UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLMES, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. No. 14-1243 (RMC)
FEDERAL ELECTION COMMISSION,	)	RESPONSE BRIEF
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S BRIEF IN RESPONSE TO PLAINTIFFS' OPENING BRIEF REGARDING CERTIFICATION

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The Federal Election Commission has demonstrated that plaintiffs' claims are moot and that plaintiffs' own dissatisfaction with the Federal Election Campaign Act's ("FECA") per-election contribution limit, which the Supreme Court has upheld, does not present any substantial constitutional question. Plaintiffs' opening brief and proposed facts confirm both the mootness and insubstantiality of their constitutional claims, which plaintiffs now admit are actually premised on a federal regulation that they are not challenging in this case, not the statutory contribution limit they seek to have rewritten. Indeed, plaintiffs' own recent submissions undermine the erroneous premise of their constitutional claims, *i.e.* that FECA contains a "bifurcated" $5,200 per-election-cycle contribution limit, which purportedly "allow[s] some contributors to give $5,200 for the general election." (Pls.' Br. at 29.) Not only is that assertion tellingly absent from plaintiffs' proposed facts, plaintiffs affirmatively concede, as they must, that FECA's per-election limit applies "separately with respect to each election," and that "*in 2014*, individual persons *could* contribute no more than $2,600 per candidate, per federal election." (Pls.' Proposed Facts ¶¶ 3, 5.)

Plaintiffs' request for certification hinges not only on their mischaracterizations of FECA but also on their erroneous assertion that this Court must certify *any* proposed constitutional question unless the Supreme Court has previously ruled on the same provision based on the same facts and the same legal theory. That exceedingly narrow interpretation of this Court's gatekeeping role under 52 U.S.C. § 30110 is wrong, as even plaintiffs' own authorities demonstrate.

For the reasons below and those detailed in the FEC's opening brief, no constitutional questions should be certified and this case should be dismissed as moot or summary judgment should be awarded to the Commission.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A PROBABILITY THAT *THEIR OWN* PURPORTED INJURY WILL RECUR IN THE FUTURE

As we have previously explained, plaintiffs' moot claims cannot survive unless plaintiffs submit evidence of a "demonstrated probability" that "the same controversy will recur *involving the same complaining party*." (FEC's Br. Opposing Certification and in Support of Summ. J. in Favor of the Commission at 15 (Docket No. 27) ("FEC Br.") (collecting cases) (emphasis added).) Plaintiffs have failed to meet that standard here: they have not even proposed a single fact concerning *any* future contributions plaintiffs intend to make, let alone submitted evidence of planned future contributions to general-election candidates whose opponents will have lacked "substantial primary opponents." Plaintiffs rely instead on their erroneous claim that some contributors "could give $5,200 solely for use in the general election, while [plaintiffs] were denied that same ability" and the generalized prediction that "this . . . will continue to occur in future electoral cycles" (Pls.' Opening Br. Regarding Certification at 20-21 (Docket No. 25) ("Pls.' Br."). Even setting aside plaintiffs' false premise, which their own Proposed Facts for Certification ¶¶ 3, 5 (Docket No. 26) ("Proposed Facts"), contradict, their prediction fails to demonstrate that *plaintiffs* will likely face their alleged injury in the future. (*See* FEC Br. 15-16.)

II. THE QUESTIONS PRESENTED HERE ARE SETTLED AND INSUBSTANTIAL, AND MUST NOT BE CERTIFIED TO THE EN BANC COURT OF APPEALS

The Court of Appeals has explained that in section 30110 cases, district courts "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). This important gatekeeping function ensures that only legal questions that are unsettled and substantial are certified to the en banc courts of appeals. *See Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) (explaining that section 30110 cases "displac[e] existing caseloads and call[] court of appeals

judges away from their normal duties"). FECA "is not an unlimited fountain of constitutional questions." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981).

As the Commission has explained (FEC Br. at 13), constitutional challenges are only to be certified when the issues are "neither insubstantial nor settled." *Cal. Med. Ass'n*, 453 U.S. at 192 n.14. That is plainly the case here, where plaintiffs' constitutional claims are both foreclosed by Supreme Court decisions *and* premised on completely erroneous characterizations of a federal statute and a Supreme Court decision. *Holmes v. FEC*, No. 14-1243 (RMC), 2014 WL 5316216, at *1, *4 & n.5, *5 (D.D.C. Oct. 20, 2014) (explaining that plaintiffs' claims are contrary to "the analysis and conclusions of the Supreme Court in *Buckley v. Valeo* and its progeny," rejecting plaintiffs' characterization of FECA's per-election contribution limit as a $5,200 per-election-cycle limit, and rejecting plaintiffs' suggestion that Congress or the Supreme Court in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014), approved $5,200 contributions for a single election).

