ORAL ARGUMENT SCHEDULED: MARCH 30, 2015 AT 9:30 AM

No. 14-5281

In the

United States Court of Appeals
for the District of Columbia Circuit

LAURA HOLMES, ET. AL,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

On questions certified by the United States District Court
for the District of Columbia under 52 U.S.C. § 30110

Plaintiffs' Opposition to Defendant FEC's Motion for Remand

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INTRODUCTION

This is a straightforward, narrow constitutional challenge, which Plaintiffs pursue under a compulsory statutory procedure. 52 U.S.C. § 30110.[1] This Court recently held that "Congress's objective when it enacted [§ 30110]… was, and is, speed." *Wagner v. FEC*, 717 F.3d 1007, 1013 n. 6 (D.C. Cir. 2013). It went on to note, quoting the Supreme Court, that "[t]he most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal." *Id.* at 1014 (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980)).

Nevertheless, by seeking a remand, the Federal Election Commission ("FEC" or "Commission") essentially seeks "first review" by the district court. This is improper, as § 30110 "continues to pretermit review by district courts and panels of courts of appeals." *Id*. at 1015. Moreover, the FEC's approach would add months, if not years, to a process Congress deliberately singled out for expedition.

District courts are required by 52 U.S.C. § 30110 to "*immediately* certify" questions of BCRA's constitutionality "to the *en banc* [C]ourt of [A]ppeals." *Id*. at 1009 (emphasis supplied). In doing so, lower courts are required to find the facts necessary to determine the merits of the case, and certify such facts to the Court of

[1] This statute was previously codified at 2 U.S.C. § 437h. To avoid confusion, parties referred to it as such below. Plaintiffs now adopt the new codification.

Appeals along with all constitutional questions. *Id*. This is a direct, compulsory procedure, which the district court appropriately performed. The FEC has not argued (let alone demonstrated) that the facts certified are insufficient to decide the questions before this Court under § 30110. It has also failed to cite a single decision that would render the specific questions Plaintiffs present "insubstantial" or "frivolous." Thus, its motion for remand should be denied, and the merits of this case heard in this Court, as Congress unambiguously commanded.

ARGUMENT

I. Section 30110 is clear, is not discretionary, and was properly invoked here.

Section 30110 is brief, and deserves to be read in its entirety:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

52 U.S.C. § 30110.

This language is not ambiguous. It requires district courts to "immediately" certify "all question of constitutionality." The command is forceful and clear. The Supreme Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992) (collecting cases). Having noted and given effect to unambiguous statutory language, "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Nevertheless, the Commission states that "[t]he Supreme Court has held that use of section 30110 is subject to a number of restrictions and should be construed narrowly." FEC Mot. at 6. Its support for this position comes from two footnotes in *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981) ("*Cal. Med.*"), and a short passage in *Bread PAC v. FEC*, 455 U.S. 577 (1982).

The Commission's first error is to claim—three times—that "[c]ourts are to construe the availability of section 30110 narrowly." FEC Mot. at 2, 6, 16. Its support for this proposition is *Bread PAC v. FEC*. There, a PAC sought to invoke § 30110's "unique system of expedited review" even though, as a corporation, it was plainly not one of the "three carefully chosen classes of persons" named in the statute: the FEC itself, national party committees, and natural persons eligible to vote for President. 455 U.S. at 581. The Court rejected the PAC's "expansive construction" in favor of the statute's "obvious meaning." *Id*. In doing so, the Court noted the potential burden Congress placed upon the judiciary, and concluded that in such cases "close construction of statutory language takes on added importance" because "[j]urisdictional statutes are to be constructed with precision and with fidelity to the terms by which Congress has expressed its wishes." *Id.* (quotation marks and citation

omitted). *Bread PAC* simply cannot be read as requiring § 30110 to be construed "narrowly"—a characterization the Court never used, and one at odds with the text of the opinion.

The Commission's other Supreme Court authority is *Cal. Med.*, where the FEC attempted—unsuccessfully—to narrow the scope of § 30110 review. Specifically, the Commission asked the Court to "preclude the use of [§ 30110] actions to litigate constitutional challenges to the Act that have been or might be raised as defenses to ongoing or contemplated Commission enforcement proceedings." *Cal. Med.*, 453 U.S. at 189. The Court declined to adopt this "cramped construction of the statute," noting the "all-encompassing language" of § 30110. *Id.* at 190, 191; *see also id.* at 190 ([§ 30110] expressly requires a district court to 'immediately…certify *all* questions of the constitutionality of this Act' to the court of appeals." (emphasis original)). Furthermore, it stated that the Commission's interpretation would "undermine the very purpose" of the statute, which is "to provide a mechanism for the rapid resolution of constitutional challenges to the Act." *Id.* at 191.

