EN BANC ARGUMENT SCHEDULED FOR NOVEMBER 30, 2018

No. 18-5227

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN NATIONAL COMMITTEE, INC.,
Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

On Certification of Constitutional Questions from the
United States District Court for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Federal Election Commission hereby certifies as follows:

(A) Parties and Amici. The Libertarian National Committee, Inc., was the plaintiff in the district court and is the plaintiff in this *en banc* proceeding pursuant to 52 U.S.C. § 30110. The Federal Election Commission was the defendant in the district court and is the defendant in this Court. There were no *amici curiae* in the district court. In this Court, the Goldwater Institute and the Institute for Free Speech have each filed a brief as *amici curiae* in support of the plaintiff. The Campaign Legal Center and Democracy 21 have indicated an intention to participate as amici curiae in support of the Federal Election Commission in this Court.

(B) Rulings Under Review. This case comes before the Court of Appeals by way of certified constitutional questions, and so there is no ruling under review. On June 29, 2018, United States District Judge Beryl A. Howell certified three questions regarding the constitutionality of the Federal Election Campaign Act together with findings of fact. The certification appears in the Joint Appendix at JA 147-48, and the factual findings appear at JA 181-235.

(C) Related Cases. This case has not previously been before this court or any other court, nor are there "any other related cases currently pending in this

court or in any other court." Circuit Rule 28(a)(1)(C). The District Court previously considered a substantially similar case between the same parties as this action. *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013) (Wilkins, J.). That court declined to certify to the Court of Appeals a broad question as the Libertarian National Committee, Inc., had requested, but the court instead certified a narrower question. *Id.* A panel of this Court summarily affirmed the district court's refusal to certify the broader question. *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5094 (D.C. Cir. Feb 7, 2014) (per curiam). The *en banc* Court of Appeals later dismissed the narrower certified question as moot. *Libertarian Nat'l Comm., Inc. v. FEC*, 13-5088 (D.C. Cir. Mar. 26, 2014) (*en banc*) (per curiam).

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GLOSSARY

BCRA	Bipartisan Campaign Reform Act of 2002
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FEC Add.	Addendum to Federal Election Commission's Motion to Dismiss for Lack of Subject-Matter Jurisdiction (Document # 1749853)
JA	Joint Appendix
LNC	Libertarian National Committee, Inc.

JURISDICTIONAL STATEMENT

The Libertarian National Committee, Inc. ("LNC") lacks standing to sue under Article III of the Constitution for the reasons explained in the Federal Election Commission's Motion to Dismiss for Lack of Subject-Matter Jurisdiction (Doc. No. 1749853).

If the LNC possesses standing, the district court otherwise had jurisdiction to find facts and certify constitutional questions to this Court under 52 U.S.C. § 30110. That same provision grants jurisdiction for this Court to hear certified questions of constitutionality of the Federal Election Campaign Act ("FECA") and directs that the Court hear the matter sitting *en banc*.

STATUTES AND REGULATIONS

All applicable statutory provisions are contained in the Plaintiff's Opening Brief.

STATEMENT OF THE CASE

The LNC challenges two aspects of FECA's limits on political contributions to national political party committees. First, the LNC claims that its First Amendment right to free speech requires an exception to the generally applicable annual limits so that it may immediately receive in one lump sum a large contribution that a now-deceased supporter left the LNC in his estate. Second, the LNC facially challenges the constitutionality of a 2014 amendment to FECA, in

which Congress increased the amount of money national committees can legally accept by authorizing those committees to create three segregated accounts that can be used only to defray particular categories of expenses. This lawsuit is simply the latest episode in a forty-year legal effort by groups associated with the Libertarian Party to have FECA's contribution limits declared unconstitutional. Although the LNC professes not to challenge that history, many of the arguments it makes here are similarly meritless under decades of clear precedent.

A. Political Party Corruption, Federal Campaign Finance Regulation, and the Libertarian Party's Court Challenges

Many of our nation's most notorious political scandals have included actual and apparent *quid pro quos* involving contributions to political party committees. After the "Democratic campaign book" scandal involving payments to the party in return for government business, Congress enacted restrictions on contributions to national political parties as part of the Hatch Act. (JA 201.) The Watergate scandal and "deeply disturbing examples" from the 1972 federal elections included contributors giving large amounts of money "to secure a political quid pro quo from current and potential office holders." *Buckley v. Valeo*, 424 U.S. 1, 26-27 & n.28 (1976) (per curiam). In response, Congress enacted FECA's limits on contributions from individuals and certain other groups to federal candidates. *Id.* Congress also created a system for public financing of presidential elections,

including funds to political parties to "defray their national committee Presidential nominating convention expenses." *Id.* at 87.

The Libertarian Party immediately joined others in challenging the constitutionality of these provisions. The Libertarian Party argued, as the LNC does here, that limits on contributions to candidates were "a regulation on the content as well as the quantity of political communication" and therefore they had to be justified by a "compelling governmental interest." Reply Br. of the Appellants, *Buckley v. Valeo*, Nos. 75-436; 75-437, 1975 WL 171458, at *19, *53 (U.S. filed Nov. 3, 1975). The party additionally argued that the limits on contributions to candidates were unconstitutionally overbroad because "most large contributors do not seek improper influence." *Buckley*, 424 U.S. at 29. And the presidential convention financing provisions violated the First and Fifth Amendments, the party argued, because they were "blatantly discriminatory" against minor parties and independent candidates. Br. of the Appellants, *Buckley v. Valeo*, Nos. 75-436; 75-437, 1975 WL 441595, at *169 (U.S. filed Sept. 30, 1975).

The Supreme Court rejected each of these arguments. The Court determined that contribution limits need only be "closely drawn" to a "sufficiently important interest," rather than the "compelling" interest of strict scrutiny that the Court applied to expenditure limits. *Buckley*, 424 U.S. at 25. The Court found "no

indication" that contribution limits "would have any dramatic adverse effect on the funding of campaigns and political associations" and that their "overall effect" was "merely to require candidates and political committees to raise funds from a greater number of persons" and encourage direct political expression by those who would otherwise exceed the limits. *Id.* at 21-22. The Court concluded that although it "may be assumed" that "most large contributors do not seek improper influence," "Congress was justified in concluding that" all contributions must be limited in order to eliminate "the opportunity for abuse." *Id.* at 29-30. And the Court held that FECA's provision of public financing for presidential nominating conventions was not discriminatory against minor parties. *Id.* at 104-05.

After *Buckley*, Congress established a $20,000 limit on the amount that any person could contribute each calendar year to any political committee established and maintained by a national political party. *See* FECA Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475 (1976) (codified as amended at 52 U.S.C. § 30116(a)(1)(B)). At that time, FECA's contribution limits applied only to donations that fell within the statute's definition of "contribution," specifically those donations "made by any person for the purpose of influencing any election for *Federal* office." *See* 52 U.S.C. § 30101(8)(A)(i) (emphasis added); *Shays v. FEC*, 414 F.3d 76, 80-81 (D.C. Cir. 2005). Donations to political party committees purportedly "aimed at state and local elections" were not limited in

amount, were largely unregulated by FECA, and came to be termed "soft money." *Shays*, 414 F.3d at 80.

For some time, the Federal Election Commission ("Commission" or "FEC") "took a permissive view" regarding contributions that were ostensibly intended to influence both federal and state elections. *Id.* at 80. Thus, in 1977 the Commission permitted political parties to fund mixed-purpose activities in part with soft money. *McConnell v. FEC*, 540 U.S. 93, 123-24 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). Additionally, the Commission authorized political party committees to allocate their administrative expenses between accounts containing funds raised in compliance with FECA's source-and-amount limits and accounts containing soft money. *Id.* at 123 n.7.

Many years of experience with soft money led to "disturbing findings" about its use and "campaign practices related to the 1996 federal elections." *McConnell*, 540 U.S. at 122; *see* JA 203-10. A series of *quid pro quos* by former lobbyist Jack Abramoff and former Representative Bob Ney included substantial sums to party committees. (JA 207-09.) Congress responded by again refining FECA's limits on contributions to national party committees through enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). *McConnell*, 540 U.S. at 122. Among other changes, that law increased the limit for contributions to national political

party committees to $25,000 and indexed that limit for inflation, but banned soft money by requiring that all contributions to those committees be subject to FECA's limits. *See* BCRA, Pub. L. No. 107-155, §§ 101(a), 307(a)(2), (d), 116 Stat. 81 (2002) (codified as amended at 52 U.S.C. §§ 30116(a)(1)(B), (c), 30125(a)).

