No. 19-_____

In The
Supreme Court of the United States

LIBERTARIAN NATIONAL COMMITTEE, INC.,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the asserted interest of preventing *quid pro quo* corruption, the Federal Election Commission limits the amount of money that a political party may receive each year from a deceased donor.

Over the course of his life, Joseph Shaber made various small donations to the Libertarian Party. He was unknown to party officials and candidates. Upon his death, the party learned that Shaber had unconditionally left it $235,575.20. Does limiting the size of Joseph Shaber's uncoordinated testamentary bequest to the party violate the party's First Amendment right to free speech?

2. In 2014, Congress imposed content-based spending restrictions on contributions to political parties.

A national political party committee may now spend only 10% of an individual's maximum annual contribution on unrestricted speech. Of an individual's maximum annual contribution, 30% must be spent on presidential nominating conventions, 30% on election contests and other legal proceedings, and 30% on party headquarters buildings. 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), 30125(a)(1). Money being fungible, these restrictions negligibly impact, if at all, party committees that would otherwise spend money from general funds on such government-preferred speech. Party committees that cannot or do not prioritize government-preferred spending purposes can raise and spend as little as 10% of each donor's otherwise-allowable contribution.

QUESTIONS PRESENTED – Continued

Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9) and 30125(a)(1) violate the First Amendment right of free speech by conditioning the size of contributions to a political party on the content of the party's speech?

RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Libertarian National Committee, Inc.

LIST OF PARTIES

Petitioner is the Libertarian National Committee, Inc., which was the plaintiff below.

Respondent is the Federal Election Commission, which was the defendant below.

RELATED PROCEEDINGS

1. *Libertarian Nat'l Committee, Inc.* v. *Federal Election Commission*, United States District Court for the District of Columbia, No. 16-cv-00121-BAH. The district court denied the Federal Election Commission's motion to dismiss on January 3, 2017.

2. *Libertarian Nat'l Committee, Inc.* v. *Federal Election Commission*, United States District Court for the District of Columbia, No. 16-cv-00121-BAH. The district court made factual findings and certified constitutional questions to the en banc District of Columbia Circuit on June 29, 2018, pursuant to 52 U.S.C. § 30110.

3. *Libertarian Nat'l Committee, Inc.* v. *Federal Election Commission*, United States Court of Appeals for the District of Columbia Circuit, No. 18-5227. The court of appeals entered its judgment on May 21, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Libertarian National Committee, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

The en banc D.C. Circuit divided in upholding two significant intrusions on Americans' fundamental First Amendment right of free political speech. The court essentially held contribution limits immune from most as-applied constitutional challenges, and declared that this Court's protection of speech from content-based restrictions, confirmed in *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), is inapplicable to campaign finance regulations. This case, arising on certified constitutional questions pursuant to the expedited procedure of 52 U.S.C. § 30110, plainly concerns recurring issues of significant national importance. The questions presented overlapped on this case's facts, but either may be independently reviewed.

1. Americans of all political persuasions tend to die. And when they do, it often turns out that they have remembered their favorite political parties in their wills and other testamentary vehicles. Testation, deeply rooted in our tradition as one's final act of civic engagement, often has a political dimension. Money thus regularly passes into our electoral campaign system from those who cannot police any *quid pro quo*

relationship respecting what is always, until the moment of death, only a revocable promise to donate.

The deceased who leave political legacies were often unknown in life to party officials, candidates, and officeholders. Their testamentary vehicles were often drafted long before anyone might have predicted their time of death, let alone the identity of the candidates, officeholders, and issues of that future day. Upon death, as far as anyone knows, there is nothing more that a donor might do for a political party, and nothing more that a party might do for the donor. And unlike what this Court offered with respect to donations by the living in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), political testation is only a form of speech, not association.

Yet donors, dead and living, are equally subject to the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq*.[1] The Federal Election Commission ("FEC") could not describe how an uncoordinated bequest left to the Libertarian National Committee ("LNC") by Joseph Shaber, in life a small donor lacking any connection to party officials or candidates, might corrupt the political process. The majority nonetheless upheld the restriction of Shaber's bequest. It assumed without deciding that "closely drawn" scrutiny governed the question, and refused to consider that donors are less able to extract the fruits of corruption after they die. The analysis began and ended with the fact that contribution limits have previously been

[1] All further statutory references are to Title 52 of the United States Code.

upheld under "closely drawn" scrutiny. Nothing else was "scrutinized," closely or otherwise.