The two footnotes the Commission cites are not to the contrary. Both dealt with the burdens § 30110 imposes upon the judiciary, burdens that were far heavier when *Cal. Med.* was decided, as they included since-repealed provisions providing for direct Supreme Court review and requiring that cases be "expedited to the

greatest possible extent." FEC Mot. at 7 (noting the repeal of the "greatest possible extent" provision); *Cal. Med.*, 453 U.S. at 192 nn. 13-14. Despite those burdens, the very passages the Commission cites chide the *Cal. Med.* dissent for "exaggerat[ing] the burden [§ 30110] actions have placed on the federal courts." *Id.* at 192 n. 13. In particular, the Court noted that "only a handful" of such cases had been heard, including six cases during the two-year period from 1979-1980. *Id.*

Moreover, the Court opined that any "concerns about the potential abuse of [§ 30110] are in large part answered by other restrictions on the use of that section." *Id.* at 192 n. 14. Importantly, the restrictions the Court refers to are principally "the constitutional limitations on the jurisdiction of the federal courts," including standing. *Id.* They also include the ability to avoid constitutional issues through "resolution of unsettled questions of statutory interpretation," and the ability to dismiss "frivolous" or "purely hypothetical" claims. *Id.* The FEC would interpret this paragraph by reference solely to the use of the word "insubstantial," shorn of the context demonstrating that word to be merely a synonym for "frivolous" as that term is generally used by the courts.

Taken together (or even reading only the few paragraphs and footnotes upon which the FEC relies), both *Bread PAC* and *Cal. Med.* evidence a determination to give effect to § 30110's provisions as Congress enacted them. They cannot be fairly read to create a judicially imposed exemption from the district court's duty to

"immediately" certify "all" constitutional questions raised by a party with standing. That is precisely what the district court, with fidelity to the commands of the statute and the Supreme Court, did here.

A. As the district court's decision to certify questions demonstrates, Plaintiffs' claims are not frivolous. Thus, Congress's clear grant of exclusive jurisdiction to this Court should be heeded.

Plaintiffs pose narrow constitutional questions. They concede that *Buckley v. Valeo* foreclosed challenges to the general existence of FECA's individual contribution limits. 424 U.S. 1, 28-29 (1976) (upholding the individual contribution limits as targeted to "the narrow aspect of political association where the actuality and potential for corruption have been identified"). But the Supreme Court has clearly stated that the only constitutionally cognizable reason for limiting contribution limits is to "target what [it has] called '*quid pro quo*' corruption or its appearance…the notion of a direct exchange of an official act for money." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

For that reason, and under that rubric, Plaintiffs challenge only the bifurcation of the individual contribution limit into primary and general elections, as applied to their circumstances.

i. Because the Supreme Court has not foreclosed Plaintiffs' as-applied challenge, certification to this Court under § 30110 was proper.

For the FEC's motion for remand to succeed, the Supreme Court must have directly ruled on the certified question so as to foreclose relief.[2] *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (*en banc*) ("In a § [30110] case, the district court need not certify legal issues that have been resolved by the Supreme Court"). If the Court has not done so, then Plaintiffs' case merits certification, and remand is inappropriate. *Int'l Ass'n of Machinists and Aerospace Workers v. FEC*, 678 F.2d 1092, 1096 (D.C. Cir. 1982) (*en banc*) (under § 30110, the district court certifies questions that are "neither frivolous nor so insubstantial as to warrant dismissal for failure to state a claim"); *Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1335, 1339 (D.C. Cir. 1975) (constitutional question is "substantial" unless Supreme Court has "foreclose[d] the subject" and left "no room for the inference that the question sought to be raised can be the subject of controversy").