At the same time, Congress generally prohibited state, district, and local committees of political parties from spending funds raised outside of FECA's limits on "Federal election activity." 52 U.S.C. § 30125(b)(1). These groups, however, may receive contributions to finance activities falling outside the statutory definition of that term without regard to federal restrictions. *Id.* A "main goal" of BCRA was to reverse the effect of the allocation regime which had "permitted the political parties to fund federal electioneering efforts with a combination of hard and soft money." *McConnell*, 540 U.S. at 142. But in doing so, Congress also "carve[d] out an exception" to allow "state and local party committees to pay for certain types of federal election activity with an allocated ratio" of money raised pursuant to FECA's source and amount limitations and so-called "Levin funds." *Id.* at 162-63. Levin funds are subject to a $10,000 contribution limit, but FECA otherwise "leaves regulation of such contributions to the States." *Id.* at 163; *see* 52 U.S.C. § 30125(b)(2). Thus, Congress permitted state and local parties to receive from a single person $10,000 subject to FECA's

source and amount limitations but which could be used for any purpose; another $10,000 in Levin funds from any source permitted by state law which could be used to finance specified federal election activity; and other amounts for nonfederal uses subject only to the law of the relevant state. *See* 52 U.S.C. §§ 30116(a)(1)(D), 30125(b); 11 C.F.R. § 300.30 (outlining rules for separate federal, nonfederal, and Levin accounts).

The LNC and other party committees immediately challenged the constitutionality of BCRA and revived previously unsuccessful arguments for the application of strict scrutiny. Among other things, the LNC argued that the BCRA provision requiring all "Federal election activity" to be financed through funds raised pursuant to FECA (1) should be subject to strict scrutiny like expenditure restrictions because it "requir[ed] national political parties to engage in political spending exclusively with federal money"; (2) regulated fundraising by political parties that purportedly could not corrupt federal candidates; and (3) discriminated against political parties in a manner "similar to that from content-based regulation." *See* Br. of the Political Parties, *McConnell v. FEC* (and consolidated cases), Nos. 02-1727; 02-1733; 02-1753, 2003 WL 21911213, *35-39, *50-57, *91-98 (U.S. filed July 8, 2003).

The Supreme Court again rejected these arguments. The Court maintained *Buckley*'s application of a lower level of scrutiny for contribution limits than for

restrictions on expenditures. *McConnell*, 540 U.S. at 134-42. The Court reasoned that BCRA's restrictions on party committees' use of soft money "simply limit the source and individual amount of donations" and were not "expenditure limitations." *Id.* at 139. Applying the "lesser demand" of closely drawn scrutiny, the Court concluded that the "special relationship and unity of interest" between federal candidates and political parties provided sufficient justification for Congress to limit contributions to both groups. *Id.* at 145. In the course of this and other challenges, the Supreme Court and lower courts have repeatedly explained how political parties are particularly susceptible to contributors who want a *quid pro quo* relationship with an officeholder. (JA 198-200.)

More recently, a Libertarian party committee and supporter sought to have federal contribution limits enjoined as to funds they would choose to place in segregated accounts and spend independently from candidates, but they withdrew their challenge after, *inter alia*, the district court found their claims "in tension with forty years of Supreme Court jurisprudence upholding contribution limits to political parties" and denied their motion for preliminary injunction. *Rufer v. FEC*, 64 F. Supp. 3d 195, 205 (D.D.C. 2014).

B. Congress's 2014 Amendments to FECA

In 2014, Congress made two statutory changes that affect the amounts of money national party committees may raise. In April 2014, Congress terminated

the public funding of presidential nominating conventions. *See* Gabriella Miller Kids First Research Act, Pub. L. No. 113-94, 128 Stat. 1085 (2014) (codified at 26 U.S.C. §§ 9008-09, 9012). All parties must now finance their nominating conventions through private contributions.

Later that same year, Congress amended FECA to authorize national political party committees to create three "separate, segregated account[s]" which could be "used solely to defray expenses incurred with respect to": (1) "a presidential nominating convention"; (2) "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party"; and (3) "the preparation for and the conduct of election recounts and contests and other legal proceedings." 52 U.S.C. § 30116(a)(9)(A)-(C); *see* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014) (codified at 52 U.S.C. § 30116(a)-(d)). Contributions to any of these accounts are limited to "300 percent of the amount otherwise applicable" to contributions to these national committees per calendar year. 52 U.S.C. § 30116(a)(1)(B). National committees may continue to use funds contributed into their general account on any expense they wish, even if they also choose to raise money for that expense through the new segregated accounts.

Congressional leaders explained the purpose behind these new account-based party limits through identical explanations of congressional intent.

160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); *see also* 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid). That intent was to "provide national political party committees with a means of acquiring additional resources" for presidential nominating conventions "because such conventions may no longer be paid for with public funds." 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner). The two other types of new accounts, to raise funds to defray headquarters and legal expenses, similarly reflected Congress's desire to permit political parties to acquire more resources. *Id.*; *see also* 160 Cong. Rec. H9074 (daily ed. Dec. 11, 2014) (statement of Rep. Cole) (explaining that the new limits would allow political "parties who are more transparent and more accountable" than many independent groups "to have the resources to compete"). Congressional leaders noted that these two types of expenses were less directly tied to election campaigns for federal office. *See* 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (stating that "many of" these expenses, "such as recount and legal proceeding expenses, are not for the purpose of influencing Federal elections").

As the explanations of congressional intent clarified, "[a]ll of the funds" parties could raise into the new accounts would be limited to "'hard money' subject to all of the source limitations, prohibitions, and disclosure provisions of" FECA. 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep.

Boehner). Congress therefore adhered to the principle, recognized by the *McConnell* Court, that all contributions to national political party committees should be subject to FECA's provisions to advance the "strong interests in preventing corruption" and its appearance. *McConnell*, 540 U.S. at 156.

As the contribution limits stand today, a person may contribute up to $33,900 to a national party committee's general fund plus an additional $101,700 to each of the three segregated accounts the committee may create, for combined annual limits totaling $339,000. *See* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10,904, 10,905-06 (Feb. 16, 2017).

C. The Segregated Account Provisions' Impact on the LNC

Although the LNC argues that it has less use for the categories of expenses identified in 52 U.S.C. § 30116(a)(9) than for electoral advocacy, the record reflects that the LNC actually spends substantial sums on those specific activities. The LNC does not tailor its accounting records to the segregated account provisions in FECA, but in general, the LNC spent approximately $467,251.58 on those types of expenses in 2016 alone, which is a little more than 20% of the amount it budgeted for expenses that year. (JA 188.) Some of those expenses undoubtedly financed expressive activities, but others were typical office and

administrative expenses such as mortgage payments, utility fees, and cleaning services. (JA 125-26.)

Even prior to the 2014 congressional amendments, the LNC regularly engaged in project-based fundraising and "guaranteed" that funds raised through those solicitations would "be used *only* for" the expenses identified. (JA 186.) The LNC finds that this kind of fundraising "is often more effective" than "asking for 'unearmarked' money." (JA 183.) At least some of that fundraising tracked the categories of expenses Congress later identified in the segregated account provisions. For example, the LNC has for many years maintained a separate "building fund" and "Legal Offense Fund." (JA 184-86.)

The LNC has also taken advantage of the newly expanded segregated limits, accepting more than $55,000 into a segregated account for its headquarters. (JA 186.) That money came from donors who had already contributed the maximum amount into the LNC's general fund, and so it was money the LNC could not have accepted absent the new segregated account provisions. (*Id.*)

D. The Application of FECA's Contribution Limits to Testamentary Contributions

FECA's contribution limits apply to contributions made through testamentary estates just as those limits would have applied to the decedent were he or she still living. *See, e.g.*, FEC Advisory Op. 2015-05 (Shaber), 2015 WL 4978865, at *2 (Aug. 11, 2015) (citing Commission advisory opinions). In cases

where a decedent's estate planning documents result in a contribution to a candidate or political party in excess of the relevant annual limit, the estate or an independent third party (such as a trustee or escrow agent) may retain the excess funds and contribute them to the recipient in successive years in amounts that comply with FECA's limits, until the full sum is distributed. *Id.* at *2-3.