2. Shortly after Shaber's passing, Congress complicated matters by jettisoning the key "soft money" contribution limit upheld in *McConnell* v. *FEC*, 540 U.S. 93 (2003). In the corners of a last-minute budget deal, without the benefit of a legislative record that might justify restrictions on political speech, Congress replaced the straightforward contribution limit that *McConnell* considered with a new scheme. FECA now provides that up to 90% of an individual's annual contribution to a political party committee can be spent only on government-privileged speech: presidential nominating conventions, the litigation of election contests and other legal proceedings, and the purchase and operation of party headquarters buildings.

If a party shares Congress's speech preferences, it can speak more, without restriction. Money is fungible, and the "restricted" funds merely offset unrestricted funds that would have been spent on those government-preferred purposes. But if a party does not share Congress's speech preferences—if its presidential nominating conventions are inexpensive or if it holds midterm conventions, if it has few legal bills and no election contests, or if it prefers to fund expressive operations outside its headquarters, that party does not speak as it wishes. It speaks less.

This scheme fails the strict scrutiny to which it should be subjected under *Reed*. Not one shred of *evidence* supports the counterintuitive notion that larger

donations are less corrupting when tied to the peculiar speech Congress privileged, which often benefits specific candidates and officeholders. Striving to explain the relationship between corruption concerns and Congress's preferred speaking purposes, the FEC could not even articulate a rational basis for the scheme. It offered nothing more than contradictory suppositions, culminating in a multi-factor essay amounting to, "It depends." Yet because the law employs the artifice of restricting "contributions"—even if it does so according to the *content of the speech* that the contributions fund—the majority below upheld it under its watered-down "closely drawn" version of "scrutiny."

Courts can label and process content-based spending restrictions however they like, but the bottom-line result here is plain for all to see: how much an American can give to a political party, and how much that party can spend, depend on what the party says.

OPINIONS BELOW

The D.C. Circuit's en banc opinion, App.1a-80a, is reported at 924 F.3d 533. The district court's opinion and order certifying constitutional questions and facts to the en banc D.C. Circuit, App.81a-199a, is reported at 317 F. Supp. 3d 202. The district court's opinion denying the FEC's motion to dismiss, App.200a-17a, is reported at 228 F. Supp. 3d 19.

JURISDICTION

The court of appeals entered its judgment on May 21, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment, and relevant provisions of Title 52 of the United States Code, are reproduced at App.218a-25a.

STATEMENT OF THE CASE

A. The Regulatory Framework

An individual may donate up to $355,000 to a national committee of a political party annually: Up to $35,500 in funds that a party may spend as it desires, and up to triple that amount, $106,500, deposited in each of three separate, segregated accounts. Section 30116(a)(1)(B).[2] Party committees may spend money from the three "separate, segregated account[s]" only on (A) "a presidential nominating convention," (B) party headquarters buildings, or (C) "election recounts and contests and other legal proceedings," respectively.

[2] The statute's $25,000 base limit is indexed for inflation. *See* Section 30116(c). When this case was argued below, that figure was $33,900. It now stands at $35,500. *See* 84 Fed. Reg. 2504, 2505-06 (Feb. 7, 2019).

Section 30116(a)(9); *see also* Section 30125(a)(1). Accordingly, 90% of what a person may give each year to a political party's national committee is subject to content-based expenditure restrictions.

B. Purported Justifications for FECA's New Content-Based Spending Restrictions

1. Congress tucked language creating the segregated account structure into pages 644-45 of the 701-page 2014 cromnibus bill. *See* "Subdivision N—Other Matters," Consolidated and Further Continuing Appropriations Act, 2015, 113 Pub. L. No. 235, 128 Stat. 2130, 2772-73 (Dec. 16, 2014).[3] These "Other Matters" never faced a committee hearing in either house of Congress, and were not the subject of any congressional report or investigation. *See* Congress.gov, https://www.congress.gov/bill/113th-congress/house-bill/83 (last visited Aug. 13, 2019) (absence of committee reports related to the spending purpose restrictions).

