ORAL ARGUMENT NOT YET SCHEDULED

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 MOTION FOR REMAND

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January 2, 2015

Plaintiffs Laura Holmes and Paul Jost challenge the constitutionality of FECA's $2,600 per-election limit on individual contributions to candidates as applied to certain general-election contributions they each wished to make. They invoked a special review provision of the Federal Election Campaign Act ("FECA" or "Act"), 52 U.S.C. § 30110 (formerly 2 U.S.C. § 437h),[1] which allows voters and certain other parties to bring constitutional challenges to FECA in the district courts, which must make findings of fact, screen the case for nonfrivolous constitutional questions, and then certify any such questions to the en banc court of appeals.

The Federal Election Commission ("FEC" or "Commission") seeks an order remanding this case to the district court because that court failed to perform its mandatory functions under section 30110. That special review provision requires district courts in cases properly brought under its strictures to determine as a threshold matter whether the constitutional challenge is insubstantial or raises a settled legal question. The district court erred by failing to make that determination for this challenge to a longstanding contribution limit *that the Supreme Court has repeatedly upheld*. That error was particularly striking in light of the district court's earlier conclusion, in denying the plaintiffs' motion for a

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. To avoid confusion, this submission will indicate in parentheses the former Title 2 citations.

preliminary injunction, that plaintiffs were unlikely to succeed on the merits because their claims "challenge the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny" and the court "does not have that luxury." *Holmes v. FEC*, No. 14-1243, __ F. Supp. 3d __, 2014 WL 5316216, at *1 (D.D.C. Oct. 20, 2014). In certifying questions of constitutionality to this Court, the district court acknowledged its holding that plaintiffs were unlikely to succeed on the merits of their constitutional claims, but appeared uncertain whether substantiality screening was appropriate and certified the questions "[i]n an abundance of caution." *Holmes v. FEC*, No. 14-1243, __ F. Supp. 3d __, 2014 WL 6190937, at *1 (D.D.C. Nov. 17, 2014) (attached as Exh. 1). Courts are to construe the scope of matters appropriate for certification narrowly, and the court below did the opposite, erring on the side of certification. The district court also improperly deprived the Commission of any opportunity to address whether the constitutional issues here met the standard for certification.

Another requirement of district courts in section 30110 cases is to develop a full record. Here, the district court did not allow for record development or the proposal of relevant facts by the parties. If this case did present any nonfrivolous constitutional questions, the district court would thus also have committed error and deprived this Court a complete factual record.

The district court's failure to perform its mandatory functions under section 30110 directly contravenes repeated admonishments from the Supreme Court and this Court. Left uncorrected, the district court's actions here will likely lead to further improper certifications and needless diversions of this Court's entire roster of active judges in future matters. This Court should provide guidance to lower courts and remand the case to the district court with instructions to fulfill its duties under section 30110.

BACKGROUND

I. FECA'S PER-ELECTION CONTRIBUTION LIMITS

The individual contribution limits challenged here apply on a per-candidate, per-election basis, with "election" defined to include, *inter alia*, general, special, primary, and runoff elections. 52 U.S.C. § 30101(1) (2 U.S.C. § 431(1)).

Shortly after they were enacted, the Supreme Court affirmed the constitutionality of FECA's individual contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), holding that the limits were consistent with both the First and Fifth Amendments. *Id.* at 35. The Court found that the limits serve the government's important anti-corruption interests, explaining that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. The Court also explained that the limits

were further justified by the "almost equal[ly] concern[ing] . . . impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27.

The *Buckley* Court also rejected an equal protection challenge to FECA's individual contribution limits. The Court observed that FECA "applies the same limitations on contributions to all candidates" and rejected arguments that the limits discriminate against major-party challengers to incumbents, explaining that "[c]hallengers can and often do defeat incumbents in federal elections." *Id.* at 31, 32. "[T]he danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents," the Court explained, concluding that "Congress had ample justification for imposing the same fundraising constraints upon both." *Id.* at 33. Observing that courts should not second-guess Congress's decisions regarding the exact dollar figure at which to set a contribution limit, the Court also concluded that FECA's then-$1,000 contribution limit was neither unconstitutionally overbroad nor unreasonably low. *Id.* at 30.