In 2014, a panel of this Court rejected an LNC challenge to FECA's contribution limits as they generally applied to testamentary contributions. That panel determined that the merits of the LNC's claim were "so clear as to warrant summary" affirmance of the district court's refusal to certify the LNC's broad proposed question. *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5094, 2014 WL 590973, at *1 (D.C. Cir. Feb. 7, 2014) (per curiam). The district court had concluded that "the as-applied challenge brought by the LNC" was "impermissible because it raise[d] issues that the Supreme Court ha[d] already addressed" and that preventative contribution limits "should be the same for bequests as for other contributions." *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 166-67 (D.D.C. 2013) ("*LNC I*"). The district court did certify a narrow question whether FECA's contribution limits could be constitutionally applied to one specific bequest to the LNC, from a donor whose only known interaction with the LNC during his life was a single $25 contribution, *id.* at 168-71, but that part of the matter became moot while pending before this Court, *see* Order, *Libertarian Nat'l*

Comm. v. FEC, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (*en banc*) (per curiam) (Doc. No. 1485531).

E. Joseph Shaber's Testamentary Contribution to the LNC

Later in 2014, Joseph Shaber, a longtime supporter of the LNC, passed away. (JA 223.) In his estate planning documents, Shaber had made the LNC a beneficiary of a trust to be paid after his death. (JA 222-23.) The LNC's interest was ultimately determined to be worth $235,575.20. (JA 224.) Due to normal administrative delays, the LNC did not have access to any of the money until 2015. (JA 223.)

Although Congress's 2014 amendments to FECA meant that the LNC could have accepted the entire amount Shaber left all at once by utilizing segregated accounts, and the Trustee offered to contribute in that way, the LNC declined. (*See* JA 224; FEC Add. at 104-05.) The LNC instead stated that it wished to "accept and spend the entire amount" on "general expressive purposes, including expression in aid of its federal election efforts." (JA 224.) Shaber had not restricted how the LNC should accept the funds, specifying that the money should be distributed "outright" to the LNC. (JA 224.) The Trust and the LNC agreed to deposit funds in excess of the general annual limit into an escrow account for annual distributions equal to that limit. (JA 224-25.) The LNC considered

accepting the entire amount into separate accounts in 2016 but ultimately decided against that plan in order to maintain this lawsuit. (FEC Add. at 106.)

While he was alive, Shaber had made 46 donations to the LNC, totaling $3,315. (JA 221.) Those contributions made Shaber eligible to be a "life member" of the LNC, and they led the LNC to include Shaber on in-house mailing lists through which the LNC makes regular solicitations for contributions. (JA 221-22.) The LNC also invited Shaber to at least one VIP event in 2013, which was held in conjunction with a large annual convention that Libertarian candidates frequently attend, and sent Shaber at least one fundraising appeal directly related to its headquarters. (JA 222, 224.)

The LNC has asked supporters to include the LNC as a beneficiary in their estate planning, though the record does not reflect whether Shaber himself received such a solicitation. (JA 226.) These requests have been successful. The LNC has learned that at least two living individuals have named or intend to name the LNC as a beneficiary in their wills. (JA 226, 231.)

F. District Court Proceedings

The LNC filed this suit in 2016, making claims that the general and segregated account limits cannot constitutionally be applied to Shaber's contribution and a facial claim that the segregated account limits are unconstitutional content-based speech restrictions. (JA 13-16.) The Commission

moved to dismiss, arguing that the injuries the LNC alleged were either self-inflicted or not caused by FECA and therefore could not support Article III standing. The district court denied the Commission's motion. (JA 29.) After discovery, the Commission again moved to dismiss, arguing that the constitutional questions the LNC sought to ask this Court were ineligible for certification under 52 U.S.C. § 30110. The district court denied that motion as well, concluding that the LNC's claims were not "wholly insubstantial, obviously frivolous, or obviously without merit" so as to be ineligible for certification. (JA 177 (alteration and internal quotation marks omitted).) The district court certified three questions and entered findings of fact. (JA 181-235.)

SUMMARY OF ARGUMENT

The LNC's claims each run counter to Supreme Court precedent. The LNC's as-applied claims depend on its contention that it has a First Amendment speech right to receive a specific contribution from a deceased donor, but it has not established any such right. Contribution restrictions burden the *associational* rights of both the donor and recipient of a campaign contribution, but the LNC expressly disclaims reliance on any such associational right as it relates to contributions received through a decedent's estate. And as far as *speech* rights are concerned, prior decisions evaluating contribution limits have primarily relied on the rights of the *donor*, not the recipient, and in any event have concluded that

constitutional harm occurs only if the limits are too low — a claim the LNC does not make.

Even if a First Amendment speech right to receive exists, applying contribution limits to the specific testamentary contribution at issue here remains constitutional. The LNC does not contest that limits on testamentary contributions are justified by corruption concerns, consistent with longstanding precedent. Instead, the LNC argues that an exception to those limits should be made for a single donor. But under closely drawn scrutiny, a generally valid contribution limit is not unconstitutionally overbroad because it prohibits more than only corrupt contributions.

The LNC's facial attack on Congress's amendment of FECA to permit political parties to raise funds in *higher* amounts for segregated accounts that may be used only for certain categories of expenses is similarly flawed. The applicability of these higher contribution limits depends on the category of expense the party undertakes, not the content of any speech financed by those expenses. Nor do the segregated account provisions restrict expenditures; parties remain free to spend as much as they wish on any type of expense.

The Supreme Court has already affirmed Congress's judgment that all contributions to national parties can corrupt or create an appearance of corruption, a conclusion that the LNC does not dispute here. But it does not necessarily follow

that all contributions must be subject to the same dollar limit. Here, Congress exercised its particular expertise in the costs and nature of running for political office and determined that while all contributions should remain subject to an annual limit, a higher limit for certain categories of expenses would permit the parties to raise additional resources for those activities without presenting an intolerable risk of corruption. This Court should accept that judgment.

STANDARD OF REVIEW

The LNC filed this case pursuant to 52 U.S.C. § 30110. That provision requires the district court, after making appropriate findings of fact, to certify all non-frivolous questions of constitutionality of FECA to the *en banc* court of appeals. *Id.*; *see Holmes v. FEC*, 875 F.3d 1153, 1157 (D.C. Cir. 2017) (*en banc*), *cert. denied*, 138 S. Ct. 2018 (2018). This Court determines the merits in this first instance, and no judgment of the district court is under review. *See Wagner v. FEC*, 717 F.3d 1007, 1011 (D.C. Cir. 2013). The district court's findings of fact "may not be set aside unless clearly erroneous." *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 743 (D.C. Cir. 2000).

ARGUMENT

I. THE CONTRIBUTION LIMITS AT ISSUE ARE SUBJECT TO, AT MOST, CLOSELY DRAWN SCRUTINY

"In *Buckley*, the Supreme Court set out the standards for judicial review of campaign-finance regulations challenged under the First Amendment." *Holmes*,

875 F.3d at 1158. There, the Court distinguished between limits on a person's election-influencing expenditures and limits on a person's contributions to candidates or political groups. Limits on a person's independent expenditures are subject "to 'the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.'" *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (quoting *Buckley*, 424 U.S. at 44-45) (plurality op.). Limits on a person's financial contributions to others, however, are subject to a "lesser" standard and "'may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.'" *Id.* (quoting *Buckley*, 424 U.S. at 25).

The Court drew this distinction between expenditures and contributions in light of the differences in "the degree to which each encroaches upon protected First Amendment interests." *McCutcheon*, 572 U.S. at 197. Expenditure restrictions are subject to strict scrutiny because they "necessarily reduce[] the quantity of expression." *Buckley*, 424 U.S. at 19. A "limitation upon the amount that any one person or group may contribute to a candidate or political committee," by contrast, "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. This is so because contribution limits "permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and

issues." *Buckley*, 424 U.S. at 21. And while "contribution restrictions could have a severe impact on political dialogue" if they are set at too low a limit, they are permissible unless they would "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Id.*

In light of these principles, the LNC concedes two important points. First, the LNC states that "this case does not challenge *Buckley*." (Opening Br. at 60 n.13.) Second, the LNC states that it "does not revisit" the conclusion in *LNC I* "that testamentary bequests may theoretically raise corruption concerns, thus generally warranting their subjection to FECA's contribution limits." (*Id*. at 35.)

These concessions greatly reduce the scope of legal issues this Court must decide. Because the LNC does not dispute that testamentary contributions may raise corruption concerns or that FECA's limits on those contributions are "generally warrant[ed]," the narrower application of those principles here easily survives review. And the LNC's acceptance of *Buckley*'s distinction between expenditures and contributions effectively decides its facial claim, despite the LNC's efforts to persuade the Court to apply strict scrutiny.