Plaintiffs nevertheless urge certification by relying on their own relaxed interpretation of the certification standard that would require certification of virtually every case brought under section 30110: "whether a case challenging the same provision, under the same legal theory, premised upon the same or similar facts, has been presented to and decided by the Supreme Court." (Pls.' Br. at 8.) Plaintiffs' microscopic interpretation of the scope of legal questions that would not be certified under section 30110 lacks support from any case and instead reflects only what plaintiffs believe should be "the heart of the inquiry." (*Id.*)

Various courts, including the D.C. Circuit, have construed section 30110 in a manner consistent with the district courts' important gatekeeping function and contrary to the manner urged by plaintiffs. In *Wagner*, the D.C. Circuit explained that the question before the district

court is whether the plaintiffs' claims are "frivolous *or* involve settled legal questions," 717 F.3d at 1009 (emphasis added). The Fifth Circuit has explained that only if a district court "concludes that colorable constitutional issues are raised from the facts" should it certify questions for en banc review. *Khachaturian v. FEC*, 980 F. 2d 330, 332 (5th Cir. 1992) (en banc) (per curiam); *see also Cao v. FEC*, 688 F. Supp. 2d 498, 502 (E.D. La. 2010) (quoting same). And in *Goland v. United States*, the Ninth Circuit affirmed the district court's denial of certification of questions that "d[id] not fall outside the principles" established by Supreme Court precedent. 903 F.2d 1247, 1253 (9th Cir. 1990). *See infra* pp. 12-13 (citing additional cases properly applying the standard for certification under section 30110).[1]

Plaintiffs' invented certification standard is also contrary to the decisions it cites (Pls.' Br. 6-14) as purported support for applying that standard here. In *Goland*, the plaintiff brought suit under section 30110 to challenge the constitutionality of FECA's contributions limits and disclosure provisions, which he alleged infringed his First Amendment right to contribute anonymously. 903 F.2d at 1252. The district court concluded that the challenge was foreclosed by *Buckley* and declined to certify any constitutional question, and the plaintiff appealed. *Id.* at 1249.

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[1] Plaintiffs also cite (Pls.' Br. at 8) as analogous the substantiality standard for determining whether a case should be certified to a three-judge court. The Commission agrees that the standard articulated in *Feinberg v. Federal Deposit Insurance Corporation*, 522 F.2d 1335, 1339 (D.C. Cir. 1975), for certification to a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284, is instructive in the similar context of certification to the en banc court of appeals under FECA. But plaintiffs' selective quotation of the Court of Appeals decision in *Feinberg* underscores their distortion of the relevant standard. *Compare* Pls.' Br. at 8 (quoting portions of standard articulated in *Feinberg*), *with Feinberg*, 522 F.2d at 1339 (explaining that "[c]onstitutional claims may be regarded as insubstantial *if they are* '*obviously without merit*,' or *if their* '*unsoundness so clearly results from the previous decisions of* (*the Supreme Court*) as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'") (citations omitted, emphasis added to highlight language omitted by plaintiffs).

A three-judge panel of the Ninth Circuit Court of Appeals affirmed, notwithstanding the fact that the proposed constitutional questions were "in a sense . . . novel" and based on "unusual facts," because "they d[id] not fall outside the principles established in the cases upholding FECA's contribution limits and disclosure requirements." *Id.* at 1253. The court rejected the plaintiff's argument that the Supreme Court in *Buckley* did not consider questions concerning anonymous contributions to minor party candidates. "The issues Goland raises," the court explained, "were resolved by the Court in *Buckley*, and no feature of his admittedly distinctive factual situation distinguishes his case." *Id.* at 1258. Specifically, the court explained that *Buckley* had approved the application of contribution limits to minor party candidates and those limits served to deter corruption even where contributions were made anonymously. *Id.* at 1259. The importance of protecting anonymous political activity, the court continued, provided no reason to revisit the Supreme Court's conclusion in *Buckley* that FECA's reporting and disclosure requirements "justified the indirect burden imposed on first amendment interests." *Id.* at 1260. Thus, even though the Supreme Court in *Buckley* had *not* considered the same legal theory or facts presented in *Goland*, a three-judge panel of the Ninth Circuit upheld the district court's refusal to certify the constitutional questions presented in that case.

Goland thus plainly does not support plaintiffs' suggestion that certification is required unless the Supreme Court has ruled on the same facts and legal theory. (*Contra* Pls.' Br. at 9 (discussing *Goland* as a purported example of plaintiffs' broad interpretation of the certification standard).) Indeed, plaintiffs here are no more able to escape the dispositive effect of *Buckley* than Goland was, notwithstanding his "distinctive" factual scenario. It is not necessary for the Supreme Court to have considered and rejected the exact same legal theory and the exact same or

similar facts for a district court to conclude that a proposed section 30110 challenge is not appropriate for certification in light of more generally governing Supreme Court precedent.