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), amended FECA to raise the individual limit and index it for inflation. *See* BCRA § 307(b), 116 Stat. 102-103 (codified at 52 U.S.C. § 30116(a)(3) (2 U.S.C. § 441a(a)(3))); BCRA § 307(d), 116 Stat. 103 (codified at 52 U.S.C. § 30116(c) (2 U.S.C. § 441a(c)(1))). The limit that applied to

contributions made to federal candidates during the 2013-2014 election cycle was $2,600 per candidate, per election.[2] Because FECA defines "election" to include various types of electoral contests, the total amount that one may contribute to a particular candidate during a particular election cycle depends on the number of elections in which that candidate participates in pursuit of federal office.

Commission regulations explain the rules for determining to which election a particular candidate contribution is attributed. Contributors "are encouraged" to designate in writing the particular election for which an individual contribution is intended. 11 C.F.R. § 110.1(b)(2)(i). If a contributor does not make a written designation, his contribution is treated as if intended for "the next election for that Federal office after the contribution is made." *Id.* § 110.1(b)(2)(ii).

A contributor may designate his contribution in writing for a particular election even after that election has occurred, but in such cases the contribution must not exceed the candidate's net debts outstanding from the designated election. 11 C.F.R. § 110.1(b)(3)(i). In the event that a candidate's net outstanding debts amount to less than the amount of a contribution designated for a previous election, FEC regulations permit the candidate (or his committee) to refund the contribution,

[2] FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013).

reattribute it from a different person, or redesignate it for a different election. *Id.* § 110.1(b)(3)(i)(A)-(C).

II. SECTION 30110 PROCEDURE

Section 30110, the special judicial-review provision plaintiffs invoke, was added to FECA in 1974 to provide expedited consideration of anticipated constitutional challenges to the extensive amendments to FECA that year. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1285-1286 (1974). Section 30110 provides that voters and certain other parties "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." 52 U.S.C. § 30110 (2 U.S.C. § 437h).

The Supreme Court has held that use of section 30110 is subject to a number of restrictions and should be construed narrowly, in part because it creates "a class of cases that command the immediate attention of . . . the courts of appeals sitting en banc." *See Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982). If a section 30110 claim passes other threshold inquiries, a district court "should perform three functions. First, it must develop a record for appellate review by making findings of fact. Second, [it] must determine whether the constitutional challenges are frivolous or involve settled legal questions." *Wagner v. FEC*, 717

F.3d 1007, 1009 (D.C. Cir. 2013) (per curiam) (internal citations omitted). The Supreme Court has described the frivolousness inquiry in this context as a determination whether the issues are "insubstantial." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) ("*Cal. Med.*"). And third, only then should it "certify the record and all non-frivolous constitutional questions" to the *en banc* court of appeals. *Wagner*, 717 F.3d at 1009; *see* 52 U.S.C. § 30110 (2 U.S.C. § 437h).

Section 30110 was enacted in 1974 and proposed by Senator Buckley to ensure that constitutional questions regarding FECA were expeditiously resolved. *Wagner*, 717 F.3d at 1013. It originally provided "for direct appeal to the Supreme Court" and required "both the courts of appeals and the Supreme Court 'to advance on the docket and to expedite to the greatest possible extent' any matter certified," but Congress deleted those provisions in 1984 and 1988. *Id.* at 1010. Any person in the enumerated classes of persons in section 30110 — which includes voters such as plaintiffs here — wishing to file constitutional challenges to FECA in this Circuit must use the procedures of section 30110. *Id.* at 1012-15.

III. PROCEDURAL BACKGROUND

Plaintiffs Laura Holmes and Paul Jost, American citizens who are married to each other, brought this suit in July 2014 alleging that FECA's per-election limits on contributions to candidates violate their First Amendment right of association and their Fifth Amendment right to equal protection of the laws. *Holmes*, 2014

WL 5316216. Both plaintiffs contributed the maximum permitted $2,600 to their preferred candidates for those candidates' general-election campaigns, and refrained from contributing to such candidates before their primaries out of a belief that their contributions would otherwise have been "'wasted in an intraparty squabble.'" *Id.* at *4. Both plaintiffs wished to make an additional $2,600 contribution to their preferred candidates' general-election campaigns, which would bring their total general-election contributions to those candidates to $5,200, twice the per-election limit. *Id.* at *2.