II. FECA'S PROPHYLACTIC CONTRIBUTION LIMITS MAY BE CONSTITUTIONALLY APPLIED TO SHABER'S CONTRIBUTION TO THE LNC

A. The LNC Has Not Established That It Has a First Amendment Right to Receive Shaber's Testamentary Contribution

As an initial matter, the LNC has not established that the First Amendment's protection of the freedom of speech includes the right of an organization to receive a political contribution from a particular deceased donor. The Supreme Court's analysis of contribution limits has consistently explained those limits bear "more heavily on the *associational* right than on freedom to speak," *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000) (emphasis added), beginning with *Buckley* where the Court "focused on the effect of the contribution limits on the freedom of political association." *McCutcheon*, 572 U.S. at 197 (citing *Buckley*, 424 U.S. at 29). The Supreme Court has explained that limits on the amount a person may contribute to a political group also implicate the speech rights of the *contributor*. *E.g.*, *id.* at 203. Here, however, the LNC makes plain that "Shaber's death ended his expression and association" and that the LNC "does not associate with the dead." (Opening Br. at 34.) Thus, consistent with caselaw, *see, e.g.*, *LNC I*, 930 F. Supp. 2d at 170, the LNC disclaims any reliance on Shaber's speech or associational rights, or its own rights to associate with its supporters. (*See* Opening Br. at 33-34.) Instead, the LNC seeks to extend the Supreme Court's analysis of the *contributor's* speech rights to establish that *its own* speech rights are violated

when the law prevents it from accepting an unlimited amount from a specific source. (Opening Br. at 31-33).

The LNC's proposed extension is contrary to the Supreme Court's analysis. *Buckley* made clear that contribution limits "could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. But the Court found "no indication" that FECA's contribution limits "would have any dramatic adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21-22. Following *Buckley*, the *McConnell* Court explained that because "the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients," contribution limits "impose serious burdens on free speech *only if they are so low* as to" fail *Buckley*'s test. *McConnell*, 540 U.S. at 135 (emphasis added).

The LNC has not argued that applying FECA's annual limits to Shaber's contribution prevents it — the recipient — from engaging in effective advocacy. Nor would such an argument be successful, since FECA's current combined limits for contributions to national committees are substantially higher than the limits the Supreme Court has previously approved. *See, e.g.*, *Buckley*, 424 U.S. at 21; *McConnell*, 540 U.S. at 159, 173.

In fact, the LNC has not shown that the limits at issue impair its speech at all. While the act of receiving a political contribution involves speech rights of the donor and serves to associate the donor with the recipient, it does not involve speech *by the recipient*. Contributions "result in political expression *if*" they are "spent by a candidate or an association to present views to the voters." *Buckley*, 424 U.S. at 21 (emphasis added). "A contributor does not direct" how a recipient expends funds, so "any decision" on how to spend funds "is an independent one on the part of" the recipient. *Cf. Holmes*, 875 F.3d at 1167 (discussing transfers between primary and general election funds of candidate campaigns). While a contribution limit that is too low may inhibit speech by preventing a group from "amassing the resources necessary" to pay for "distribution of the humblest handbill or leaflet," "hiring a hall and publicizing" an event, or purchasing time "on television, radio, and other mass media," the "overall effect" of a limit that is not too low "is merely to require" such groups "to raise funds from a greater number of persons." *Buckley*, 424 U.S. at 19, 21-22.

The cases on which the LNC relies do not establish that its right to free speech encompasses a right to receive Shaber's political contribution. (*See* Opening Br. at 32-33.) Every case the LNC cites considered contribution limits in the context of donations from *living* donors or active organizational entities. (*Id.*) There was thus no need for those courts to "parse distinctions between the speech

and association standards of scrutiny." *Shrink Mo.*, 528 U.S. at 388. Nor did those courts have occasion to distinguish between a prospective donor's right to speech and the speech rights of the recipient. In two cases, the language the LNC cites comes from the courts' description of the parties' arguments, not the courts' analysis. (*See* Opening Br. at 32-33 (quoting *McCutcheon*, 572 U.S. at 195; *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013)).) Only one case separately addressed whether the First Amendment encompasses a right to receive campaign contributions, and even there, the Second Circuit did not disaggregate the recipient's speech rights from her right to associate. *See Dean v. Blumenthal*, 577 F.3d 60, 68 n.7 (2d Cir. 2009). In any event, the court concluded that "it is 'far from obvious whether in fact there is such a right'" to receive under the First Amendment. *Id.* at 68.

Contrary to the LNC's argument, the Eighth Circuit's recent decision in *Free & Fair Election Fund v. Missouri Ethics Commission* clarifies that contribution limits generally implicate only the speech rights of the donor. 903 F.3d 759, 763 (8th Cir. 2018). There, the Eighth Circuit concluded that a state law prohibiting "a political action committee from receiving contributions from other political action committees" violated "a political action committee's First Amendment rights to freedom of speech and association." *Id.* at 762. That court reasoned that "prohibiting a PAC from *receiving* contributions . . . necessarily

prohibits a PAC from *making* contributions to other PACs," and "therefore limits the *donor-PAC*'s speech . . . rights under the First Amendment." *Id.* at 763 (third emphasis added). In other words, a PAC-to-PAC transfer implicates speech rights on the donor side, not the recipient side.

The LNC has therefore failed to establish any First Amendment right to receive Shaber's testamentary contribution.

B. Even if the LNC's Receipt of Contributions Implicates Its Speech Rights, Testamentary Contributions Raise Corruption Concerns and May Be Limited

1. FECA's Contribution Limits Are Not Subject to the Type of Individualized Exception the LNC Seeks

Applying FECA's contribution limits to testamentary contributions survives review even if closely drawn scrutiny applies. As previously noted, the LNC has conceded that testamentary contributions may "raise corruption concerns" and that application of FECA's contribution limits to that category of contributions is "generally warrant[ed]." (Opening Br. at 35.) Indeed, factual findings by the *LNC I* court and the district court below amply support that proposition. *See* 930 F. Supp. 2d at 166, 186; JA 216-21; *see also LNC I*, 930 F. Supp. 2d at 167 (observing that in light of the potential for corruption or its appearance, the "preventative" contribution limits "should be the same for bequests as for other contributions").

Nevertheless, the LNC proposes that the Commission must prove that Shaber's contribution, specifically, was "related to" a "quid pro quo arrangement." (Opening Br. at 38 (internal quotation marks omitted).) But the LNC's pursuit of an individualized exception for Shaber's testamentary contribution is inconsistent with the Supreme Court's treatment of FECA's prophylactic contribution limits. *See, e.g.*, *Buckley*, 424 U.S. at 29. Indeed, the LNC's argument closely resembles the overbreadth claim the Libertarian Party lost in *Buckley*. There, the Supreme Court concluded that a $1,000 limit on contributions to a candidate was not unconstitutionally overbroad merely because "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Id.* at 29-30. While "the truth of" that "proposition may be assumed, it does not undercut the validity of the $1,000 contribution limitation." *Id.* at 29-30. Not only is it "difficult to isolate suspect contributions," but "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

Buckley also rejected the contention that only corrupt transactions could be barred. 424 U.S. at 27. "[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action," and so the Court concluded that it was

constitutionally permissible for Congress to regulate contributions beyond those for which a criminal *quid pro quo* relationship could be proven. *Id.* at 27-28.

Consistent with closely drawn scrutiny, *Buckley* also concluded that the contribution limit there was constitutional even "in the case of large contributions from immediate family members" where "the risk of improper influence is somewhat diminished." *Id.* at 53 n.59. Even though Congress could have structured the contribution limitation to take account of the ways that testamentary bequests or familial contributions are different, "Congress' failure to engage in such fine tuning does not invalidate the legislation." *Buckley*, 424 U.S. at 30.

Following *Buckley*, no court has held that an otherwise valid contribution limit is invalid as applied to a single, allegedly non-corrupting contribution. *See, e.g.*, *Ognibene v. Parkes*, 671 F.3d 174, 191 (2d Cir. 2011) (rejecting argument that contribution limits were "overbroad because they ban legitimate as well as corrupt acts"). The very nature of a prophylactic rule is that it does not require individualized proof "because few if any contributions" involve "*quid pro quo* arrangements." *See Citizens United v. FEC*, 558 U.S. 310, 357 (2010). For example, a living individual who desired to contribute $1 million to a federal candidate could not succeed in petitioning a court to permit the contribution by arguing that there was no proof that his contribution was part of a *quid pro quo* transaction. *Cf. Holmes*, 875 F.3d at 1162 (upholding distinction between primary-

and general-election contributions even where plaintiffs' planned twice-the-limit contributions were within the total amount permitted in an election cycle).