Judge Wilkins's decision in *Libertarian National Committee v. FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013) ("*LNC*"), *aff'd in part*, No. 13-5094, 2014 WL 509973 (D.C. Cir. 2014), stands for the same proposition. In *LNC*, the plaintiffs sought certification under section 30110 of the question whether FECA's annual contribution limits to political party committees as applied to testamentary bequests violated the First Amendment. *Id.* at 156. The district court found that plaintiffs' broad question was foreclosed by *Buckley*, even though the Supreme Court had not squarely addressed bequests in that decision (or any other). *Id.* at 165-66 (explaining that the Supreme Court had upheld contribution limits in *Buckley* and "the as-applied challenge brought by the LNC . . . impermissibl[y] . . . raises issues that the Supreme Court has already addressed"). The court explained that bequests generally "may very well raise the anti-corruption concerns that motivated the *Buckley* and *McConnell* Court to dismiss a facial attack on contribution limits," notwithstanding the fact that neither of those cases analyzed contribution limits in the specific context of bequests. *Id.* Thus, in *LNC* too, the absence of a Supreme Court decision that considered and rejected the exact same legal theory and facts did not preclude the court from declining to certify a proposed section 30110 challenge given broadly governing Supreme Court authority.

It is true, as plaintiffs observe, that the court in *LNC* reframed the constitutional question plaintiffs had proposed in order to certify a "valid, narrower" question regarding the specific bequest at issue in that case. *Id.* at 171. The district court noted that the specific factual circumstances of the case suggested that the anticorruption interests in that particular case may have been minimal. *Id.* at 170-71. Those circumstances included not only that the bequestor had

died, but also that the recipient had virtually no contact with the bequestor before he died or with his heirs or representatives after his passing. *Id.* Assuming that certification was correct,[2] here there is no "valid, narrower" question the Court could certify (and plaintiffs have not even attempted to identify one). The question certified in *LNC* concerned the constitutionality of limits on a particular contribution in completely aberrant circumstances, a question that neither the Supreme Court nor any other court had specifically addressed. Here, however, plaintiffs pose no unique circumstances whatsoever with respect to reducing the danger of corruption and its appearance. The double-the-limit general-election contributions plaintiffs sought to make would implicate precisely the same corruption concerns as excessive contributions made by any other contributors, including contributors who *did* make primary contributions. (*See* FEC Br. at 20.)[3]

Cao v. FEC, 688 F. Supp. 2d 498 (E.D. La. 2010), also supports the Commission's position, not plaintiffs'. In *Cao*, the district court declined to certify several proposed constitutional questions because such questions failed to satisfy the threshold substantiality inquiry. The plaintiffs in *Cao* brought suit under section 30110 challenging various contribution and coordinated expenditure limits applicable to political parties. The district court declined to

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[2] The matter became moot and the en banc Court of Appeals did not review the certification. Order, *Libertarian National Committee v. FEC*, No. 13-5094 (D.C. Cir. Mar. 26, 2014) (Document #1485531).

[3] *LNC* is also distinguishable because it is not possible for this Court to reframe and limit plaintiffs' broad constitutional questions to apply only to the specific contributions plaintiffs sought to make here. The only question this Court can certify is based on a hypothetical application of FECA, because the only actual facts plaintiffs have alleged are now moot. *See supra* p. 2; *infra* p. 17-18; FEC Br. 15-16. As Judge Wilkins explained, "the Supreme Court has repeatedly cautioned that, in campaign finance cases in particular, it may not be appropriate to decide an as-applied challenge based on facts not before the court." *LNC*, 930 F. Supp. 2d at 166. The Supreme Court in *California Medical* similarly explained that it "do[es] not construe [section 30110] to require certification of constitutional claims . . . that involve purely hypothetical applications of the statute." 453 U.S. at 192 n.14 (internal citations omitted).

certify half of the plaintiffs' proposed questions, and the lines the court drew further show why this Court should decline to certify any constitutional questions here.

Specifically, the court rejected as frivolous two proposed constitutional questions that were premised on erroneous interpretations of law. *Cao*, 688 F. Supp. 2d at 535-39 (rejecting as frivolous proposed questions "premised on the [erroneous] idea that *all* campaign finance regulations are subject to an 'unambiguously campaign related' requirement"). Because the district court determined that the plaintiffs' legal theory was meritless, it concluded that their proposed constitutional questions premised on that flawed theory were frivolous and refused to certify such questions to the en banc court of appeals. *Id.* at 538-39. The Fifth Circuit affirmed those decisions. *In re Cao*, 619 F.3d 410, 418-19 (5th Cir. 2010).

The constitutional issues plaintiffs purport to raise here are similarly premised on erroneous legal interpretations, including (a) plaintiffs' mischaracterization of FECA's per-election contribution limit as a "bifurcated" $5,200 per-election-cycle "overall limit" (*e.g.*, Pls.' Br. 6, 13, 19), and (b) plaintiffs' suggestion that the Supreme Court has indicated that a $5,200 per-election contribution is "non-corrupting" and constitutionally permissible (*id.* at 19, 32). As plaintiffs' own Proposed Facts make clear (Pls.' Proposed Facts ¶¶ 4-6), the text of FECA flatly contradicts their assertion that the Act imposes a "bifurcated" "overall limit" on individual contributions to candidates. *See infra* p. 16-17. And as this Court previously recognized, "contrary to Plaintiffs' suggestion, neither Congress nor [the Supreme Court in] *McCutcheon* approved contributions of $5,200 for a single election." *Holmes*, 2014 WL 5316216, at *4.