Plaintiffs moved for a preliminary injunction alleging that FECA's $2,600 per-election limit is unconstitutional as applied to plaintiffs' desired $5,200 general-election contributions. *Id.* at *2. The district court denied plaintiffs' motion, explaining that it did not have the "luxury" of overruling *Buckley v. Valeo*, which upheld the then-$1,000 per-election limit on contributions, and its progeny. *Id.* at *1. The district court further explained that "the 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." *Id.* at *4 (citing *Buckley*, 424 U.S. at 26-27). And it quoted the Supreme Court's recognition in *Buckley* that "'the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents,'" as well as the Court's corresponding

conclusion that "there is 'ample justification for imposing the same fundraising constraints upon both.'" *Id.* (quoting *Buckley*, 424 U.S. at 33).

The district court found that plaintiffs' equal protection claims were similarly unlikely to succeed on the merits. Again relying on *Buckley*, the court explained that "[p]laintiffs have not been treated differently than any other contributor because [FECA] 'applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations.'" *Id.* at *5 (quoting *Buckley*, 424 U.S. at 31). The court further found that none of the other preliminary-injunction factors weighed in favor of granting plaintiffs' motion. *Id.* at *6-7.

Having concluded that plaintiffs' claims appeared to lack any merit, the district court ordered plaintiffs to show cause why the court should not convert the order denying their preliminary-injunction motion into a final appealable order that denied their request to certify constitutional issues to this Court for en banc consideration. (Dist. Ct. Docket No. 16.) Plaintiffs responded by arguing that their challenge did not raise settled legal questions. (Dist. Ct. Docket No. 17.)

On November 12, 2014, the district court — without having provided the Commission any opportunity to respond to plaintiffs' show-cause response or to otherwise take a position regarding the relevant record in this case and what if any constitutional questions merited certification — issued an order listing two dozen

findings of fact and certifying two constitutional questions to this Court for en banc consideration. Dist. Ct. Docket No. 18; *see Holmes* 2014 WL 6190937 (reissued certification order with minor revisions). After expressing apparent uncertainty regarding whether it should screen the questions presented to determine whether they are frivolous or settled questions, the court made findings of fact and certified questions to this Court "[i]n an abundance of caution." 2014 WL 6190937, at *1.[3]

ARGUMENT

I. THE DISTRICT COURT'S CERTIFICATION ORDER VIOLATED DUE PROCESS

No "lawsuit[] can[] be resolved with due process of law unless *both* parties have had a fair opportunity to present their cases." *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974) (emphasis added). The district court failed to provide the Commission this opportunity. Upon denying plaintiffs' preliminary-injunction motion, the court ordered the plaintiffs to show cause why it should not also deny the request in their complaint to certify constitutional questions. Plaintiffs filed a response and nine days later the district court issued its certification order. But it never gave the Commission any opportunity to respond to plaintiffs' arguments, to otherwise urge the court not to certify any questions, or, alternatively, to present the Commission's views regarding what questions should be certified and what

[3] On December 2, 2014, this Court ordered that merits briefing commence with a brief by plaintiffs on January 9, 2015. Unless the Court orders otherwise, that briefing is deferred pending resolution of this motion. D.C. Cir. R. 27(g)(3).

facts should be included in the record. This alone marks a fundamental departure from the adversarial process and merits a remand. *See Khachaturian v. FEC*, 980 F.2d 330, 331-32 (5th Cir. 1992) (remanding section 30110 case where district court had "premature[ly]" certified constitutional questions "on an ex parte order, without giving the FEC an opportunity to respond," and thus deprived itself of "the benefit of briefing" from the parties).