Consequently, in the § 30110 context, courts have found that narrow, as-applied challenges are sufficiently "substantial" and certification is appropriate, even

[2] Plaintiffs' challenge is clearly not a "sophistic twist" within the meaning of *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990) (dismissing as "creative" and "sophistic" contributor's suggestion that, because he contributed anonymously, the individual contribution limit upheld in *Buckley* was inapplicable to him).

in cases concerning contribution limits upheld facially by the Supreme Court.[3] *Cao v. FEC*, 688 F. Supp. 2d 498, 533 (E.D. La. 2010) *aff'd som. nom. Republican Nat'l Comm. v. FEC (*In re *Anh Cao)*, 619 F.3d 410 (5th Cir. 2010) (certified question concerning $5,000 contribution limit as applied to a political party's PAC giving to a candidate); *Buckley*, 424 U.S. at 35-36 (upholding the $5,000 contribution limit for PACs giving to candidates) .

ii. There exists no authority foreclosing a challenge to the bifurcated contribution limit as it applies to Plaintiffs and those similarly situated.

The FEC suggests that *Buckley* forecloses this case because it held that "FECA 'applies the same limitations on contributions to all candidates'" and rejected arguments that the law discriminates against major-party challengers to incumbents, explaining that '[c]hallengers can and often do defeat incumbents in federal elections.'" FEC Mot. at 4 (quoting *Buckley* at 31, 32.) The Commission misunderstands Plaintiffs' equal protection argument. As Plaintiffs noted below, its

[3] In its briefing, the FEC accords talismanic importance to whether a provision has been "blessed"—that is, facially reviewed and upheld by the Supreme Court. FEC Mot. at 14 ("[A] party challenging a statute that has previously been upheld bears a greater burden than a party challenging a statute for the first time"). The FEC's sole support for this "blessed" standard is *Khachaturian v. FEC*, which, as discussed in some detail *infra*, challenged whether contribution limits ought to apply to independent candidates—a question upon which the *Buckley* Court squarely ruled. Such a case was obviously "frivolous" or "insubstantial." The question is whether the *case* is novel, not whether a statute has been previously upheld against a different legal challenge espousing a different legal theory.

challenge "is not based on an incumbent/challenger distinction, but rather the asymmetry posed whenever a candidate who faces a primary challenge competes in the general election against a candidate who ran virtually unopposed during the primary." Pl. Reply Mem. on Mot. for Prelim. Injunction (Dkt. 13) at 11.

The FEC also suggests that it was inappropriate for the district court to certify questions because *Buckley* found that "courts should not second-guess Congress's decisions regarding the exact dollar figure at which to set a contribution limit." FEC Mot. at 4 (citing 424 U.S. at 30). But the bifurcated limit allows supporters of candidates without primary challengers to contribute twice as much money for the general election. This is not simply an exercise in legislative discretion in setting dollar amounts. *Compare Buckley*, 424 U.S. at 30. It *doubles* the scope of association that certain contributors enjoy, and does so as a matter of statutory and regulatory design. Moreover, the FEC's redesignation provision merits not a single mention in the *Buckley* opinion. Finally, the bifurcation of the individual contribution limit has never been directly challenged, so the FEC has never offered an anti-corruption rationale for that portion of the federal statute.

Simply put, Plaintiffs bring a novel, yet straightforward, case of substantial constitutional importance. Consequently, the district court appropriately certified Plaintiffs' two constitutional questions.

iii. The FEC's suggestions that the district court was somehow "uncertain" about certification, or failed to find that Plaintiffs' case was novel, are meritless.

The FEC's next complaint is a procedural argument that the district court "clearly failed to make th[e] threshold determination" that Plaintiffs' case was not foreclosed by Supreme Court precedent. FEC Mot. at 13. The Commission predicates this argument—for which it accuses the district court of committing "reversible error," a phrase usually reserved for appeals—on the district court's use of the words "abundance of caution." *Id*. But the district court's order plainly used that phrase to modify its earlier statement "that Plaintiffs were unlikely to succeed on the merits of their constitutional challenge to FECA." Cert. Order at 1. The district court explicitly and correctly recognized that it did not have jurisdiction to decide the merits. *Id*. at 1-2 (citing 52 U.S.C. § 30110); *Wagner*, 717 F.3d at 1011 (§ 30110 "grants exclusive merits jurisdiction to the *en banc* court of appeals"). The court also did not "find[] the questions presented" to be "'frivolous' or 'settled principles of law,'" given that it certified questions to this Court. Cert. Order at 2 (citing *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 165 (D.D.C. 2013) (quoting *Khachaturian*, 980 F.2d at 331)). The district court recognized that while it might not agree with the merits of Plaintiffs' claims, that question was a decision for this Court. Indeed, if nothing else, the district court's "caution" demonstrates that it approached the certification issue with requisite seriousness.

iv. The district court's denial of Plaintiffs' motion for a preliminary injunction has no bearing on this Court's jurisdiction under § 30110.