Debate was scant. The FECA amendments "should have been subject to debate and amendment in an open process by the full Senate," but "we simply cannot allow a government shutdown." 160 Cong. Rec. S6812 (daily ed. Dec. 13, 2014) (statement of Sen. Collins).

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[3] A "cromnibus" is "[l]egislation which combines a long-term omnibus spending bill with a shorter-term continuing resolution" that averts a government funding lapse. *See* "Cromnibus," Political Dictionary, available at http://politicaldictionary.com/words/cromnibus/ (last visited Aug. 15, 2019).

The legislative record thus lacks discussion of links between corruption concerns and political contributions of various sizes restricted to various purposes.

2. The parties nonetheless developed a factual record exploring potential rationales that might justify the scheme.

"Every dollar received through the separate, segregated accounts provided for in [Section 30116(a)(9)] potentially frees up another dollar in the recipient's general account for unrestricted spending." App.141a (CF38). Thus, parties "may in some circumstances value a contribution with use restrictions more highly than a smaller contribution without such restrictions." *Id.* (CF39). "A political party may value a higher contribution with use restrictions . . . " App.141a (CF40).[4]

The FEC explained that "larger contributions *are generally more likely* to lead to actual or apparent *quid pro quo* arrangements and can do so regardless of how the funds are ultimately used." App.143a (CF41) (emphasis added); *see also* App.138a-39a (CF35). Yet the FEC asserted that "political parties will generally value [unrestricted contributions] higher," because they can allegedly be used to "maximally benefit federal

[4] The FEC objected to certification of various facts extracted from its discovery responses by arguing that, if certified, its "full response[s] should in fairness be included. *See* Fed. R. Evid. 106." *See*, *e.g.*, App.142a (CF40 n.21). But the LNC indeed introduced the FEC's "full responses" into the record. The FEC has always been free to assert the relevance of any part of its writings.

candidates"; accordingly, "such contributions pose a relatively more acute danger of quid pro quo corruption." App.143a (CF41).

As the FEC also admitted, "[*a*]*ll* contributions to political parties can create the risk of corruption or its appearance regardless of the way that money is ultimately spent." App.140a (CF36). The FEC theorized that "Congress could have permissibly concluded that contributions to a political party that directly benefit a particular candidate or can be spent directly on a particular election contest pose an especially acute risk warranting a lower dollar limit." *Id.*

At bottom, the FEC admitted that a larger, "within-limit [restricted] contribution could appear as corrupt as or more corrupt than a lower [unrestricted contribution] that exceeds the general-account limit, *depending on circumstances*." App.145a (CF43) (emphasis added). These circumstances include

> the identity of the contributor and the receiver, the policy interests of the contributor, the current status of relevant policies, *the financial needs and goals of the receiver including as to the types of spending for which segregated account funds might be used* and the public knowledge of those matters, the receiver's ability to raise funds for different proposed uses, and whether any relevant policy changes happen close in time to the contribution.

App.145a-46a (CF43) (emphasis added). The FEC continued by offering that "it is also possible that a

particular contribution *below* the general account limit may have an appearance of corruption that exceeds that of a higher contribution to a segregated account." C.A. App.61-63 (emphasis added).

Notwithstanding its multi-factor, situational corruption test and its reticence to "opine on matters" that the FEC believes are "committed to the discretion of Congress," C.A. App.60, 62, the FEC hypothesized that "Congress *could have* permissibly concluded" that unrestricted donations pose greater corruption risk than restricted donations, as the FEC believes that "unrestricted funds contributed to a political party *may be* used for activities that maximally benefit federal candidates and thus *may* pose a relatively more acute danger of actual and apparent corruption." App.140a-41a (CF37) (emphasis added).

C. FECA's Application to the Deceased

1. The FEC interprets "person," as used in Section 30116(a)(1), "to include the dead and their estates." App.3a-4a (citation omitted); App.170a (CF85). Testamentary bequests to political parties that exceed contribution limits must be placed in escrow, from which a party must withdraw funds every year until the funds are exhausted. The funds may earn interest, but parties may not exercise control over such funds, including control over the direction of the funds' investment strategies or strategic choice as to the amount of withdrawals made in any particular year. *See* FEC Advisory Ops. 2015-05 (Shaber), 2004-02 (Nat'l

Comm. for an Effective Congress), 1999-14 (Council for a Livable World); C.A. App. 45.

