (1974))); *Buckley v. Valeo*, 387 F. Supp. 135, 138 (D.D.C.) (holding that section 437h certification is appropriate where "a substantial constitutional question is raised by a complaint"), *remanded on other grounds*, 519 F.2d 817 (D.C. Cir. 1975).

For example, in *Goland*, the plaintiff challenged FECA's contribution limits as applied to anonymous donations to minor party candidates and argued — just as the LNC does here — that his claim should be certified because the Supreme Court had not squarely addressed that particular scenario when facially upholding the contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Goland*, 903 F.2d at 1252-53. The Ninth Circuit acknowledged that the challenge "involve[d] a 'unique set of facts' and [was] 'unlike any other considered in the reported decisions of the federal courts,'" but still affirmed the district court's ruling denying certification because the claim was insubstantial under *Buckley*. *Id.* at 1253, 1258.

By determining whether the LNC's claim is frivolous, the district court did not "improperly rule[] on the merits" of the LNC's claim, as the LNC contends. (LNC Opp'n at 8, 15.) On the contrary, "some 'merits' review is appropriate," since a district court performing its gatekeeper role under section 437h "could not effectively assess the 'frivolousness' of the claims in [a] motion to certify without undertaking a thorough review of the controlling law." *Cao v. FEC*, 688 F. Supp. 2d 498, 502 (E.D. La.), *aff'd and remanded sub nom. In re Cao*, 619 F.3d 410 (5th Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 1718 (2011).

This Court's recent ruling in *Wagner v. FEC* reaffirmed that a district court must examine even an unsettled question of FECA's constitutionality before it can be certified. The Court explained that under section 437h, "the district court must

determine whether the constitutional challenges are frivolous or involve settled legal questions," and "immediately certify the record and all *non-frivolous* constitutional questions to the *en banc* court of appeals." *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (first emphasis added).[3]

C. The LNC's Claim Is Frivolous and the LNC Fails to Demonstrate Otherwise

While the LNC admits that its repetition of the novel-claim argument presents a risk of "landing blows the horse can no longer feel" (LNC Opp'n at 14) — indeed, the LNC's novelty argument quickly becomes less than novel — the LNC makes little effort to demonstrate that its claim, even if novel, presents a non-frivolous question. Nor could it, in light of Supreme Court precedent and the factual record in this case. The Supreme Court has determined, twice, that

[3] The LNC quotes the *Wagner* ruling out of context to improperly suggest that the district court here was not permitted to determine whether the LNC's claim is frivolous. (LNC Opp'n at 8; *see also id.* at 2, 4, 9.) *Wagner* held that when certain plaintiffs (the FEC, national parties, and individual voters) bring constitutional challenges against FECA, they must use section 437h, and cannot instead elect ordinary district court review by invoking federal question jurisdiction under 28 U.S.C. § 1331. 717 F.3d at 1009-12. Thus, when *Wagner* stated that section 437h was intended "to deprive district courts and panels of the circuit courts of appeals of jurisdiction to consider the constitutionality of the FECA," *id.* at 1011-12 (internal quotation marks omitted), the Court was stating that plaintiffs cannot invoke section 1331 instead of section 437h. The Court was not stating that a district court can no longer evaluate whether a claim properly brought under section 437h is frivolous, as the LNC implies. (LNC Opp'n at 2, 4, 8-9.) Indeed, *Wagner* confirmed that district courts must still decline to certify frivolous claims under section 437h, *see* 717 F.3d at 1009, as the LNC recognizes elsewhere in its brief (*see* LNC Opp'n at 4).

unlimited contributions to national party committees can corrupt, or at the very least, create the appearance of corruption of federal candidates and officeholders. (*See* FEC's Mot. for Summ. Affirmance at 8-9 (citing *Buckley*, 424 U.S. at 26-29, 38; *McConnell*, 540 U.S. 93, 142-61 (2003)) (Doc. No. 1465546).) Candidates and their parties share such a close relationship that "contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 159 (D.D.C.) (three-judge court) (citing *McConnell*, 540 U.S. at 154-55), *aff'd*, 130 S. Ct. 3544 (2010).

The record in this case — which the LNC does not even address — demonstrates that an unlimited contribution to a national party committee would not cease being potentially corrupting just because it is bequeathed. (*See* Mem. Op. at 20, Civ. No. 11-0562 (RLW) (D.D.C. Mar. 18, 2013) (Docket No. 41) (copy attached as Exhibit 1 to FEC's motion).) As the district court explained after reviewing the evidence, "making one's bequest known before death could be treated just as a contribution is," since "a political committee could feel pressure to continue to ensure that a (potential) donor is happy with the committee's actions lest [the donor] revoke[s] the bequest." (*Id.*) Furthermore, a bequest may "help

friends or family of the deceased have access to political officeholders and candidates."[4] (*Id.*) The LNC gives no indication that it could refute this evidence.