The FEC suggests that the district court, in denying Plaintiffs' motion for a preliminary injunction, "conclude[ed] that plaintiffs' claims appear to lack merit and are contradicted by multiple Supreme Court decisions." FEC Mot. at 15. It also considers the district court's certification "particularly troubling because its opinion…found that plaintiffs challenge[d] a settled legal question." *Id*.

Plaintiffs reiterate that the district court considered the merits of this case only insofar as it was asked to grant the extraordinary remedy of preliminary relief. The standard for certifying questions under § 30110 and the standard for granting a preliminary injunction are vastly different. *See, e.g., SpeechNow.org v. FEC*, 567 F.Supp. 2d 70 (D.D.C. 2008) (denying plaintiffs' motion to enjoin enforcement of certain contribution limits); 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) (certifying constitutional questions to this *en banc* Court)). The showing required to certify questions is minimal, akin to that required to survive a motion to dismiss under FED. R. CIV. P. 12(b)(6). *Goland*, 903 F.2d at 1257-58 (comparing § 30110 certification standard to three judge court provision of 28 U.S.C. § 2284, and describing the showing required as "closely resembl[ing] that applied under Rule 12(b)(6)").

Moreover, with respect to certifying questions, whether a district court finds a § 30110 plaintiff's arguments compelling on the merits is irrelevant—§ 30110 "grants exclusive merits jurisdiction to the *en banc* court of appeals." *Wagner*, 717 F.3d 1011; *compare* FEC Mot. at 15 (suggesting remand is appropriate because the district court believed "'Plaintiffs challenge the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny'") (quoting *Holmes v. FEC*, 2014 U.S. Dist. LEXIS 148826 at 1-2 (D.D.C. Oct. 20, 2014)).

But Judge Collyer's denial of a preliminary injunction never suggested that Plaintiffs raised a "frivolous," "insubstantial," "foreclosed," or obviously "settled" case. Rather, on the merits, Judge Collyer decided that establishing "[t]he per-election limit…is a quintessential political decision made by politicians who understand the process far better than the courts and is deserving of deference." *Holmes*, 2014 U.S. Dist. LEXIS at 12. But this Court might well disagree—and the district court has, again, no jurisdiction to reach the merits.

B. The factual record the district court certified is sufficient to resolve Plaintiffs' constitutional questions.

i. The district court need only certify facts necessary and sufficient for this Court to decide a § 30110 challenge.

The FEC objects that "the district court's immediate certification order deprived this Court of a full factual record" because the parties had no opportunity to conduct trial-length discovery, or to extensively brief proposed findings of fact.

FEC Mot. at 20. The Commission believes that the district court's decision to "ma[k]e findings of fact culled from plaintiffs' multiple court filings and the single brief (opposing plaintiffs' preliminary-injunction motion) that the Commission has filed" failed to provide this Court with "a *complete* factual record that reflects input from both parties." *Id*. (emphasis FEC's). But § 30110 does not require that a district court engage in intensive, trial-like discovery and factfinding before certifying questions to the Court of Appeals. In fact, this Court has explicitly contemplated—and accepted—that § 30110 "results in a less-focused record than ordinary litigation." *Wagner,* 717 F.3d at 1015.

District courts are merely required to certify such facts as are *necessary* to resolve the constitutional questions a certified case presents. *Cal. Med.*, 453 U.S. at 192 n. 14 (immediate certification improper only "where the resolution of such questions *require[s]* a fully developed factual record"); *Wagner*, 717 F.3d at 1017 (district court need only "make appropriate findings of facts, *as necessary*, and to certify those facts…") (emphasis supplied); *Khachaturian v. FEC*, 980 F. 2d at 332 ("As the Supreme Court has made clear, the district court also must develop a record and make findings of fact *sufficient* to allow the *en banc* court to decide the constitutional issues") (emphasis supplied); *Buckley v. Valeo*, 519 F.2d 817, 819 (D.C. Cir. 1975) (*en banc*) (ordering district court to "[t]ake whatever may be *necessary* in the form of evidence" and "[m]ake findings of fact") (emphasis

supplied). Here, the district court did certify those facts that are necessary and sufficient to decide the questions it certified. It had the option to request briefing or proposed facts, or to order discovery. It chose, pointedly, not to do so. This decision was sound, given Plaintiffs' narrow challenge. The facts that the district court certified regarding the FEC, the Plaintiffs and their preferred candidates in 2014, the statutory scheme, and the procedural background are enough for this Court to speedily resolve this case under § 30110.[4] *Wagner*, 717 F.3d at 1011 (§ 30110 "grants exclusive merits jurisdiction to the *en banc* court of appeals").