2. The parties have previously litigated FECA's application to the deceased. In 2007, Raymond Burrington bequeathed the LNC $217,734.00 after a lifetime in which he had given the party a single $25 donation. The D.C. District Court refused to certify the LNC's categorical challenge to FECA's application against testamentary bequests, but certified an as-applied question regarding Burrington's bequest, considering Burrington was unknown to the LNC and his bequest had come as a surprise. *Libertarian Nat'l Comm., Inc*. v. *FEC* ("*LNC I*"), 930 F. Supp. 2d 154 (D.D.C. 2013), *reconsideration denied*, 950 F. Supp. 2d 58 (D.D.C. 2013).

The D.C. Circuit summarily affirmed the denial of certification with respect to the categorical challenge. *Libertarian Nat'l Comm., Inc.* v. *FEC*, No. 13-5094, 2014 U.S. App. LEXIS 3112, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014) (per curiam). Before the certified as-applied challenge could be briefed, the escrow account holding Burrington's bequest made its final disbursement. The FEC thus suggested mootness.

Notwithstanding factual findings that the LNC solicits bequests, *LNC I*, 930 F. Supp. 2d at 174 (CF22, 23); that the LNC regularly receives bequests, *id.* at 182 (CF69); that political parties generally receive bequests, *id.* at 183 (CF72, 73); and that "many bequests of amounts far exceeding FECA's annual contribution limit . . . have been left for national party committees

in recent years," *id.* at 184 (CF78); *see generally* CF76-86, the FEC confidently predicted that "there is no reasonable expectation that the Contribution Limit will restrict a bequest to the LNC again." Suggestion of Mootness, *Libertarian Nat'l Comm.* v. *FEC*, D.C. Cir. No. 13-5088, at 7 (Feb. 3, 2014).

The D.C. Circuit agreed and declared the as-applied challenge moot. *Libertarian Nat'l Comm.*, *Inc.* v. *FEC*, No. 13-5088, 2014 U.S. App. LEXIS 25108 (D.C. Cir. Mar. 26, 2014) (per curiam). Less than five months later, Joseph Shaber died, leaving the LNC a bequest even larger than Burrington's. App.180a (CF117), 181a (CF121).

D. Factual Background

1. "The major parties . . . spend substantial sums on activities that can be paid for through segregated accounts: They put on lavish nominating conventions that are spectacles made for a national audience, they maintain expensive headquarters, and they challenge and defend in court the outcomes of numerous elections across the country." App.50a. Because money is fungible, segregated contributions to the major parties "are in effect no different from general contributions." App.50a-51a.

"By contrast, minor parties gain little from this scheme because they do not have much use for segregated-account contributions. The LNC, for example, holds more modest conventions and maintains a less expensive headquarters than the major parties, and

the LNC has never spent money on election recounts and is unlikely to do so in the future." App.51a. For example, in 2015, the year that the LNC gained access to Shaber's bequest, it spent only $340.50 on the following year's presidential nominating convention, $72,827.11 on its headquarters, and $7,260.61 on legal proceedings. App.213a; C.A. App. 78. "All, or very nearly all, of the Libertarian Party's [presidential convention expenses] are incurred and paid for in the year in which the convention is held." App.135a-36a (CF28). In 2016, a presidential election year, the LNC's total spending on all three special purposes approximated only $467,251.58. App.136a (CF29).

In other words, in non-presidential years, a single donor could cover the LNC's special purpose expenses and still the content-based spending restrictions would bar the LNC from spending most of that donor's maximum allowable donation. In presidential years, two or three donors could cover the tab for the entire convention (at $106,500 apiece), and still the party would be barred from spending most of their maximum contributions for lack of sufficient government-preferred expenses. The LNC would not buy another headquarters building or foment baseless litigation merely to create segregated account expenses.

Rather than raise money that could only be spent on non-existent expenses, the LNC would raise money to speak directly to the electorate about its ideology and political mission, and to support its candidates. App.171a (CF89). The LNC would build its institutional capability, including its capability to regularly

qualify for the ballot in various states. *Id*. The LNC spends the bulk of its resources obtaining ballot access for its candidates. App.169a (CF83).

