**ORAL ARGUMENT SCHEDULED FOR MARCH 30, 2015**

No. 14-5281

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**LAURA HOLMES, *et al.***,
Plaintiffs,

v.

**FEDERAL ELECTION COMMISSION**,
Defendant.

Certified from the United States District Court for
the District of Columbia pursuant to 52 U.S.C. § 30110

# DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR REMAND

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January 22, 2015

The Federal Election Commission ("FEC" or "Commission") demonstrated in its remand motion that the district court failed to perform its mandatory duties under the Federal Election Campaign Act's special judicial review provision, 52 U.S.C. § 30110. Specifically, the court below erred by certifying constitutional questions to this Court without first determining whether such questions are frivolous or settled. It further erred by depriving the Commission of *any* opportunity to weigh in on that determination or to participate in the development of the factual record to accompany any properly certified questions.

Plaintiffs have responded to the Commission's demonstration by exaggerating the relief sought in the remand motion, misconstruing binding precedent regarding the district court's duty under section 30110, and declaring their claims to be "novel." (Opp'n at 9.) Plaintiffs' arguments regarding the merits of certification here are misplaced and, in any event, ignore what the district court explicitly recognized — the Supreme Court's holding "long ago" that the per-election contribution limits that plaintiffs challenge are constitutional because they "prevent corruption and the appearance of corruption by allowing candidates to compete fairly in each stage of the political process." (Joint Appendix ("J.A.") 48.) None of plaintiffs' arguments refutes the Commission's demonstration of the error in the district court's certification order. The Commission's motion should be granted.

## I. THE DISTRICT COURT ERRED IN FAILING TO DETERMINE WHETHER PLAINTIFFS' CHALLENGE RAISES A FRIVOLOUS OR SETTLED LEGAL QUESTION

Plaintiffs' opening argument (Opp'n at 2-6) that section 30110's use of the word "immediately" relieves the district court of its mandatory pre-certification functions defies over thirty years of this Court's — and the Supreme Court's — explicit holdings interpreting that provision. As the Commission explained in its remand motion, the Supreme Court and this Court have clearly and explicitly held that the statute's use of the term "immediately" does not require automatic certification of section 30110 cases that are frivolous, raise settled legal questions, or require a fully developed record. FEC Mot. at 6-7, 11-12, 18; *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192-94 nn. 13-14 (1981) ("*Cal. Med.*"); *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (per curiam); *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam). Notably, this Court's remand in *Buckley* occurred over Judge Bazelon's dissent, which advanced the same argument plaintiffs now make in emphasizing section 30110's "use of the word 'immediately.'" 519 F.2d at 821 (Bazelon, J. dissenting); *see also Int'l Ass'n of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1097 (D.C. Cir. 1982) (en banc) (per curiam) (reiterating that "immediately" does not preclude a district court's identification of

constitutional questions or preparation of a full factual record, because "it is undesirable to decide a constitutional issue abstracted from its factual context").

The Supreme Court and this Court have both explained that district courts play an important gatekeeping role in cases brought under section 30110. In *Cal. Med.*, the Supreme Court explained that district courts should only certify questions that are "neither insubstantial nor settled." 453 U.S. at 192 n.14. And in *Wagner*, this Court explained that district courts should only certify "non-frivolous constitutional questions" to the en banc court of appeals. 717 F.3d at 1009.

Plaintiffs do not — and cannot — refute the district court's obligation to make this threshold determination. Instead, plaintiffs focus (Opp'n at 4-6) on other language in the *Cal. Med.* opinion that in no way undermines the Court's interpretation of the certification mandate in section 30110. Plaintiffs also misconstrue this Court's opinion in *Wagner*. *Wagner* did not, as plaintiffs repeatedly argue (Opp'n at 10, 12, 14, 16), deprive the district courts in section 30110 cases of any ability to consider the merits. In *Wagner*, three individuals challenged a FECA provision *without* invoking section 30110. A panel of this Court concluded that the text and legislative purpose of section 30110 demonstrated that "the parties therein enumerated may bring actions challenging FECA's constitutionality only under that section." 717 F.3d at 1016. Most importantly here, the *Wagner* panel embraced the Supreme Court's interpretation

of the district court's threshold obligation under section 30110 to "determine whether the constitutional challenges are frivolous or involve settled legal questions." *Id.* at 1009 (citing, *inter alia*, *Cal. Med.*, 453 U.S. at 192 n.14).