Also supporting the Commission's position here is the *Cao* court's refusal to certify several issues due to the discretion legislatures have in setting contribution limits. Plaintiffs sought to challenge FECA's coordinated expenditure limits, which are regulated in the same

manner as contributions and calculated based on the size of a jurisdiction's voting-age population and accordingly apply different limits in different districts, as well as a provision that permits national party committees to make additional contributions to Senate candidates, above the limit applicable for other congressional candidates. *Cao*, 688 F. Supp. 2d at 543-44, 548. The *Cao* plaintiffs argued, *inter alia*, that (1) certain of these limits could not be justified by an anticorruption rationale; and (2) certain limits were too low. Though the Supreme Court had not earlier addressed the same precise arguments, the district court declined certification of these questions in light of guidance in *Buckley* that "Supreme Court held that the judiciary has 'no scalpel to probe' each possible contribution level," *id.* at 544 (quoting *Buckley*, 424 U.S. 1, 30 (1976) (per curiam)), and "[c]omplex line drawing regarding the anti-corruption interest is 'necessarily a judgmental decision' best left to congressional discretion," *id.* at 548 (quoting *Buckley*, 424 U.S. at 83). The court also relied on *Randall v. Sorrell*, 548 U.S. 230 (2006), in which the Supreme Court struck down Vermont's very low per-election-cycle limits on contributions in state races, concluding that the "danger signs" identified in *Randall*, 548 U.S. at 253, were absent with respect to the limits on coordinated expenditures. *Cao*, 688 F. Supp. 2d at 544-45; *see* FEC Br. at 24-25 (discussing *Randall*'s "danger signs").

The Fifth Circuit affirmed the district court with respect to the coordinated expenditure limit and found that plaintiffs waived their right to appeal the national party/Senate contribution limit. *In re Cao*, 619 F.3d at 419-20. As this Court previously recognized, precisely the same Supreme Court analyses and conclusions in *Buckley* and *Randall* make the legal issues plaintiffs raise here unsuitable for certification, as Congress's line drawing with respect to the per-election limit is due the same deference. *Holmes*, 2014 WL 5316216, at *4 (explaining that Congress's establishment of "[t]he per-election limit was designed to restrict financial contributions while

allowing expression of First Amendment associational rights in every election in which a candidate runs" and "is a quintessential political decision made by politicians who understand the process far better than the courts and is deserving of deference").

Contrary to plaintiffs' suggestion (Pls.' Br. at 10-12), the *Cao* court's certification of a question related to the $5,000 limit on contributions from political committees to candidates, 52 U.S.C. § 30116(a)(2)(A), does not support certification of any constitutional questions here. The district court found that earlier Supreme Court decisions had not dealt directly with contributions from political parties, and in particular a claim that limits on contributions from party committees need be higher than limits from other persons. *Cao* 688 F. Supp. 2d at 547. With respect to plaintiffs' constitutional challenge here, however, the Supreme Court in *Buckley did* squarely uphold the per-election limits on individual contributions to candidates. *Holmes*, 2014 WL 5316216, at *1; *see* FEC Br. at 17-18. And plaintiffs' only basis for distinguishing *Buckley* here is its erroneous characterization of FECA and the Supreme Court's decision in *McCutcheon*. *See* supra p. 8; *infra* p. 16-17.[4]

The Fifth Circuit's decision in *Khachaturian v. FEC*, 980 F.2d 330 (5th Cir. 1992), which plaintiffs acknowledge (Pls.' Br. at 8) is "instructive," is also closely on point, both procedurally and substantively. Khachaturian, an independent candidate in the 1992 senatorial election in Louisiana, brought a lawsuit challenging FECA's then-$1,000 individual contribution limit "as

[4] Plaintiffs also attempt to distinguish this case from *Buckley* (Pls' Br. at 22-23) by emphasizing the Supreme Court's focus on candidates and parties, but the Court also explicitly considered the First Amendment rights of contributors when it upheld the individual per-election limit. *See Buckley*, 424 U.S. at 24-25 (evaluating FECA's then-$1,000 limit on contributions by individuals to candidates by noting that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the *contributor's* freedom of political association" (emphasis added)); *see id.* at 28-29 (concluding that "the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues" by, among others, "individual citizens").

applied" to his independent candidacy. *Id.* at 331. After the district court denied his motion for a preliminary injunction and then certified constitutional questions pursuant to section 30110, the FEC moved for a remand. The Fifth Circuit granted the FEC's remand motion, instructing the district court to perform the frivolousness screening and, if necessary, the record-building functions required in section 30110 cases. *Id.* at 332.