Nonetheless, the Commission complains that it was never given "any opportunity to respond to plaintiffs' arguments, to otherwise urge the court not to certify questions, or, alternatively, to present the Commission's views regarding what questions should be certified and what facts should be included in the record." FEC Mot. at 10-11 (citing *Khachaturian*, 980 F.2d at 331-332) (5th Circuit found the district court had "premature[ly]" certified constitutional questions "on an *ex parte* order without giving the FEC an opportunity to respond," depriving itself of "the benefit of briefing" from the parties).

But the district court *did* hear the Commission's arguments—as well as what facts it considered necessary to evaluate the merits of this case—when the FEC

[4] In fact, as regards this Motion, the FEC has not actually suggested any missing facts that render this Court incapable of resolving this case.

briefed its successful opposition to Plaintiffs' preliminary injunction motion. Opp'n to Mot. for Prelim. Injunction (discussing the parties, relevant statutes, and arguments against Plaintiffs' constitutional claims). The situation in *Khachaturian* was very different: there, the district court considered *no* briefing and made *no* factual findings. 980 F.2d at 332. In fact, Khachaturian filed his complaint and motion to expedite on September 29, 1992—and that complaint constituted the *entirety* of the record sent to the *en banc* Court of Appeals. *Khachaturian*, No. 92-3232 (E.D. La. 1992) (Dkts. 1 and 2). The FEC was not even given time to answer Khachaturian's complaint. 980 F.2d at 332 ("The district court made no such findings [of fact] in this case. In fact, it certified the case to this court on an *ex parte* order, without giving the FEC an opportunity to respond").

Moreover, Mr. Khachaturian, unlike Plaintiffs here, sought to bring a claim squarely foreclosed by *Buckley*. He "contend[ed] that the Federal Election Campaign Act's $1,000 limit on campaign contributions [wa]s unconstitutional as applied to his candidacy." *Khachaturian*, 980 F.2d at 330. Since *Buckley* had already "considered, and rejected, claims that the contribution limit invidiously discriminates against independent and minor-party candidates as a class," the Court of Appeals determined that "Khachaturian must demonstrate that the $1,000 limit had a serious adverse effect on the initiation and scope of his candidacy." *Id*. at 331. Because the complaint had not done so, the Fifth Circuit remanded to the district

court to consider whether Mr. Khachaturian's case was frivolous. *Id*. at 332. In *this* context, the Fifth Circuit noted that "immediate adjudication" by the Court of Appeals "would be improper…where the resolution of such questions required a fully developed factual record." *Id*. at 331 (citing *Cal. Med.*, 453 U.S. at 192) (quotation marks omitted). But a factual record both necessary and sufficient to determine the outcome of *this* case *has* already been developed and certified.

The FEC may be correct that § 30110 motions have "frequently involved…allowing the parties to conduct discovery and submit proposed findings of fact." FEC Mot. at 19. Nevertheless, deciding how facts are to be determined and certified remains well within the discretion of the district court, should it consider additional facts necessary to resolve a constitutional issue. Moreover, all of the cases the FEC cites in attacking the sufficiency of the facts certified here were decided *before* this Court's ruling in *Wagner*. This is important because *Wagner* deprived district court of jurisdiction to hear the merits of Plaintiffs' case, and reaffirmed § 30110's purpose as ensuring "the public's interest in having questions of FECA's constitutionality speedily resolved." 717 F.3d at 1013. Plaintiffs submit that the practice of allowing multiple *years* of extensive discovery, dueling factual

submissions, and—effectively—summary judgment briefing contradicts the clear language of § 30110.[5]

Here, there is no need for the district court to conduct additional discovery and briefing. *Wagner*, 717 F.3d at 1013. Further delay would only frustrate the public interest and legislative intent undergirding § 30110.

ii. A remand to district court would create substantial delay, burdening both Plaintiffs' constitutionally protected expression, and the sound functioning of the federal courts.