The LNC notes that the Supreme Court has allowed individualized as-applied challenges to expenditure restrictions. (Opening Br. at 31.) But expenditure restrictions are subject to strict scrutiny, and, unlike contribution limits, they must therefore be narrowly tailored. To be sure, courts have considered certain as-applied challenges to contribution limits as well. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 149 (2003); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (three-judge court), *aff'd*, 561 U.S. 1040 (2010). But those challenges have been unsuccessful, *see Republican Nat'l Comm.*, 698 F. Supp. 2d at 160, predicated on some well-defined category rather than the facts of a specific contribution, *see Beaumont*, 539 U.S. at 159, or both, *id*.

The LNC also argues that section 30110 commands that "*all* questions of the constitutionality of" FECA be certified to the *en banc* Court. (Opening Br. at 31.) The question in this Court is not whether the LNC's as-applied claims achieve the "low bar" for certification under section 30110. *Holmes v. FEC*, 823 F.3d 69, 72 (D.C. Cir. 2016) (internal quotation marks omitted). It is whether those claims are meritorious. They are not.

2. Application of FECA's Limits to Shaber's Testamentary Contribution Is Consistent with the First Amendment

Even if FECA's contribution limits were subject to individualized scrutiny, applying those limits to Shaber's contribution is justified by the government's interests in combatting the actuality and appearance of corruption. Contribution limits are a permissible response to combat not only direct corruption, but also the "appearance or perception of corruption engendered by large campaign contributions." *McConnell*, 540 U.S. at 143; *see McCutcheon*, 572 U.S. at 192-93. As *McConnell* established, all "large contributions to a national party can corrupt, or at the very least, create the appearance of corruption." 540 U.S. at 144.

The same is true of testamentary contributions. The LNC actively solicits its supporters to include large gifts in their estate planning (*see* JA 226), as did the national parties with the soft-money contributions at issue in *McConnell*, 540 U.S. at 146. As in *McConnell*, the LNC has created a program to "tall[y] the amount of" testamentary bequests it has raised. *Id.*; *see* JA 226. And as in *McConnell*, the record reflects that donors or their associates have "asked that their contributions be credited to particular candidates." 540 U.S. at 146; *see* JA 217, 221.

The fact that a testamentary contribution is completed after the donor's death does not immunize it from being or appearing to be part of a *quid pro quo* corruption scheme. "[N]othing prevents a living person from informing the beneficiary of a planned bequest about that bequest" (JA 216), and a "living person

may alter his or her estate planning documents at any time before death for any reason" (JA 219). Therefore, a person's "promise to bequeath a contribution in the future could cause that political party, its candidates, or its office holders to grant political favors to the individual in the hopes of preventing the individual from revoking his or her promise." (JA 218-19 (internal quotation marks omitted).)

The record establishes that corruption risks attend Shaber's specific contribution. Shaber contributed to the LNC 46 times while he was alive, totaling more than $3,000, thereby making him eligible for "life member" status. (JA 221.) The LNC included Shaber on routine solicitations and invitations as part of its in-house mailing list, which is used to solicit testamentary contributions. (JA 222, 226.)

Even if Shaber's contribution was not itself a *quid* for a *quo*, several other large potential testamentary contributions the LNC identifies implicate corruption concerns, and the LNC offers no workable way to distinguish among them. For example, the LNC states that one of its large annual donors plans to revise his estate plan to provide a gift to the LNC of up to $1 million upon his death. (JA 229-32.) The LNC also notes that its former National Chair wishes to leave 40% of his estate to the LNC upon his death. (JA 232-33.) Testamentary contributions of this type, which the LNC plainly has advance knowledge of, raise additional corruption concerns. Courts have "no scalpel to probe" differences in degree

between contributors who were in contact with a recipient party one, 46, or 4600 times during their lives. *Buckley*, 424 U.S. at 30.

FECA's contribution limits, moreover, apply equally to all parties. "[A]ny attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election." *Buckley*, 424 U.S. at 34-35, 70; *see, e.g.*, *United States v. Goland*, 959 F.2d 1449 (9th Cir. 1992); Carla Marinucci, *GOP Donors Funding Nader/Bush Supporters Give Independent's Bid a Financial Lift*, S.F. Chron., July 9, 2004, http://www.sfgate.com/politics/article/GOP-donors-funding-Nader-Bush-supporters-give-2708705.php (last visited Oct. 12, 2018). As a result, the LNC's "lack of federal officeholders" and its concomitant limited "ability to offer" any "political favors" from its own officeholders does not eliminate the risks of actual or apparent corruption that a ruling in the LNC's favor might create. (Opening Br. at 38.)

Application of FECA's contribution limits to testamentary contributions is also supported by the important government interest in "prevent[ing] attempts to circumvent" FECA's otherwise valid limits. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) (internal quotation marks omitted). The record establishes that national parties often receive testamentary

contributions. "Estates have contributed more than $3.7 million in bequeathed funds to recipients that must file reports with the FEC" since 1978, a figure which is likely underinclusive. (JA 219; *see also* JA 86-89.) If these contributions were excluded from FECA's limits, donors would likely shift more of their giving from limited annual contributions to unlimited testamentary contributions, thereby increasing the one-time value of their contribution and the concomitant risk of corruption. (*See* JA 226.) As the Supreme Court has observed, donors often react to changes in campaign finance law "by scrambling to find another way" to purchase political favors. *McConnell*, 540 U.S. at 165.

III. FECA'S LIMITS ON CONTRIBUTIONS TO NATIONAL PARTY COMMITTEES REMAIN CONSTITUTIONAL AFTER THE 2014 AMENDMENTS PERMITTING THOSE PARTIES TO RAISE FUNDS IN LARGER AMOUNTS

The Supreme Court has held that FECA's annual limits on contributions to national party committees are subject to closely drawn scrutiny and are constitutional. *McConnell*, 540 U.S. at 141-60. The Court explained that the "special relationship and unity of interest" between national parties and federal candidates and officeholders make it "neither novel nor implausible" that large contributions "can corrupt or, at the very least, create the appearance of corruption." *Id.* at 144-45. These relationships and the "means by which parties have traded on" them were sufficiently intertwined to justify BCRA's application

to *all* money raised and spent by the national parties, even though some of that money funded activities for which "no federal office [was] at stake." *Id.* at 154-55.

The only relevant change Congress has made to the contribution limits since *McConnell* was its 2014 amendment to *increase* the amount a person may contribute annually, so long as some of that money is deposited in segregated accounts to defray specific categories of expenses. This change does not render a permissible campaign finance system constitutionally suspect; rather, it draws the limits more closely to the corruption interest. Congress's amendment also serves its obligation under the First Amendment by ensuring that "the amount or level" of contribution limits is high enough to allow recipients to "'amass[] the resources necessary for effective advocacy.'" *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 21). FECA's revised contribution limits clearly merit the traditional deference to "Congress's ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *Id.* at 137.

A. The Segregated Account Provisions Restrict Contributions, Not Expenditures, and Are Subject to Closely Drawn Scrutiny

Initially, the LNC argues that Congress's 2014 amendment "radically altered FECA's nature and structure" and converted what had been a constitutional contribution limit into an expenditure limit subject to strict scrutiny. (Opening Br. at 40-44.) That claim lacks merit.

An expenditure limit is a "restriction on the amount of money a person or group can spend on political communication" and "necessarily reduces the quantity of expression." *Buckley*, 424 U.S. at 19. A contribution limit, in contrast, is "a limitation upon the amount that any one person or group may contribute to a candidate or political committee." *Id.* at 20. In *McConnell*, the Court clarified that the "relevant inquiry" is whether a given campaign finance restriction "burdens speech in a way that a direct restriction on the contribution would not." 540 U.S. at 138-39. As that Court explained, the soft-money ban at issue was a contribution limit because it did not "in any way limit[] the total amount of money parties can spend." *Id* at 139.

Under these standards, FECA's limits remain contribution limits, not restrictions on speech, after the 2014 amendments. The segregated account provisions are framed as a limit on the amount of money that a person may contribute, not as a limit on how much the party may spend. 52 U.S.C. § 30116(a)(1)(B) (providing that "no person shall make contributions" which "exceed 300 percent of the amount otherwise applicable"). And the segregated account provisions do not cap spending, either generally or in connection with the categories of expenses for which larger contributions are permitted. *See* 52 U.S.C.