The LNC's donors share its priorities. They are uninterested in donating money that would be of little or no practical use. The LNC identified donors who gave the maximum unrestricted base contribution and would have exceeded that limit but for the segregated spending purpose restrictions. These donors would exceed the unrestricted base limit in future years, but refrain from doing so because the content-based spending restrictions would limit or eliminate the value of their donations beyond FECA's base amount. *See* App.185a-90a (CF139-156).

2. During his lifetime, Joseph Shaber made 46 donations to the LNC, totalling $3,315. App.178a (CF110). But without its knowledge, the LNC was made a beneficiary of his trust in 2010. App.180a (CF115). The size of Shaber's gift to the LNC was contingent upon various factors, including the value of his property and whether he would have grandchildren at the time of his passing. *Id.* (CF116). Shaber died in 2014, rendering the trust irrevocable, *id.* (CF117), and preventing him from engaging in political expression, association, or support. *Id.* (CF118).

The LNC's share of the trust was eventually determined to be $235,575.20. App.181a (CF121). Shaber specified that the LNC should take his bequest "outright." *Id.* (CF123).

The FEC is unaware of any condition or limitation attached by Shaber to his bequest. *Id.* (CF124). Nor is the FEC aware of any *quid pro quo* arrangement related to Shaber's LNC bequest. App.182a (CF125). To the LNC's knowledge, neither Shaber nor anyone related to him or acting on his behalf has had any relationship with the LNC, its officers, board members, or candidates, apart from Shaber's contribution history. App.183a (CF129). Aside from pursuing its ideological and political mission, the LNC provided nothing of value to Shaber, or to anyone else, in exchange for his bequest to the LNC. *Id*. (CF133). Shaber's trust cannot impose new restrictions on Shaber's bequest. App.182a (CF126).

The LNC would accept and spend the entirety of Shaber's bequest for its general expressive purposes, including expression in aid of its federal election efforts. App.182a (CF127). In 2015, upon first gaining access to Shaber's bequest, the LNC took the maximum then allowed for unrestricted purposes. App.180a (CF119). Shaber's trust and the LNC agreed to deposit the remaining $202,175.20 into an FEC-compliant escrow account, subject to this litigation's outcome. App.182a (CF128). The LNC is prohibited from pledging, assigning, or otherwise obligating the account's anticipated contributions before they are disbursed. App.183a (CF132).

E. Proceedings Below

1. The LNC brought this case in the United States District Court for the District of Columbia, seeking the certification of questions (1) challenging the application of any contribution limits to Shaber's bequest, (2) facially challenging Sections 30116(a)(1)(B), (a)(9), and 30125(a)(1) owing to their content-based speech restrictions, and (3) challenging the content-based restrictions' application against the Shaber bequest. The FEC moved to dismiss the complaint, arguing that the LNC's injury with respect to Shaber's bequest was self-inflicted, because it could have accepted the entirety of the bequest in various segregated spending purpose accounts. With respect to the facial challenge, the FEC claimed that the LNC's injury was one of competitive disadvantage, which is neither caused by FECA nor redressable in court.

The district court denied the FEC's motion to dismiss. "The LNC does not argue" that FECA bars its acceptance of "the entire Shaber bequest in one lump sum," but that it could not "accept the entire bequest for *general expressive purposes* when the bequest became available in 2015." App.210a. "LNC's injury is that it cannot accept money—from Shaber's bequest *and from other donors*—for spending *as it wishes*." App.210a-11a (internal quotation marks omitted). The district court also rejected the FEC's claim that the LNC had sufficient offsetting segregated account expenses to accept Shaber's full bequest, App.212a-14a, and rejected the FEC's competitive disadvantage

theory as an unfair misreading of the complaint. App.214a-16a.

Following discovery, the LNC moved for fact-finding and certification. The FEC moved to dismiss, asserting the proposed constitutional questions were frivolous. In the alternative, the FEC proposed its own facts and sought to rephrase the questions. The district court denied the FEC's second motion to dismiss, some of which it found "convoluted and barely comprehensible." App.96a. It made 178 factual findings, certified the LNC's first question, and certified the LNC's second and third questions with some modification. App.127a-99a.

2. The en banc D.C. Circuit unanimously rejected the FEC's third motion to dismiss, brought along the same lines as the Commission's previous unsuccessful efforts. App.7a-11a. But the court divided on the merits. Judge Griffith dissented from the judgment upholding the spending purpose restrictions. Judge Katsas, joined by Judge Henderson, concurred in the judgment as to the spending purpose restrictions, but dissented from the judgment upholding the application of contribution limits as to Shaber's bequest.