On remand, the district court dismissed the case. *See Khachaturian v. FEC*, No. 92-3232, slip op. (E.D. La. May 6, 1993) (attached hereto as Exhibit 1). Recognizing that frivolous questions must not be certified and that dismissal was warranted if the complaint failed to state a claim, the court considered Khachaturian's contention that FECA's individual contribution limit "'had a serious adverse effect on the initiation and scope of his candidacy.'" *Id.* at 4-5. Khachaturian had identified eleven contributors prepared to give him more than $200,000. *Id.* at 5. The district court explained that *Buckley* had already upheld FECA's individual contribution limit, "that the statute imposes evenhanded restrictions," and that "'the impact of the Act's $1,000 contribution limitation on major-party challengers and minor party candidates does not render the provision unconstitutional on its face.'" *Id.* at 4-5 (quoting *Buckley*, 424 U.S. at 31, 35). Because "[t]he law is clear . . . that the $1,000 . . . limit applies to minor party candidates," and because Khachaturian could "not point to any facts regarding 'the utility of these additional accounts' regarding the election outcome," *i.e.*, "why a "$200,000 campaign . . . would be any more successful than a $75,000 campaign," the district court held that Khachaturian failed "to come even close to the Rule 12(b)(6) test for considering constitutional claims." *Id.* at 5-6.

Here, plaintiffs' claim likewise fails to come even close to passing frivolousness/substantiality screening, for the *identical* reason that *Buckley* already "'blessed'" (*Khachaturian*, 980 F.2d at 331) the very same per-election individual contribution limit they

challenge. As the district court in *Khachaturian* explained, "'[i]t is unnecessary to look beyond [FECA's] primary purpose — to limit the actuality and appearance of corruption resulting from large individual financial contributions — in order to find a constitutionally sufficient justification for the [per-election] contribution limitation.'" Exh. 1 at 5 (quoting *Buckley*, 424 U.S. at 26); *accord* Pls. Br. at 14 ("conced[ing] that the government may limit individual political contributions"). Plaintiffs' purported "as-applied" twist on the same stale challenge rejected in *Buckley* and *Khachaturian*, based upon the invention of a "bifurcated" $5,200 contribution limit, is frivolous, just as the independent candidacy twist Khachaturian attempted over twenty years ago was frivolous. The district court in *Khachaturian* refused to recertify the constitutional question *Buckley* had settled. This Court should do the same.

In sum, none of the cases cited by plaintiffs supports their position that this case presents a substantial constitutional question warranting certification under section 30110. On the contrary, as the foregoing cases illustrate, federal courts have routinely and consistently refused to certify frivolous constitutional claims pursuant to section 30110. And the cases cited above stand in the company of numerous others. *See, e.g.*, *Judd v. FEC*, 304 F. App'x 874, 875 (D.C. Cir. 2008) (per curiam) (affirming district court's dismissal because "[t]he special judicial review provisions under [52 U.S.C. § 30110] and its accompanying note do not apply where, as here, the constitutional challenge to [FECA] is frivolous"); *Nat'l Comm. of the Reform Party of the United States v. Democratic Nat'l Comm*, 168 F.3d 360, 367 (9th Cir. 1999) (affirming district court's decision denying certification: "Because plaintiffs lack standing to challenge FECA's appointment provision, the district court was correct to dismiss that claim without certifying it. The Reform Party's other constitutional challenge to FECA — that it unconstitutionally preempts common law remedies — was frivolous because plaintiffs had no common law

remedies for FECA to preempt."); *Whitmore v. FEC*, 68 F.3d 1212, 1215-16 (9th Cir. 1995) (affirming denial of certification where "plaintiffs sought an injunction commanding competing congressional candidates not to accept out-of-state contributions"; the "claims are frivolous, so they were properly dismissed"); *Gifford v. Congress*, 452 F. Supp. 802, 810 (E.D. Cal. 1978) (refusing to certify constitutional questions and dismissing FECA challenge on the "ground that it is frivolous") (cited with approval in the Supreme Court's opinion in *California Medical* construing section 30110, *see* 453 U.S. at 192 n.14), *aff'd sub nom. Gifford v. Tiernan*, 670 F.2d 882 (9th Cir. 1982); *Mott v. FEC*, 494 F. Supp. 131, 135-37 (D.D.C. 1980) (finding that "Stahlman's claims in essence present three identifiable constitutional questions" that "[t]he Buckley decision answers . . . in the negative" and concluding that *Buckley* and the Ninth Circuit's decision in *California Medical* "foreclose any challenge to the $5,000 contribution limits and require that plaintiff Stahlman's claims be dismissed"); *see also Sykes v. FEC*, 335 F. Supp. 2d 84, 94 (D.D.C. 2004) (dismissing claims for lack of standing and observing that plaintiff's claim "may well be frivolous" because it was "nearly impossible to distinguish from *Whitmore*, [*supra*,] and the Ninth Circuit's holding of frivolousness is persuasive").