§ 30116(a)(1)(B), (9). National parties may spend as much as they wish on any expense.[1]

The structure of the segregated account provisions is functionally indistinguishable from the limits on state and local parties' use of money raised outside of FECA's restrictions on federal election activity upheld in *McConnell*. 540 U.S. at 139. There the Court reviewed a BCRA provision that barred those parties "from spending nonfederal money on federal election activities," though it left those parties' contributions for other expenses federally unregulated, and provided exceptions for certain spending subject to separate limits and allocation formulas. *Id.* As the Court concluded, the BCRA provision "simply limit[ed] the source and individual amount of donations"; that it did "so by prohibiting the spending of soft money [did] not render" it an "expenditure limitation." *Id.* The LNC admits that it "could have deposited the entirety of Shaber's" contribution in segregated accounts when it became available in 2015, but the LNC argues that it would not have been able to spend all of that money that year. (Opening Br. at 43 (citing *LNC v. FEC*, 228 F. Supp. 3d 19, 26 (D.D.C. 2017)).)

[1] The provision providing for a segregated account for convention expenses does limit the benefit provided by the higher limit added in 2014, 52 U.S.C. § 30116(a)(9)(A), but national parties may spend in excess of that amount on conventions using funds contributed through the pre-existing general limit. In any event, the LNC does not challenge the statute on that basis.

This claim is incorrect. The passage of the district court opinion on which the LNC relies merely concluded that the LNC had not, as a factual matter, incurred enough expenses in the relevant categories to fully "free[] up the full value of" Shaber's contribution for general spending. *LNC v. FEC*, 228 F. Supp. 3d at 26. The district court did not conclude that FECA prevented the LNC from spending more than a certain amount. To the contrary, the district court expressly concluded that the segregated account provisions should be characterized as a contribution limit rather than an expenditure restriction, as the LNC goes on to admit. (JA 169-70; Opening Br. at 43.)

As the Commission explained in its motion to dismiss in this Court, the LNC actually did incur enough presidential convention, headquarters, and legal proceedings expenses in 2015 and 2016 to fully utilize Shaber's contribution with general spending. But regardless, FECA's limits did not require the LNC to spend below a given dollar amount, either generally or on any category of expense. The LNC may *choose* not to incur more expenses, but that does not convert FECA's limits into expenditure restrictions. *Cf. Republican Nat'l Comm.*, 698 F. Supp. 2d at 156 (noting that *McConnell* "squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money or to structure its finances").

Treating the segregated account provisions as contribution limits rather than as speech restrictions is consistent with *Buckley*'s rationale for distinguishing the levels of scrutiny between those types of limits. As with pre-existing contribution limits, the segregated account provisions leave contributors "free to become a member of any political [party] and to assist personally in the [party's] efforts on behalf of candidates." *Buckley*, 424 U.S. at 22. Contributors to the national party committees also remain "free to engage in independent political expression." *Id.* at 28. Like other contribution restrictions, FECA's segregated account provisions entail "only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20.

As a result, FECA's limits on contributions to national party committees are what they appear to be: limits on contributions subject to closely drawn scrutiny, not speech restrictions.

B. The Segregated Account Provisions Are Content Neutral, Rendering Strict Scrutiny Inapplicable

The LNC also argues that the segregated account provisions should be reviewed under strict scrutiny based on its view that they are content-based speech restrictions. (Opening Br. at 44-49.) But even if the segregated account limits did restrict speech, like other FECA limits on contributions to national party committees they do not discriminate on the basis of content.

Preliminarily, FECA's contribution limits only indirectly have potential impacts on the speech of political parties. Not all of the funds contributed to candidates or political parties are then converted by the recipient into speech, as *Buckley* and later cases recognized. *Cf. Holmes*, 875 F.3d at 1167 (noting that recipients independently make spending decisions). That is partly why the Supreme Court has consistently rejected calls from the Libertarian Party and other litigants to apply strict scrutiny to those limits; "[w]hile contributions *may* result in political expression *if* spent by a candidate or an association to present views to the voters," they do not necessarily have that result. *Buckley*, 424 U.S. at 21 (emphasis added).

Although contribution limits affect speech less than association, such limits do still burden both interests at least as to the contributor. *McConnell*, 540 U.S. at 140 n.42. Given the Supreme Court's conclusion that contribution restrictions bear "more heavily on the associational right than on [the] freedom to speak," however, "a contribution limitation surviving" the intermediate scrutiny applicable to "a claim of associational abridgment would survive a speech challenge as well." *Shrink Mo.*, 528 U.S. at 388.

In any event, FECA's limits do not discriminate on the basis of content. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v.*

Town of Gilbert, 135 S. Ct. 2218, 2227 (2015). Speech restrictions are also content based if the law "cannot be 'justified without reference to the content of the regulated speech' or [was] adopted by the government 'because of disagreement with the message'" conveyed. *Id.* at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "Meanwhile, 'laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.'" *A.N.S.W.E.R. Coal. v. Basham*, 845 F.3d 1199, 1208 (D.C. Cir. 2017) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994)).

Here, the availability of the segregated account-based contribution limits does not depend on any "topic discussed or the idea or message expressed" in speech financed by funds contributed pursuant to those limits. *Reed*, 135 S. Ct. at 2227. Rather, what matters is the type of expenses the national party defrays with segregated account funds. Take, for example, the account that may be used to defray "expenses incurred with respect to a presidential nominating convention." 52 U.S.C. § 30116(a)(9)(A). FECA does not condition the availability of that account on the topics discussed or the message conveyed at that convention. A party could use the funds to support a potential presidential candidate, but it could also use them to pay for transportation of party officials to the event or to finance discussions on topics of interest to the party that are unrelated to its presidential

nominee. Along similar lines, a party could use FECA's headquarters account to purchase telephone service, and it would not matter whether the party uses its phones for fundraising, electoral advocacy, or to call a restaurant to order catering for a late-night meeting. *See* 52 U.S.C. § 30116(a)(9)(B). Although the availability of the segregated accounts to defray expenses depends on the *context* of the expenses (*e.g.*, the telephone must be in the party's headquarters), it does not depend on the *content* of speech related to those expenses (*e.g.*, what is said on the telephone).

The segregated account provisions, therefore, turn "not on the content of any speech, but on the desirability of providing to" national political parties access to additional funds for certain types of expenses. *A.N.S.W.E.R. Coal.*, 845 F.3d 1209. The provisions make "no reference at all to speech," but instead identify specific categories of party spending. *Id.* The law applies "equally to all" national party committees "regardless of viewpoint," message, or ideology. *Hill v. Colorado*, 530 U.S. 703, 719 (2000). A party's decision to engage in speech or communicative conduct does not "trigger[] coverage under the statute" depending on the message it chooses to impart. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010). Moreover, Congress justified adopting the segregated account provisions "without reference to the content of" any regulated speech and

not "because of disagreement with the message" any speech conveys. *Ward*, 491 U.S. at 791.

The LNC describes how contributions to the segregated accounts might be used for certain types of speech (Opening Br. at 44-47), but the applicability of the limits does not depend on whether a party chooses to convert the contributed funds into speech on any particular topic, or whether the funds are converted to speech at all. The LNC might use a headquarters account to make an architectural statement or hang a political sign in its window (*id*. at 45), but it might also use that account to pay for its mortgage or for cleaning services (JA 125-26). While all of those activities help the LNC spread its message, the applicability of FECA's contribution limits does not depend on the content of any speech. And in any event, the "level of scrutiny . . . does not turn on how the [LNC] chooses to spend the money." *Republican Nat'l Comm.*, 698 F. Supp. 2d at 156.

The Supreme Court has repeatedly blessed contribution restrictions that would have been content-discriminatory schemes under the approach the LNC proposes. In *Buckley*, the Court reviewed FECA's limit on contributions "made for the purpose of influencing" a federal election and rejected the Libertarian Party's argument that the statute regulated the content of speech. *Buckley*, 424 U.S. at 20-23; *cf. Hill*, 530 U.S. at 719-26 (holding that statute prohibiting "knowingly approach[ing]" a person "for the purpose of . . . engaging in oral

protest, education, or counseling" was content neutral). In *McConnell*, the Court rejected the LNC's call to apply strict scrutiny to a BCRA provision that permitted state party committees to use one account to raise funds subject to FECA's source and amount limitations for federal election activity, a separate account to raise limited Levin funds that could be used for mixed expenses and were not subject to source limitations, and a third account to raise funds limited only by state law for use in state and local elections. 540 U.S. at 139. Each of these statutory provisions regulated contributions depending on how the money was to be used, but that did not mean that they discriminated based on content.