2. a. The majority acknowledged that this Court has "left open the question whether closely drawn scrutiny . . . applies to a law limiting a recipient's right to receive a donation absent a corollary restriction on a contributor's right to contribute." App.15a. Nonetheless, because precedent had not expressly foreclosed such application, the majority "assume[d], without

deciding, that closely drawn scrutiny applies to the imposition of contribution limits on Shaber's bequest." App.15a-16a.

The majority offered that "[t]he risk of quid pro quo corruption does not disappear merely because the transfer of money occurs after a donor's death," App.17a, without explaining how, exactly, a dead donor whose gift had become irrevocable could change his mind if a corrupt party did not live up to its end of the bargain.

It then observed that bequests could theoretically be coordinated with a party in a *quid pro quo* deal, holding against the LNC its refusal to revisit *LNC I*'s recent foreclosure of a broad categorical challenge to FECA's afterlife application. App.18a-19a. Turning to Shaber's bequest, the majority had "no trouble making the unremarkable assumption that Shaber's contribution was not, in fact, part of a corrupt quid pro quo exchange." App.20a. But it countered that contribution limits exist because separating noncorrupt from corrupt contributions is too difficult a task. App.21a-22a.

"That is not to say as-applied challenges to FECA's contribution limits are impossible." App.22a. But the majority asserted that the LNC's challenge with respect to Shaber's bequest was "based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to [FECA]" earlier. App.23a (internal quotation marks omitted). It added that because the LNC's challenge was narrowly tailored to Shaber's bequest, it could not consider whether uncoordinated bequests writ large, of

which Shaber's was the example before the court, cannot be limited by FECA. App.24a-25a.

2. b. The majority found that FECA's new limits on contributions to national committees should still be characterized as contribution rather than expenditure limits, notwithstanding their content-based spending restrictions. App.29a.

The majority further held that the cromnibus amendment did not impose content-based restrictions on speech at all. The LNC pointed out that it can only spend money donated beyond the base limit "to pay for a presidential nominating convention but not a mid-term convention, or for a sign on its headquarters but not a billboard on the street." App.30a. The cromnibus amendment restricts, explicitly, spending from the parties' accounts. The majority answered that "[r]eceiving money *facilitates* speech, to be sure, but a bank account balance becomes speech only when spent for expressive purposes." App.31a.

Nonetheless, the majority next quoted *McConnell* and *Buckley* for the proposition that contribution limits may "impose serious burdens on [recipients'] free speech." *Id.* (internal quotation marks omitted). But because the cromnibus scheme is not *Buckley*'s example of an impermissible burden, the majority found that the First Amendment is unburdened. The LNC's "speech remains unencumbered by FECA." App.31a-32a.

The majority also perceived a conflict between *McConnell* and *Reed*. It noted that "FECA would be rife with content-based restrictions" that would be subject to

strict scrutiny were *Reed*'s treatment of content-based restrictions applicable to election laws. App.32a. To subject "*McConnell*-approved BCRA" to strict scrutiny under *Reed* would, in the majority's view, be tantamount to holding that *Reed* overruled *McConnell* by implication. App.32a-33a.

Seeing neither expenditures nor the content of speech burdened, the majority assumed that "closely drawn" scrutiny governed the LNC's facial challenge to the cromnibus scheme, and upheld it. App.34a. The majority viewed the cromnibus amendment as having done the LNC a favor, because it raised the overall contribution limit. App.35a. And it was "untroubled" by the lack of a "robust record of congressional factfinding" underlying the cromnibus amendment, because in its view, Congress "relaxed contribution limits." App.38a. The introduction of content-based spending restrictions was of no concern, because the overall contribution limit grew.

3. Judge Griffith dissented as to the spending purpose restrictions, which he found to fail closely-drawn scrutiny.

"*McConnell* does not resolve this case." App.43a. "This is a new scheme. *McConnell* did not address the propriety of a regime with these [preferred spending] exceptions" to a general contribution limit. App.44a. Congress made a new judgment that vast sums of money exceeding the base limit are non-corrupting if tied to particular spending purposes, and that judgment must be justified under the First Amendment. *Id.*

Congress's "self-serving assertions" that "many" expenditures from the cromnibus accounts are not intended to influence federal elections (*but see* presidential nominating conventions) are insufficient. App.45a. "And an ambivalent record is not enough to survive closely drawn scrutiny." *Id*. (citations omitted).