Given the evidence, the district court concluded that bequests "may very well raise the anti-corruption concerns that motivated the *Buckley* and *McConnell* Courts to dismiss a facial attack on contribution limits." (Mem. Op. at 20.) And on that basis, the district court correctly held that the LNC's challenge is frivolous "because it raises issues that the Supreme Court has already addressed." (*Id.* at 19 (citing *Republican Nat'l Comm.*, 698 F. Supp. 2d at 157).)

Instead of addressing the record and rebutting the district court's analysis, the LNC makes meritless attempts to distort the FEC's arguments. First, the LNC claims that the Commission's reliance on *Buckley* and *McConnell* is "bizarre" because the Commission took discovery in this case. (LNC Opp'n at 15.) But the discovery confirmed that bequests to parties can lead to the same risks of corruption that caused the Supreme Court to facially uphold limits on contributions to parties in those cases. (Mem. Op. at 20.) At no point has the Commission

[4] For example, a witness for the LNC testified that the LNC could have rewarded the son of a donor who left the LNC a large bequest with membership in a major donor group, which provides access to LNC candidates. (Mem. Op. at 20.) Also, the record showed, *inter alia*, that testators leaving bequests to parties have directed which candidates should benefit from their bequest, and on one occasion, "an estate trustee . . . contacted the Democratic National Committee about a $200,000 bequest to ask that it be used to defeat a particular candidate." (*Id.*)

suggested that *Buckley* and *McConnell* involved bequests, as the LNC repeatedly and inaccurately states. (*See, e.g.*, LNC Opp'n at 11, 15.)

Second, the Commission does not argue that *Buckley* and *McConnell* bar certification of *all* as-applied challenges to FECA's contribution limits, as the LNC claims. (LNC Opp'n at 9, 11-12, 15.) The LNC's particular as-applied challenge, however, is frivolous in light of *Buckley*'s and *McConnell*'s holdings and the record in this case. (*See* Mem. Op. at 20.) The LNC's as-applied claim thus stands in stark contrast to other cases where parties have brought successful, non-frivolous as-applied challenges to FECA's contribution limits in different contexts where courts found corruption risks were not demonstrated through evidence or otherwise present. *See, e.g.*, *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010) (*en banc*) (invalidating contribution limit as applied to political committees that make only independent expenditures); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293-95 (4th Cir. 2008) (same); *see also McConnell*, 540 U.S. at 231-32 (invalidating limit on contributions by minors).[5]

[5] Similarly, in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), the Supreme Court carved out a categorical exemption to a FECA spending restriction on the basis of its conclusion that there was no corruption danger presented in that particular as-applied challenge (unlike in the LNC's as-applied challenge here). 551 U.S. 449, 476-82 (2007). Thus, the LNC's comparison of this case to *WRTL* is inapt. (LNC Opp'n at 11.) *WRTL* is also distinguishable because it involved a *spending* limit, not a contribution limit as in this case. 551 U.S. 449, 476-82. As a result, the Supreme Court applied strict scrutiny, *id.*, not the intermediate scrutiny that applies to contribution limits like the one at issue here.

Third, the LNC erroneously claims that the Commission's Rule 59(e) motion before the district court is relevant here. (LNC Opp'n at 10.) In that motion, the Commission challenged the district court's decision to certify a narrowed constitutional question to the *en banc* Court (now pending as matter number 13-5088). (*See* Mem. in Supp't of FEC's Mot. to Alter or Amend the J., Civ. No. 11-0562 (RLW) (D.D.C. Apr. 15, 2013) (Docket No. 48).) The Commission argued the district court holding that the contribution limit could be invalid as applied to a *single* bequeathed contribution was inconsistent with the court's simultaneous ruling that bequeathed contributions in general can cause corruption. (*Id.* at 1-2.) The Commission acknowledged in its briefing on that motion (*see* Reply Mem. in Supp't of FEC's Mot. to Alter or Amend the J. at 8, Civ. No. 11-0562 (RLW) (D.D.C. May 9, 2013) (Docket No. 54)), as it has here, *supra* at 9, that as-applied challenges to contribution limits have been successful — but only where the record shows that a category of contributions presents *no* risk of corruption (unlike this case, *see* Mem. Op. at 18-22). In any event, there is a separate *en banc* proceeding regarding that single contribution; it presents no cause for full briefing here.

CONCLUSION

Because the parties' positions are clear and further proceedings would not benefit the Court, the district court's ruling should be summarily affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2013, I electronically filed the Commission's Reply in Support of Its Motion for Summary Affirmance with the Clerk of the Court of United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

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