Plaintiffs also fail to refute the Commission's demonstration that the district court failed to engage in that threshold analysis. Instead, plaintiffs posit that the court *implicitly* determined that their claims did not pose frivolous or settled questions of law "given that it certified questions to this Court." (Opp'n at 10.) But the district court's certification decision does not support plaintiffs' assumption that the court must have made such a determination *sub silentio*. The certification order on its face reflects the district court's uncertainty about whether it should determine if the "questions presented are 'frivolous' or 'settled principles of law'" and its consequential decision to certify them without making that determination "[i]n an abundance of caution." (J.A. 58.) Had the court actually concluded that plaintiffs' claims raise *un*settled legal questions, its certification decision would not have reflected the abundantly cautious approach the court said it was undertaking.

Plaintiffs' assumption is also inconsistent with the district court's explicit holding, in denying plaintiffs' preliminary-injunction motion, that plaintiffs' claims are untenable because they "challenge the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny." (J.A. 41; *see* J.A. 48 ("[T]he

Supreme Court has long ago concluded that restrictions on the amount of money one can contribute per election prevent corruption and the appearance of corruption by allowing candidates to compete fairly in each stage of the political process.").)

Plaintiffs' extended substantive arguments about the purported novelty of their constitutional claims (Opp'n at 6-9) are misplaced; such arguments are irrelevant to the question *whether the district court made that threshold determination*. In any event, and as explained above, the district court clearly disagreed with plaintiffs' own assessment of the novelty of their constitutional claims. Neither the record in this case nor logic support plaintiffs' hypothesis that the district court both explicitly concluded that plaintiffs' claims contradict "*Buckley v. Valeo* and its progeny," and silently determined that the same claims raise unsettled legal questions.

## II. THE FEC IS ENTITLED TO DUE PROCESS IN DISTRICT COURT PROCEEDINGS IN SECTION 30110 CASES AND ITS DUE PROCESS RIGHTS WERE VIOLATED HERE

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). The district court here, however, deprived the Commission of *any* opportunity to present its views on whether any constitutional questions should be certified to this Court, what any such questions should be, and what facts should be included in the record that

accompanies any such questions to this Court for en banc review. Plaintiffs, by contrast, were *ordered* by the district court to present their views on the certification question. (J.A. 56 (denying preliminary injunction and ordering plaintiffs to show cause why the court should not issue a final order declining to certify constitutional questions to the Court of Appeals for en banc consideration).)

Plaintiffs do not dispute that the Commission was deprived of the same opportunity. Instead, they assert, irrelevantly, the lack of any due process right "to avoid certification" and suggest that due process rights were not implicated in the proceedings below because the district court's certification determination did not itself "'resolve any lawsuit.'" (Opp'n at 19.) But due process rights are not so limited. The district court's certification order resulted in an en banc appellate proceeding to decide purported questions of constitutional law based on a factual record established without any input from the Commission. Surely the government has a right to present its views to the district court before it makes such a determination against the government's interests. If plaintiffs' cramped view of due process rights were correct, the FEC would have no due process rights whatsoever in district court proceedings in section 30110 cases. Plaintiffs have failed to provide any support for such a conclusion and, contrary to their suggestion (Opp'n at 19), the Commission's ability to defend against plaintiffs' challenges *in this Court* does not cure the deprivation of the FEC's due process

rights in the court below.

## III. THE DISTRICT COURT ERRED IN FAILING TO ALLOW ANY INPUT FROM THE COMMISSION IN DEVELOPING THE FACTUAL RECORD

As explained above and in the Commission's remand motion (Mot. at 17-18), this Court has recognized the "manifest" need for a "full-bodied" factual record in cases challenging the constitutionality of federal statutes. *Martin Tractor Co. v. FEC*, 627 F.2d 375, 380 (D.C. Cir. 1980) (section 30110 case). Indeed, in section 30110 cases in particular, this Court has explained that district courts "must [first] develop a record for appellate review by making findings of fact." *Wagner*, 717 F.3d at 1009. And as previous section 30110 cases demonstrate, and as due process requires, *see supra* pp. 5-6, district courts must allow the parties to participate in developing the factual record, including by conducting discovery and submitting proposed findings of fact. (*See* FEC Mot. at 19 (collecting cases).) The district court's immediate certification here precluded the Commission from conducting even limited discovery or submitting *any* proposed findings of fact that could help this Court review the constitutionality of the challenged provisions, to the extent that such review is even warranted.