Moreover, in the analogous context of the Bipartisan Campaign Reform Act's ("BCRA") special judicial-review provision, 52 U.S.C. § 30110 note, which requires district courts to make a similar threshold substantiality determination before convening a three-judge court to consider a constitutional challenge to a BCRA provision, another court in this district recently rejected as too insubstantial claims that are "foreclosed by clear United States Supreme Court precedent." *Independence Institute v. FEC*, __ F. Supp. 3d __, No. 14-1500 (CKK), 2014 WL 4959403, at *1 (D.D.C. Oct. 6, 2014), *appeal docketed*, No. 14-5249 (D.C. Cir. Oct. 22, 2014). In *Independence Institute*, the court rejected the plaintiff's request to convene a three-judge court in a case

challenging certain disclosure requirements that the Supreme Court had previously upheld, and granted summary judgment to the FEC. The plaintiff had challenged BCRA provisions defining and requiring disclosures for "electioneering communications" as applied to their proposed advertisement, a radio ad that urged listeners to contact their senators (one of whom was up for reelection) and ask them to support a piece of legislation, but which lacked any express candidate advocacy. *Id.* at *1-*2. The Supreme Court had upheld the challenged provisions on their face in *McConnell v. FEC*, 540 U.S. 93 (2003), and as applied to certain advertisements promoting a movie about Hillary Clinton in *Citizens United v. FEC*, 558 U.S. 310 (2010). But Independence Institute argued that its claims were not foreclosed by those decisions based on, *inter alia*, substantive differences between the advertisement Independence Institute sought to run and the movie ads at issue in *Citizens United*, as well as distinctions between Independence Institute's tax status and the tax status of Citizens United. *Independence Institute*, 2014 WL 4959403, at *5-*7. Specifically, Independence Institute claimed that Citizens United's movie ads contained pejorative references to Mrs. Clinton, while its proposed radio ad was "genuine issue speech" that lacked any pejorative candidate references. *Id.* at *1, *6. In other words, Independence Institute made the same argument that plaintiffs make here, *i.e.*, that its case was not foreclosed by a Supreme Court decision upholding the same challenged provision because its challenge did not rely on "the same legal theory" and was not "premised upon the same or similar facts." *Compare id.* at *5-*7, *with* Pls.' Br. at 8.

The court in *Independence Institute* rejected that argument and concluded that Independence Institute's constitutional challenge was "squarely foreclosed" by the analysis and conclusions of the Supreme Court in *Citizens United*. *Independence Institute*, 2014 WL 4959403, at *10. The court acknowledged that Independence Institute and Citizens United were

respectively organized under different sections of the tax code but explained that the organizations' tax status was "immaterial" in analyzing the constitutionality of FECA's disclosure requirements and thus rejected Independence Institute's tax-status argument as emphasizing "a distinction without a difference." *Id.* at *5. The court also did "not disagree" with Independence Institute's assertion that the movie ads at issue in *Citizens United* "could be considered critical of then-candidate Hillary Clinton," whereas Independence Institute's proposed radio ad "*on its face,* sa[id] nothing positive or negative about a candidate for Federal office." *Id.* at *6. But the court found that this too was "a distinction without a difference," because the scope of the Supreme Court's holding in *Citizens United* clearly foreclosed the slightly different facts and arguments presented in *Independence Institute*. *Id.* at *6-*7.

Following *Independence Institute,* this Court's similar conclusion that plaintiffs' claims here "challenge the analysis and conclusion of the Supreme Court in *Buckley v. Valeo* and its progeny," likewise justifies dismissal, not certification. *Holmes*, 2014 WL 5316216, at *1.

III. PLAINTIFFS' CERTIFICATION BRIEF AND PROPOSED FACTS CONFIRM THAT THEIR FIRST AMENDMENT CHALLENGE IS INSUBSTANTIAL

The Commission has previously explained (FEC Br. 16-26) the various reasons why plaintiffs' First Amendment challenge to FECA's per-election contribution limit is insubstantial and does not qualify for certification under section 30110. Plaintiffs' efforts to escape the dispositive effect of "*Buckley* and its progeny" underscore the insubstantiality of their claims.

For example, plaintiffs argue (Pls.' Br. 16) that *Buckley* never considered a situation where "FECA itself creates an unfair advantage" that favors "certain contributors over others," but then admit that it is not FECA but actually an FEC regulation, 11 C.F.R. § 110.3(c)(3), "which allows for th[e] result [to which plaintiffs object] in the first place." (*See also* Pls.' Proposed Facts ¶¶ 3, 9-11 (acknowledging that "*in 2014,* individual persons *could* contribute no

more than $2,600 per candidate, per federal election" and that plaintiffs' constitutional claims are brought "on the basis of" 11 C.F.R. § 110.3(c)(3), which permits a general-election candidate to spend unused primary contributions for general election expenses).) Plaintiffs erroneously contend that a rule permitting all general-election candidates to spend contributions they already have received in a particular way creates an advantage for contributors. Even setting that aside, however, plaintiffs' own argument confirms that it is *not* "FECA itself" that permits the circumstances about which plaintiffs complain. This Court previously observed that even if plaintiffs may object to that regulation, they "have not brought [a] challenge [to it] here." *Holmes*, 2014 WL 5316216, at *6 n.8. Indeed, as the FEC previously explained (FEC Br. 29-30), plaintiffs *could not* obtain section 30110 certification of a challenge to a regulatory provision. And plaintiffs appear to lack standing to challenge section 110.3(c)(3) in *any case*, because the provision does not regulate any activities by contributors, 11 C.F.R. § 110.3(c)(3), and plaintiffs have failed to explain how a regulation that permits *candidates* to spend contributions they already have received in a particular manner creates any injury in fact for contributors.