The FEC's central concern is "burden[ing] the court of appeals [so] as to impede the sound functioning of the federal courts." FEC Mot. at 12 (citation and quotation marks omitted). Plaintiffs are surprised that the Commission raises such concerns, given its insistence upon protracting this litigation with this motion, its demand for further discovery, and its belief that the district court must consider additional, extensive, unnecessary factors before certification. This case is scheduled for oral argument, and Plaintiffs file their opening brief on the merits

[5] *See SpeechNow.org v. FEC*, No. 08-248 (D.D.C. 2009) (district court, *after* deciding that certifying questions was appropriate, spent July 29, 2008-September 29, 2009 overseeing discovery and competing briefing on findings of fact) (Dkt. 40, Dkt. 73); *Libertarian Nat'l Comm. v. FEC*, No. 11-562 (D.D.C.), 13-5094 (D.C. Cir.) (after two years of extensive discovery, briefing on findings of fact and oral argument in district court, and full briefing and a written opinion concerning FEC's FED. R. CIV. P. 59e motion, certified question about constitutionality of contribution limits as applied to bequests was ultimately mooted because so much time had passed that the bequest's *res* dropped below the contribution limit); *Mariani v. FEC*, 80 F. Supp. 2d 352, 354 (M.D. Pa. 1999) (district court spent 216 days between finding questions non-frivolous and issuing findings of fact).

contemporaneously with this brief. For all its concern about "assuring that section 30110 does not disrupt the dockets of the courts of appeals," granting the FEC's motion would be disruptive to both this Court and the district court. FEC Mot. at 16. Moreover, remand would likely impose additional First Amendment injury.

"A constitutional challenge to FECA's provisions clouds the rights and obligations of all Americans in the area of utmost constitutional protection. Th[is] uncertainty was precisely what the Congress sought to remove by commanding expedited resolution of challenges to FECA." *Wagner*, 717 F.3d at 1014. The entire purpose of § 30110 is to ensure that First Amendment challenges are resolved with dispatch, so as to prevent this harm. *Buckley*, 519 F.2d at 819 (observing the "intention of Congress for expedition in appellate disposition").

As Chief Justice Roberts observed in a controlling opinion, litigation involving fundamental First Amendment freedoms "must entail minimal *if any* discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007) (emphasis supplied). "[E]xtensive discovery," on the other hand, inevitably creates "litigation [which] constitutes a severe burden on political speech" and association. *Id.* at 468 n. 5. This Court has, in the past, taken pains to avoid such extensive proceedings. In *Wagner*, for example, this Court allowed just "five days" for "the district court to make appropriate findings of fact, as necessary,

and to certify those facts and the constitutional questions to the *en banc* court of appeals." 717 F.3d at 1017. Here, the necessary facts and the constitutional questions are already before this Court. There is no need for further delay.

III. Because certification of questions pursuant to § 30110 does not dispose of or resolve a case, the Commission's due process objection is misplaced.

The FEC suggests that the district court's decision to certify constitutional questions amounts to a violation of the fundamental equitable principle that "[n]o 'lawsuit[] can[] be resolved with due process of law unless *both* parties have had a fair opportunity to present their cases.'" FEC Mot. at 10 (quoting *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974)) (emphasis FEC's).

This assertion is deeply flawed. In certifying questions, the district court was not purporting to "resolve" any lawsuit—a position the FEC has itself taken in another case. *Libertarian Nat'l Comm. v. FEC*, No. 11-562, Order on Mot. for Taxation of Costs (Dkt. 72) at 2 (D.D.C., Dec. 12, 2014) (denying LNC's bill of costs on the grounds that obtaining certification of a constitutional question is not a "favorable judgment" or a "court-ordered change in the legal relationship of the parties…accompanied by judicial relief") (citation and quotation marks omitted). There is no due process right to avoid certification to this Court. The Commission has a full opportunity to defend the constitutionality of the challenged statute before this Court, precisely as Congress intended.

CONCLUSION

The Commission's motion for remand should be denied.

Respectfully submitted this 12th day of January, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2014, I electronically filed Plaintiffs' foregoing Opposition to the FEC's Motion for Remand with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system. I further certify that the requisite number of paper copies were hand delivered to the Clerk's office.

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