II. THE DISTRICT COURT FAILED TO DETERMINE WHETHER PLAINTIFFS' CHALLENGE RAISES A FRIVOLOUS OR SETTLED LEGAL QUESTION

The Supreme Court has made clear that district courts play an important gatekeeping role in determining whether to certify constitutional questions to the circuit courts, explaining that district courts should only certify questions under section 30110 when the issues presented are "neither insubstantial nor settled." *Cal. Med.*, 453 U.S. at 192 n.14. Recently, in *Wagner*, this Court reiterated that only *after* a district court determined whether the constitutional challenge is frivolous or involves settled legal questions could the court "certify the record and all non-frivolous constitutional questions." 717 F.3d at 1009.

The Supreme Court construed section 30110 in this manner for good reason. Certification of questions to courts of appeals sitting en banc necessarily disrupts their dockets. Section 30110 creates "a class of cases that command the immediate attention of . . . the courts of appeals sitting en banc, displacing existing caseloads

and calling court of appeals judges away from their normal duties." *Bread Political Action Comm.*, 455 U.S. at 580.[4] Screening for settled questions reduces "the burden [the special review procedure places] on the federal courts" and prevents its "potential abuse." *Cal. Med.*, 453 U.S. at 192 nn.13-14. FECA "is not an unlimited fountain of constitutional questions"; the Court expected resort to the provision "will decrease in the future" and that the special review procedures would thus not pose "any significant threat to the effective functioning of the federal courts." *Id.* at 192 n.13. Substantiality screening was one of the "restrictions on the use of" the special procedure that led the Court to conclude that the provision would not be subject to "abuse" and would not so "burden" the courts of appeals as to impede "the sound functioning of the federal courts." *Id.* at 192-94 nn.13-14.

Lower courts have generally been faithful to the Supreme Court's command. In *Khachaturian*, however, the Fifth Circuit was forced to remand a section 30110 challenge that had been certified by a district court to the en banc appellate court, explaining that the district court "did not make the requisite threshold inquiry . . .

[4] Part of the Supreme Court's concern in *Bread Political Action Committee* was the requirement in the statute at that time that section 30110 proceedings be expedited. 455 U.S. at 580. Though the expedition provision has been repealed, section 30110 "continues to pretermit review by district courts and panels of courts of appeals and that pretermission undoubtedly serves the Congress's goal of expedition." *Wagner*, 717 F.3d at 1014 (noting that expedition repeal changed only section 30110's "volume, not its tune"). It thus continues to pose a danger of docket disruption.

whether this challenge is frivolous." 980 F.2d at 331. "[T]he district court should first determine whether Khachaturian's claim is frivolous in light of *Buckley*," the Fifth Circuit explained, and "[i]f no colorable constitutional claims are presented on the facts as found by the district court, it should dismiss the complaint." *Id.* at 332.[5]

The court below clearly failed to make that threshold determination. Instead, it simply certified constitutional questions and factual findings "[i]n an abundance of caution." *Holmes*, 2014 WL 6190937, at *1. This was reversible error. This Court has held that district courts "*must* determine whether the constitutional challenges are frivolous or involve settled legal questions," *Wagner*, 717 F.3d at 1009 (emphasis added), and the district court failed to do so here.

[5] *See also, e.g.*, *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 161 (D.D.C. 2013) (explaining that section 30110 "does not require certification of frivolous or settled principles of law") (internal quotations marks omitted); *Mariani v. United States*, 80 F. Supp. 2d 352, 354 (M.D. Pa. 1999) (same); *Cao v. FEC*, 688 F. Supp. 2d 498, 501 (E.D. La 2010) ("The district court's task is to determine whether the constitutional challenge is frivolous.") (internal quotations marks omitted); *Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (dismissing claims in case invoking section 30110 procedure and explaining that certification was intended to be available "only where a 'serious' constitutional question was presented" (quoting Senator James L. Buckley, sponsor of the amendment that became Section 30110, 120 Cong. Rec. 10562 (1974))); *Buckley v. Valeo*, 387 F. Supp. 135, 138 (D.D.C. 1975) (indicating that section 30110 certification is appropriate where "a substantial constitutional question is raised by a complaint"), *remanded on other grounds*, 519 F.2d 817 (D.C. Cir. 1975).

Like a single judge who is asked to convene a three-judge court to hear a constitutional challenge, a district court may decline to certify a question under Section 30110. *See Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990); *Mott v. FEC*, 494 F. Supp. 131, 133 (D.D.C. 1980). And even if a question differs slightly from settled law it may still decline to certify. *See Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (*en banc*) ("[N]ot every sophistic twist that arguably presents a 'new' question should be certified.") (quoting *Goland*, 903 F.2d at 1257).