Plaintiffs' submissions also confirm the erroneous premise of their legal arguments — *i.e.*, that FECA establishes a "bifurcated" $5,200 per-election-cycle contribution limit, (Pls.' Br. at 6, 13, 14, 17, 18, 19, 20, 22, 24, 26, 28, 29, 30, 31, 32). *See supra* pp. 8, 12. Plaintiffs' Proposed Facts omit any reference to the supposed "bifurcated" $5,200 limit, while admitting that the individual contribution limit applies "*separately with respect to each election*," that "*in 2014*, individual persons *could* contribute no more than $2,600 per candidate per federal election," and that FECA defines election to include "a general, special, primary, or runoff election." (Pls.' Proposed Facts ¶¶ 3-5.) Plaintiffs further acknowledge that "[t]he total amount

that an individual may contribute to a particular candidate during a full election cycle depends on the number of elections in which that candidate runs," and that in some circumstances, such as where a candidate participates in a runoff election, the total amount an individual may contribute to that candidate during a particular election cycle is higher than the combined total for one primary and one general election. (*Id.* ¶ 6.) Plaintiffs' Proposed Facts thus confirm FECA's establishment of *separate* contribution limits "with respect to each election" and the corresponding absence of any "bifurcated" election-cycle limit in the Act. It is thus unsurprising that plaintiffs have found no decisions "consider[ing] the constitutionality of bifurcating the individual limit on candidate contributions" (Br. 17), because the limit is not "bifurcated." *See Holmes*, 2014 WL 5316216, at *4 n.5 ("Plaintiffs' attempt to reframe the issue" by mischaracterizing FECA "falls short.").

In addition to confirming the insubstantiality of the legal issues in this case, plaintiffs' submissions demonstrate that their claims are inappropriately hypothetical. In *California Medical*, the Supreme Court held that section 30110 does not require certification of constitutional claims "that involve purely hypothetical applications of the statute." 453 U.S. at 192 n.14. Section 30110 "does not entitle the eligible plaintiffs to raise any conceivable constitutional issue with respect to the Act and the relevant criminal sections, no matter how remote or speculative." *Buckley v. Valeo*, 519 F.2d 821, 850 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in relevant part*, 424 U.S. 1 (1976).

Although plaintiffs' claims do not even involve "the statute" because they turn on a regulation, they are still inappropriately based on plaintiffs' "hypothetical application[]" of that regulation. Plaintiffs have failed to offer any evidence that any campaign, let alone the 2014 campaigns of Scott Peters and David Loebsack, used a contributor's separate $2,600 primary and

general-election contributions solely on general-election expenses. Indeed, the FEC served discovery asking plaintiffs to state the factual basis for their assertion that contributors to Peters or Loebsack actually made $2,600 primary- and general-election contributions which were then used, by those candidates, solely on general election expenses. Plaintiffs could not do so. (Declaration of Jayci A. Sadio (Docket No. 27-1) Exhs. 1-2 (Holmes/Jost Interrog. Resp. ¶ 1) ("Sadio Decl.").) Plaintiffs' claims are thus improperly hypothetical and should be dismissed on that basis alone. *Cal. Med.*, 453 U.S. at 192 n.14 (section 30110 does not require certification of questions concerning hypothetical applications of FECA); *see also Clark v. Valeo*, 559 F.2d 642, 650 (D.C. Cir.) (en banc) (per curiam) ("Neither plaintiff nor intervening plaintiff has presented a ripe justiciable 'case or controversy' which would permit this court to reach and decide the merits of the constitutional questions . . . . The certified questions are returned to the District Court unanswered, and the District Court is instructed to dismiss the case." (footnote omitted)), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

And finally, plaintiffs' suggestion (Pls.' Br. at 32) that FECA's per-election contribution limit somehow "doubles" the "scope of association that certain contributors enjoy" not only is factually flawed, it ignores the contrary holding in *Buckley* that the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution" and that in the associational context, it is in the "[m]aking of a contribution," which, "like joining a political party, serves to affiliate a person with a candidate." *Buckley*, 424 U.S. at 21-22.

IV. PLAINTIFFS HAVE FAILED TO IDENTIFY ANY SUBSTANTIAL FIFTH AMENDMENT QUESTION

The Commission has also previously explained (FEC Br. 30-39) why plaintiffs' subjective dissatisfaction with FECA's per-election contribution limit, which applies equally to all persons and does not deny plaintiffs or anyone else equal protection of the law, fails to

identify any constitutional question that warrants certification. *See Holmes*, 2014 WL 5316216, at *5 ("Plaintiffs have not been treated differently than any other contributor.")

Plaintiffs' latest submissions still fail to identify any separate classes of contributors *created by FECA*, or even to allege (let alone demonstrate) that FECA's per-election limit was enacted specifically to further a discriminatory purpose. (*See* FEC Br. at 30-33.) On the contrary, plaintiffs *admit* that FECA's per-election limit "'on its face' . . . does not appear discriminatory" (Pls.' Br. 29). For that reason alone, plaintiffs' equal protection claim is not cognizable and thus is clearly insubstantial.