C. Under Closely Drawn Scrutiny, FECA's Limits on Contributions to National Party Committees Remain Constitutional

FECA's limits on contributions to national party committees remain supported by the governmental interest in combating *quid pro quo* corruption and its appearance after Congress's 2014 amendments. As this Court has recognized, this "interest may properly be labeled compelling," and so it would satisfy either intermediate or strict scrutiny. *See, e.g.*, *Wagner v. FEC*, 793 F.3d 1, 8 (D.C. Cir. 2015) (*en banc*) (internal quotation marks omitted). The *McConnell* Court concluded that the "Government's strong interests in preventing corruption, and in particular the appearance of corruption, are . . . sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA." 540 U.S. at 145, 156. But that Court did not hold that the Constitution

required all contributions to political parties to be regulated to the same extent. Instead, it repeatedly invoked "deference" to Congress's "particular expertise" in structuring the limitations. *Id.* at 137; *see also id.* at 164, 171.

The Supreme Court has long deferred to legislative judgment on the specific amounts of limits on political contributions. *See, e.g.*, *Buckley*, 424 U.S. at 30. And in "practice, the legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248 (quoting *McConnell*, 540 U.S. at 137).

The LNC's primary argument that the segregated account provisions are not closely drawn to corruption concerns is that there is no sufficient basis to differentiate between contributions made under the pre-existing general limit and those subject to the higher, account-based limits. (Opening Br. at 50-58.) "This cluster of arguments misunderstands the government's burden in a campaign-finance challenge like this one." *Ill. Liberty PAC v. Madigan*, --- F.3d ----, No. 16-3585, 2018 WL 4354424, at *5 (7th Cir. Sept. 13, 2018). The Commission need not prove that the specific dollar amount of a limit independently furthers some corruption rationale. "The focus of the 'closely drawn' inquiry in this context is whether the contribution limits for individual donors are above the 'lower bound' at which 'the constitutional risks to the democratic electoral process become too

great.'" *Id.* (quoting *Randall*, 548 U.S. at 248). So long as the dollar limits "exceed that lower boundary, the Supreme Court has 'extended a measure of deference to the judgment of the legislative body that enacted the law.'" *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 737 (2008)).

This judicial deference remains appropriate even though Congress did not select a single, across-the-board limit for all contributions to national party committees. This Court's recent *en banc* decision in *Holmes v. FEC* essentially decided this point. 875 F.3d at 1162. There, this Court concluded that because contribution limits "can validly promote an anti-corruption objective," Congress need not separately justify each contribution limit's time period or dollar amount "with some added anti-corruption explanation." *Id.* at 1162-63. In reaching that conclusion, the Court pointed to *Buckley*'s analysis of FECA's original $1,000 per-election limit on contributions to federal candidates. *Id.* at 1162. "Having generally sustained" FECA's contribution limits, *Buckley* "did not ask whether Congress's choice of a flat, $1,000 limit — instead of a graduated scheme allowing for higher ceilings for certain elections — itself advanced the anti-corruption interest under the closely drawn test." *Id.* Instead, *Buckley* explained that once a court "was 'satisfied that some limit on contributions is necessary' to address corruption, it had 'no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'" *Id.* (quoting *Buckley*, 424 U.S. at 30).

Similarly here, it is undisputed that "*some* limit" on all contributions to national party committees is constitutionally permissible. *Buckley*, 424 U.S. at 30 (emphasis added); *see McConnell*, 540 U.S. at 156. Congress need not, therefore, separately justify its decision to adopt a "graduated scheme allowing for higher ceilings for" certain categories of expenses. *Holmes*, 875 F.3d at 1162; *see also Ill. Liberty PAC*, 2018 WL 4354424, at *4-5 (rejecting argument that the government must prove differences in contribution limits for different types of organizations are independently justified by corruption concerns).

Congress's 2014 amendments involved application of its "particular expertise" in the "costs and nature" of party expenses. *Randall*, 548 U.S. at 248. The provisions reflect a congressional effort to balance corruption concerns with providing "national political party committees with a means of acquiring additional resources" after the termination of public funding for presidential nominating conventions. 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); *see also* 160 Cong. Rec. H9074 (daily ed. Dec. 11, 2014) (statement of Rep. Cole) (expressing desire to ensure political parties "have the resources to compete"). This is precisely the concern the Supreme Court has instructed should animate legislatures, *Randall*, 548 U.S. at 247, and it is an indicator that the provision fits closely with the interest served.

Congress also concluded higher contribution limits were appropriate as to two other types of segregated accounts, for party committee headquarters and legal proceedings expenses, since those were less directly tied to the core electoral purpose of persuading voters. *See* 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner). As the district court found, the LNC's headquarters provides "full-time, professional support for the on-going political activities of the party" (JA 187 (internal quotation marks and alterations omitted)), but those purposes are less-directly tied to any particular candidate, election, or officeholder.

Congress likewise concluded that "recount and legal proceeding expenses" were "not for the purpose of influencing federal elections" under FECA and therefore could be subject to higher limits. 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner). To support this conclusion, Congress cited earlier Commission guidance explaining that, under FECA, a "contribution" includes any "payment of money . . . for the purpose of influencing a Federal election," but the statute's definition of an "election" does not include a recount. FEC Advisory Op. 2006-24 (NRSC/DSCC), 2006 WL 2918565, at *3 & n.1 (Oct. 5, 2006). As a result, pre-BCRA Commission authority excluded contributions to finance recounts from FECA's contribution limits, though restrictions on the permissible sources of contributions remained applicable. *Id.* BCRA altered this conclusion and required that recounts be financed through hard money funds. *Id.*;

see also FEC Advisory Op. 2009-04 (Franken/DSCC), 2009 WL 961213, at *2 (Mar. 20, 2009) (extending that analysis to national party committees). By providing a segregated account with a higher contribution limit to fund those expenses, Congress adopted a "refinement on the pre-BCRA regime" that had permitted those expenses to be funded by unlimited contributions. *McConnell*, 540 U.S. at 162.

The balance Congress struck is similarly supported by record evidence that national party committees place a higher value on unrestricted contributions than those that may only be used for designated expenses. (JA 197.) Indeed, the primary basis of the LNC's claim is that it prefers to receive unrestricted contributions, to the point that it has deprived itself of additional money it could have received through segregated accounts. (JA 215-16.) Other parties structure their fundraising strategies to ensure that contributions are first made to the parties' general account, and only then to the segregated accounts subject to the higher dollar limit. (JA 197.) And it is simple common sense that the more a political party values a contribution, the more likely that contribution will be or appear to be part of a *quid pro quo* corruption scheme.

The record also reflects that the segregated account provisions have achieved their goal of providing national parties with a means of acquiring additional resources without interfering with their general advocacy efforts. (*See*

JA 197.) As one national party committee explained, paying for legal expenses "with funds from a pre-existing legal proceedings account" did "not reduce by a dime the resources we can put towards our political work." (*Id.*)

The segregated account provisions are also justified because they "reinforce the First Amendment associational interests embodied in campaign contributions." *Holmes*, 875 F.3d at 1166. Like the separate primary and general elections at issue in *Holmes*, the segregated account provisions "concern distinct associational interests" insofar as each category of expenses serves "a different purpose" and "frequently feature[s] a discussion of different issues and priorities." *Id.* The LNC's experience bears this out. The LNC provides separate forms of recognition for donors specifically to its "building fund." (JA 186.) Donors like Chastain and Rufer who do "not want any part of" their contributions to be restricted or who do not believe the LNC "has much use for those spending" categories may choose to associate with the LNC only through its general fund. (JA 228, 230.) General contributions therefore "involve[] a different associational tie than contributing to" the more operational expenses reflected in the segregated account provisions. *Holmes*, 875 F.3d at 1166.

For all the space the LNC devotes to attacking the Commission's discovery responses (*see, e.g.*, Opening Br. 53-55, 57), those responses merely make the basic point that whether a particular contribution is or appears corrupt depends on

the circumstances. There is no objective amount at which a contribution becomes corrupting or appears as such. Congress needs to ensure that the burdens on contributions it imposes are generally proportionate to the corruption interest and meaningfully serve it. *McCutcheon*, 572 U.S. at 210-15. The Commission need not, however, prove a precise amount at which contributions become actually or apparently corrupt. *See Ill. Liberty PAC*, 2018 WL 4354424, at *5. For example, a payment of $1 in exchange for a legislator's official act would remain corrupt even though it would be within the relevant contribution limit. On the other hand, a payment of $1 million to a national party committee is not necessarily attempted corruption if it is made outside of a bargained-for exchange. This lack of an empirical standard is why courts have provided "a measure of deference to the judgment" of Congress in structuring contribution limits. *Davis*, 554 U.S. at 737.