Accordingly, a challenge does not merit certification merely because it purports to be "as applied." *Khachaturian*, like the instant case, involved an as-applied challenge to a contribution limit that had earlier been facially upheld in *Buckley*. The Fifth Circuit noted that a party challenging a statute that has previously been upheld bears a greater burden than a party challenging a statute for the first time. *Khachaturian*, 980 F.2d at 331 (explaining that "'questions arising under 'blessed' provisions [of FECA] understandably should meet a higher threshold' of frivolousness" (quoting *Goland*, 903 F.2d at 1257)). The district court failed to make even a basic frivolousness determination, let alone apply the higher standard appropriate for this challenge to a longstanding contribution limit repeatedly upheld by the Supreme Court. *See Holmes v. FEC*, 2014 WL 5316216,

at *3-*6 (concluding that plaintiffs' claims appear to lack merit and are contradicted by multiple Supreme Court decisions).

The district court's error is particularly troubling here because its opinion denying plaintiffs' motion for a preliminary injunction found that plaintiffs challenge a settled legal question. The district court explained that plaintiffs were unlikely to prevail on the merits of their claims because their challenge is foreclosed by Supreme Court precedent: "Plaintiffs challenge the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny. This Court does not have that luxury." *Holmes*, 2014 WL 5316216, at *1. The district court's prior holding and its improper application of an "abundance of caution" standard make clear that the court neither explicitly nor implicitly determined that this case presents a substantial constitutional question warranting consideration by the full Court of Appeals.

The court cited the determination by another district court in *SpeechNow.org v. FEC*, Civ. No. 08-0248, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2008) ("*SpeechNow*"), that a district court's only "prerogative under section [30110]" was to certify constitutional questions, rather than to render judgment of any kind. *Holmes*, 2014 WL 6190937, at *1. The court also cited a more recent decision from another district court, in *Libertarian National Committee, Inc. v. FEC*, 930 F. Supp. 2d 154, 165 (D.D.C. 2013), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir.

Feb. 7, 2014) (per curiam), in which that court explained that it could not certify "frivolous" or "settled" questions to the Court of Appeals. *Holmes*, 2014 WL 6190937, at *1. The court's certification out of "caution" thus appears to stem from uncertainty whether it was within its "prerogative" to decline to certify frivolous or settled questions. The court may have misunderstood the quoted language from *SpeechNow*, as the district court judge in that case had earlier reviewed the proposed questions for substantiality.[6] In any event, the court was not only permitted to decline to certify such questions, it was required to do so.

Courts are to construe the availability of section 30110 narrowly, *Bread Political Action Comm.*, 455 U.S. at 580, and the district court did precisely the opposite here. The district court's gatekeeping role is critical in assuring that section 30110 does not disrupt the dockets of courts of appeals. The district court's certification here portends just such a disruption. If district courts reflexively certified all section 30110 cases "in an abundance of caution" — even those in which the court has found the challenge foreclosed by Supreme Court precedent — these interferences with the functioning of courts of appeals would soon follow.

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[6] *SpeechNow*, 2009 WL 3101036, at *1 (referencing that the court had "agreed to certify five . . . questions"); *see also* Order, *SpeechNow.org v. FEC*, No. 08-0248 (JR) (D.D.C. July 29, 2008) (Docket No. 40) (certifying questions following briefing by the parties regarding frivolousness).

III. THE DISTRICT COURT FAILED TO DEVELOP A FULL RECORD AS REQUIRED IN SECTION 30110 CASES

The district court denied plaintiffs' preliminary-injunction motion based primarily on its conclusion that plaintiffs are unlikely to prevail on the merits because their constitutional challenge to FECA's per-election contribution limits is foreclosed by *Buckley* and other Supreme Court decisions. *Holmes v. FEC*, 2014 WL 5316216, at *3-*6. The Commission agrees with that conclusion, which suggests that the court would have denied certification if it had actually fulfilled its duty to determine whether plaintiffs' legal challenge is frivolous or involves settled legal questions. *See Wagner*, 717 F.3d at 1009. But if constitutional questions are to be certified to this Court, it is vital that the Court have before it a complete factual record that reflects input from both parties. Indeed, this Court has explained that in section 30110 cases, district courts "must [first] develop a record for appellate review by making findings of fact." *Wagner*, 717 F.3d at 1009 (internal citations omitted). The Supreme Court and this Court have long emphasized the importance of developing a full factual record in section 30110 cases, notwithstanding its provision for "immediate[]" certification.