Plaintiffs do not dispute that district courts in other section 30110 cases frequently have permitted the FEC to participate in the development of the factual record by allowing discovery and submissions of proposed findings of facts. They

simply (and erroneously) suggest (Opp'n at 16) that the district court had the discretion to deprive the FEC of such an opportunity and that the Commission lacked any due process right to participate in the fact-finding process.

Plaintiffs' subjective assessment that the factual record certified here "is sufficient" (Opp'n at 12) fails to refute the Commission's demonstration that it was deprived of any opportunity to participate in the record-development process. Likewise flawed is their suggestion (Opp'n at 14-15) that the Commission should have anticipatorily presented all of its arguments regarding certification and the factual record *in its preliminary-injunction opposition*, *i.e.* the only brief the Commission was permitted to submit during the proceedings below. Plaintiffs themselves undermine that suggestion when they argue (Opp'n at 11) that the district court's preliminary-injunction determination "has no bearing on" the separate determinations required under section 30110. And plaintiffs simply ignore that the district court ordered plaintiffs, *but not the FEC*, to submit a brief specifically on the certification question and then quickly issued its certification decision without providing the FEC any opportunity to respond. (*See* J.A. 3-4.)

Plaintiffs purport to respond (Opp'n at 12) to objections that the Commission "had no opportunity to conduct trial-length discovery" or to "extensively brief proposed findings of fact" but the Commission has never made any such objections. Nor has Commission indicated any desire for "multiple *years*

of extensive discovery." (Opp'n at 12-13, 16.) Likewise inaccurate is plaintiffs' suggestion that the Commission seeks "further" or "additional discovery and briefing." (*Id.* at 17.) The FEC was not permitted to conduct *any* discovery or to submit *a single brief* on the issues of certification and the factual record.

Plaintiffs offer no support for their suggestion that the additional time required for even limited discovery and factual briefing justify depriving the FEC any opportunity to weigh in on the factual record here. They emphasize that a panel of this Court in *Wagner* instructed the district court to make appropriate findings of fact and certify constitutional questions within five days of its remand order, but ignore that extensive district court proceedings, *including discovery*, had already occurred in earlier stages of that case. 717 F.3d at 1009.

Plaintiffs' First Amendment concerns (Opp'n at 18) are also unavailing. As the Commission previously explained, the plaintiffs in *Buckley* and *Khachaturian v. FEC*, 980 F.2d 330 (5th Cir. 1992), also brought First Amendment claims, yet this Court and the Fifth Circuit remanded those cases. (*See* FEC Mot. at 11, 12, 18, 19.) More fundamentally, plaintiffs' argument assumes that which the district court concluded plaintiffs could not likely establish (*see* J.A. 41) — that the per-election limit *caused* their alleged First Amendment injuries. Indeed, the district court concluded that any injury plaintiffs may have suffered was self-inflicted: "That Plaintiffs *elected not to exercise their right of free expression* before the

primary election does not render the law unconstitutional as applied." (J.A. 47 (emphasis added).)

Finally, plaintiffs' own satisfaction with the "sufficiency" of the factual record here does not demonstrate that the record is actually complete. (Opp'n at 12.) Both here and in the court below, plaintiffs have relied on *assumptions* about the behavior and intentions of individuals that contributed to their preferred candidates' opponents. (*E.g.*, Pls.' Principal Br. at 6, 16, 20.) Although the FEC maintains that even these unsubstantiated assumptions cannot salvage plaintiffs' claims, if this Court is to review those claims, the Commission should have been permitted to test and refute plaintiffs' unsubstantiated assumptions before any constitutional questions are considered and decided by this Court.

## CONCLUSION

For the foregoing reasons and those set forth in the Commission's motion, this Court should remand this case to the district court.

Respectfully submitted,

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January 22, 2015

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| Defendant. | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of January, 2015, I electronically filed the Commission's Motion for Remand with the Clerk of the Court of United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system.

Service was made on the following through the CM/ECF system:

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