In any event, plaintiffs' latest submissions undermine their Fifth Amendment claims in much the same way that those filings undercut plaintiffs' First Amendment claims. Plaintiffs' equal protection argument necessarily depends on plaintiffs' erroneous assertion (Pls.' Br. at 29) that FECA's per-election limit "favor[s] . . . contributors to candidates who do not face a primary challenge." But plaintiffs simultaneously contradict that assertion (1) by acknowledging that FECA applies *the same* per-election contribution limit to all "individual persons" (Pls.' Proposed Facts ¶ 3) and (2) by admitting that the real "basis" of their complaint is not the statutory per-election limit but an FEC regulatory provision that permits (but does not require) any general-election candidate that has not used all of his primary-election contributions to use such funds to pay for general-election expenses (*id.* ¶¶ 10-11; Pls.' Br. at 16). Plaintiffs' argument (Pls.' Br. at 24) that the Supreme Court has "consistently looked askance at asymmetric campaign finance regulations" is thus clearly misplaced; there are no asymmetric provisions at issue here. All of the cases plaintiffs cite in support of their equal protection claim are thus inapposite, as this Court previously found. *Holmes*, 2014 WL 5316216 at *5-*6; *see also* FEC Opp'n to Pls.' Mot. for Prelim. Inj. at 28-32 (Docket No. 12).

V. IF ANY QUESTIONS ARE CERTIFIED, SUCH QUESTIONS MUST BE ACCOMPANIED BY A COMPLETE FACTUAL RECORD

For the many independent reasons detailed above and in the Commission's opening brief, the Court should not certify any constitutional questions or make any factual findings as part of a certification process. But if the Court concludes otherwise, it should include with any certified questions a complete and thorough factual record, rather than the "less-focused," "succinct," or "limited" factual record plaintiffs urge. (Pls.' Br. 5, 6.) Indeed, to the extent plaintiffs' insistence on the acceptability of an incomplete record here is based on plaintiffs' concerns (*id.* at 3, 4) about "the speed with which this Court must act" or avoiding "a substantial period of discovery," such concerns are entirely unwarranted here. The Court of Appeals established a prompt deadline for this Court's submission of any questions it finds to be appropriate for certification, along with the factual record, and the Court adopted the parties' agreed proposal regarding discovery and briefing more than a month ago. (*See* Joint Proposal and Order to Govern Proceedings (Docket No. 24), Feb. 10, 2015.) The extremely brief discovery period, to which plaintiffs agreed, has already concluded and plaintiffs responded to the Commission's limited discovery requests without lodging a single objection. (*See id.*; FEC Br., Sadio Decl. Exhs. 1 & 2.) There is thus no reason for a compromised factual record here, to the extent the Court determines certification is warranted.

Plaintiffs themselves underscore the importance of a complete and thorough factual record here by emphasizing the "FEC's burden to show that its anticorruption interests are served" by the per-election limits Congress has established (Pls.' Br. at 6), as well as lodging an anticipatory objection that a "naked assertion of a 'corruption' interest" (*id.* at 17) is inadequate. Such arguments are irreconcilable with plaintiffs' insistence that a "less-focused" factual record is sufficient. Plaintiffs cannot demand, on the one hand, that the FEC must satisfy its burden of

defending the statute by demonstrating the governmental interests served by the provision, while at the same time justifying exclusion from the record of the very facts that demonstrate the various ways in which the provision serves the government's interests. If the Court of Appeals is to review the constitutionality of an Act of Congress, the record must fully reflect the facts demonstrating the governmental and public interests served by the provision. "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).

Should the Court decline to certify questions, no formal findings of fact would be required, but the Commission's more complete statement of facts further demonstrates why summary judgment should be awarded to the Commission.

CONCLUSION

There are at least half a dozen reasons why this case cannot be certified to the en banc Court of Appeals, each of which is wholly and independently dispositive:

(1) plaintiffs' claims are moot;

(2) plaintiffs' claims raise questions that *Buckley* answered nearly forty years ago, rendering such questions settled and insubstantial;

(3) plaintiffs' claims are based upon an invented $5,200 per-election-cycle contribution limit that does not exist, as this Court has already found;

(4) plaintiffs' claims depend on their erroneous contention that FECA allows some contributors to make general-election contributions in amounts that are double the statutory per-election limit;

(5) plaintiffs do not actually challenge FECA, but rather a Commission regulation, which plaintiffs have neither put in controversy nor shown they have standing to challenge, and for which plaintiffs *could not* obtain section 30110 certification; and

(6) plaintiffs' claims are based purely on a hypothetical application of the law, not actual evidence, which the Supreme Court has held is insufficient.

For all of the foregoing reasons and those in the FEC's Opening Brief, no constitutional questions should be certified and this case should be dismissed as moot or summary judgment should be awarded to the Commission.

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