In *Cal. Med.*, for example, the Court rejected Justice Stewart's concern that "[s]ection [30110] litigation will often occur . . . without the fully developed record which should characterize all litigation." 453 U.S. at 208 (Stewart, J., dissenting). The majority explained that, "as a practical matter, *immediate* adjudication of

constitutional claims through a § [30110] proceeding *would be improper* in cases where the resolution of such questions required a fully developed factual record." *Id.* at 192 n.14 (emphases added).

Even before *Cal. Med.*, this Court recognized the importance of thorough factual records compiled with the assistance of the parties in section 30110 cases. When *Buckley v. Valeo* first came before this Court, it did so without a record. This Court, en banc, remanded the case with instructions to the district court to "[t]ake whatever may be necessary in the form of evidence *over and above* submissions that may suitably be handled through judicial notice." 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam) (emphases added); *compare id.* at 821 (Bazelon, J. dissenting) (emphasizing section 30110's "use of the word 'immediately'"). Following proceedings in which the parties conducted discovery and proposed factual findings, the case returned with an "augmented" record. *Buckley v. Valeo*, 519 F.2d 821, 903 (D.C. Cir. 1975) (en banc) (per curiam).

"Because of the great gravity and delicacy of (the courts') function in passing upon the validity of an act of Congress, the need is manifest for a full-bodied record in such adjudication." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 380 (D.C. Cir. 1980) (section 30110 case) (footnotes and internal quotation marks omitted).

Moreover, in developing those facts, district courts must allow the parties to participate. *See Buckley*, 519 F.2d at 818 (remanding section 30110 case with instructions to the district court to "[t]ake whatever may be necessary in the form of evidence over and above submissions that may suitably be handled through judicial notice"); *Khachaturian*, 980 F.2d at 332 (remanding with the same instructions as in *Buckley* and suggesting that district court conduct an evidentiary hearing). Such participation has frequently involved, at a minimum, allowing parties to conduct discovery and submit proposed findings of fact. *See, e.g.*, Scheduling Order, *LNC v. FEC*, No. 11-562 (D.D.C. July 27, 2011) (Docket No. 20) (attached as Exh. 2) (setting deadlines for discovery and the filing of proposed findings of fact and responses to proposed findings of fact); Minute Order, *Cao v. FEC*, No. 08-4887 (E.D. La. Feb. 26, 2009) (Docket No. 41) (attached as Exh. 3) (same); *Mariani v. United States*, 80 F. Supp. 2d 352, 355 (M.D. Pa. 1999) ("[P]arties were directed to submit proposed findings of fact following the completion of pertinent discovery.").

Even in *SpeechNow.org v. FEC*, the only case cited as purported support for the decision below, the court certified questions under "the unique procedure" in section 30110 "following discovery" and the submission of proposed findings of fact by the parties. *SpeechNow.org*, 2009 WL 3101036, at *1.

Here, the district court's immediate certification order deprived this Court of a full factual record. The parties had no opportunity to conduct any discovery, to submit proposed findings of fact, or to respond to the other party's proposed findings of fact. Instead, the district court appears to have made findings of fact culled from plaintiffs' multiple court filings and the single brief (opposing plaintiffs' preliminary-injunction motion) that the Commission has filed thus far in the underlying proceedings. To the extent any constitutional questions are to be certified to this Court, such certified questions must be accompanied by a *complete* factual record that reflects input from both parties.

CONCLUSION

For the foregoing reasons, this Court should remand this case to the district court.

Respectfully submitted,

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January 2, 2015

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FEDERAL ELECTION COMMISSION,	)	CERTIFICATE OF SERVICE
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd 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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