The LNC also disputes Congress's logic in selecting the three categories for which segregated accounts may be created (Opening Br. at 52), but the LNC conflates the parties' required administrative costs with the ways in which the party might choose to use those funds. Citing nothing, the LNC asserts that the "*whole point* of presidential nominating conventions is to maximally benefit candidates for President and Vice-President, by selecting and showcasing them." (*Id.*) But historically, nominating conventions were more akin to an internal election, where delegates negotiated a platform and settled disputes over who

should be the nominee. *See, e.g.*, *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975) (describing the "National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates"); JA 187 (describing the "purpose" of the LNC's presidential nominating conventions). While many modern conventions may occur after nominees have been all but selected under party rules, FECA treats them as contested elections. *See* 52 U.S.C. § 30101(1)(B); 11 C.F.R. § 9008.2(g). Moreover, while parties might *choose* to "use buildings to feature signs and other displays supporting particular candidates" (Opening Br. at 52), the LNC admitted below that its primary purpose for maintaining a headquarters was the administrative support of its full-time professional staff (JA 187).

There is no evidence in the record that Congress selected these categories of expenses to burden minor parties. The LNC obliquely suggests that it is uniquely burdened by the categories Congress chose because it "speaks relatively little" through those categories. (Opening Br. at 56.) In fact, the district court found that the LNC "spent roughly $467,251.58 on 52 U.S.C. § 30116(a)(9)-sanctioned expenses in 2016," which reflects 20.6% of the LNC's budget for expenses that year. (JA 188.) In contrast, only approximately 17.4% of the Republican National Committee's total receipts were made through the segregated account provisions (JA 196), as were only 10.8% of the Democratic National Committee's (JA 195-

96). In any event, a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

More fundamentally, although Congress's effort to balance corruption concerns with the availability of party finances led it to conclude that a higher dollar limit was warranted for these categories of expenses, Congress did not exempt the expenses from FECA's contribution limits. By raising but not eliminating the limits on contributions to segregated accounts, Congress implicitly recognized that contributions for these categories of expenses still entail a risk of corruption and its appearance. Because of that risk, Congress mandated that all contributions to national party committees would be subject to FECA's "source limitations, prohibitions, and disclosure provisions," as well as the newly graduated dollar amount limits. 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner).

Congress was entitled to set that balance. It permitted an individual to give tens of thousands of dollars in funds that can be used on campaigns for particular candidates and hundreds of thousands of dollars in funds for activities that are more difficult to raise and less tied to particular candidates. Congress reasonably structured the limits in accord with the corruption risks and its obligation to ensure the parties can amass the resources for effective advocacy. The addition of the

segregated accounts expanded the amounts that can be contributed to national committees due to specific concerns and made the limits on parties even more closely drawn.

D. Applying the Segregated Account Limits to Shaber's Testamentary Contribution Is Constitutional

Application of the segregated account provisions to Shaber's testamentary contribution remains valid for the same reasons that applying FECA's general limit is constitutional. *See supra* at pp. 21-32. The LNC does not appear to make any separate argument that the segregated account provisions are uniquely burdensome when applied to testamentary contributions in general or Shaber's contribution in particular. Therefore, if the Commission is correct that FECA's general contribution limit may be constitutionally applied to that testamentary contribution and that the segregated account limits are facially constitutional, the LNC has provided no basis for the Court to rule differently on its as-applied challenge to the segregated account provisions.

E. If the Segregated Account Provisions Were Deemed Unconstitutional, the Appropriate Remedy Would Be to Revert Those Limits to the *Status Quo Ante*

If the LNC were to prevail on its argument that the segregated account provisions are unconstitutional, reverting to the pre-2014 *status quo* would be the appropriate remedy. "A court should refrain from invalidating more of the statute than is necessary," and therefore it is the court's "duty" to "maintain" an act of

Congress "in so far as it is valid." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks and alterations omitted). This question is "essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). Moreover, FECA's severability clause, 52 U.S.C. § 30144, "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. "In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Id.*

Consistent with its 40-plus years of efforts, the LNC briefly suggests that the Court should enjoin FECA's limits on contributions to national party committees in their entirety. Such a disruption and exposure of our democracy to Watergate-era level dangers of corruption is entirely unwarranted given that the overall amount of permitted contributions is unchallenged. The LNC also admits that there "is no evidence . . . that Congress would prefer to . . . have no limits at all." (Opening Br. at 63.) As the Court has previously upheld contribution limits from constitutional attack, there is also no question that reverting to a unitary general limit on contributions to national party committees would be both constitutional and workable. (*Id*. at 62.) There is, therefore, no basis to completely eliminate FECA's national party contribution limits.

The LNC's fallback proposal is for this Court to excise the statute's description of expenses for which segregated account funds may be used, but maintain the increased dollar limits. (Opening Br. at 60-63.) Presumably that would mean a person could contribute up to $339,000 to each national party committee per year for general use — an increase of 900%.

But Congress would not have accepted such a limit in the absence of the segregated account restrictions on how contributed funds could be used. There is simply no way to remove the segregated account requirements while maintaining a $339,000 contribution limit without doing the legislative work of rewriting the statute. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (stating that a statute must be "readily susceptible" to the narrowing construction and that the courts "will not rewrite" the law).

The best evidence that the text could not bear such alteration is the 2014 amendment itself. As relevant here, Congress's amendment added two provisions to FECA. First, it added the following language to the end of 52 U.S.C. § 30116(a)(1)(B): ", or in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year." Second, the amendment added three provisions at 52 U.S.C. § 30116(a)(9), which describe the types of accounts for which the higher limits apply. Striking the three provisions at

52 U.S.C. § 30116(a)(9) would eliminate the segregated accounts, but then donors would be limited to the general party limit because there would be no "accounts described in paragraph (9)" for which a higher limit could apply. 52 U.S.C. § 30116(a)(1)(B). Striking the newly added language in section 30116(a)(1)(B) would similarly revert the limits to their pre-amendment state. And of course striking the entire amendment would also maintain the prior, pre-amendment general limit. The LNC's approach of excising only the description of permissible categories of expenses, however, would create an odd and barely comprehensible regime of $33,900 per year plus $101,700 per year into each of three accounts that are separate without purpose. "Congress would not have enacted" the segregation requirement "had it known that" the categories of expenses "would be held unconstitutional"; therefore, the "two provisions must fall together." *Bismullah v. Gates*, 551 F.3d 1068, 1070 (D.C. Cir. 2009). And because the increased overall monetary cap does not "enjoy[] a textual manifestation separate from" the segregated account provisions governing the expenses on which they may be used, an increased general limit cannot be created through "textual surgery." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 883 (1997).

The fact that Congress did not simply raise the pre-existing general contribution limit also indicates that the specific segregated account provisions were essential to the amended structure. While the LNC suggests that there is no

difference between an unrestricted $339,000 contribution and a contribution in that amount placed in segregated accounts pursuant to section 30116(a)(9), Congress plainly disagreed. "Moreover, even if there were some ground compelling" the Court "to transform Congress's" segregated account provisions into a higher general limit, as the LNC suggests, this Court "could not assume that Congress necessarily would have chosen" to do so. *Holmes*, 875 F.3d at 1164. "Congress could conceivably regard a one-time contribution of" $339,900 into its general account "alone to present a greater risk of apparent or actual corruption than" multiple distinct lower contributions into each of a party's general and segregated accounts. *Id.* Should the Court agree with the LNC that the segregated account provisions are unconstitutional, the better approach would be to simply strike the entire amendment and leave to Congress the decision whether to set a higher general limit.

The LNC's final suggestion of a "judicial preference for extending benefits, 'rather than nullification'" has no place here. (Opening Br. at 63 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017)). The LNC is not bringing an equal protection claim that it is being denied benefits extended to others. Rather, Congress extended the benefit of the segregated account provisions to all political parties regardless of ideology or major party status. As a result, the question is not "whether the legislature would have struck an exception and applied the general

rule equally to all," because the general rule already applies equally to all. *Morales-Santana*, 137 S. Ct. at 1700. Instead, the question is whether Congress would have adopted the higher segregated account limits in the absence of the specific categorical restrictions it imposed. There is no evidence that it would.

CONCLUSION

This Court should answer all three certified questions in the negative.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,918 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF System.

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