Judge Griffith noted that the privileged spending purposes—presidential conventions, lawyers, buildings—might implicate corruption concerns as much as any other speech. "There can be no serious doubt that the nominating conventions of the major parties are closely connected to elections. Contributions to their staging therefore appear to raise the same corruption risks as general contributions, and the record provides no reason to think otherwise." App.46a. Party headquarters are used to "host donors and connect them to party leaders and candidates," and election recounts "resolve whether an actual candidate wins or loses a particular election." App.47a. "[W]ithout record support [the majority's rationalizations] are too speculative to carry a First Amendment burden." *Id.* (internal quotation marks omitted).

4. Judge Katsas, joined by Judge Henderson, concurred in the judgment upholding the content-based spending restrictions, but dissented from the judgment rejecting the LNC's as-applied Shaber bequest challenge.

Judge Katsas rejected the FEC's "radical" request, App.56a, to "lower the [scrutiny] bar, at least with respect to bequests." App.54a. Contribution limits that

prevent effective advocacy are not the only ones that fail closely-drawn scrutiny. "[C]ontribution limits may be insufficiently tailored for other reasons . . . [a]nd regardless of any tailoring problems, contribution limits are unconstitutional if the asserted government interest is insufficiently important." App.55a.

"In its prior cases on contribution limits, the Supreme Court considered no issues specific to bequests," and the LNC "does not rest its claim on the same factual and legal arguments the Supreme Court expressly considered in *Buckley* and *McConnell*." App.61a (internal quotation marks omitted). "[T]here are strong reasons to think that bequests—in contrast to contributions from living donors—do not pose a significant risk of actual or apparent quid pro quo corruption." App.63a. Bequests are often significantly deferred, and "there is no easy means for deceased donors or their beneficiaries to enforce any corrupt bargains." *Id.*

Indeed, "the FEC points to nothing substantiating its concerns" respecting bequests. App.64a. Its concerns are wholly theoretical. "The FEC's failure of proof here is no less dramatic" than that in *Citizens United* v. *FEC*, 558 U.S. 310, 360 (2010). App.65a.

Judge Katsas also found that the First Amendment categorically secures uncoordinated bequests from limitation. App.66a-70a. And beyond that, he determined that Shaber's bequest, in particular, could not be limited, as Shaber never informed the LNC of it, neither sought nor was offered anything in exchange

for the bequest, and was only a minor donor with no other relationship to the party. App.70a-71a.

With respect to FECA's new contribution limit, Judge Katsas agreed with Judge Griffith that the FEC had not established "a corruption-based justification for the differential treatment of these speech categories." App.76a. "But I do not think that such proof is necessary in this case." *Id.* Judge Katsas rejected the majority's contention that the case does not involve speech restrictions, but agreed with its assessment that *Reed* is inapplicable to campaign finance restrictions. *Id.*

Judge Katsas was also inclined to agree with Judge Griffith that FECA's new contribution limit is underinclusive, in that "money is fungible, the exceptions dwarf the rule, and there is no plausible anti-corruption rationale to explain the disparate treatment." App.79a. But he offered that *McConnell* precluded the claim because it upheld a lower overall limit. In his view, lower courts cannot revisit *McConnell* "based on intervening statutes." App.80a. "On this point, any course correction must come from the Supreme Court itself." *Id*.

REASONS FOR GRANTING THE PETITION

The decision below dilutes the First Amendment's protection of political speech. It affirms the subversion of Americans' expressive legacies, and it upholds a statute that segregates and limits the funds of political

parties according to the content of their speech—a stark and serious violation of Americans' core First Amendment rights. It warrants review.

I. The Questions Presented Raise Recurring Issues of Significant and Immediate National Importance.

1. "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 734 (2011) (internal quotation marks and citations omitted). And at any time, "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Colo. Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.) (citation omitted).

> A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure.

Id. at 615-16.

How strange that this most important class of speech—speech uttered during campaigns, speech uttered by political parties—should hold a second-class

status when it comes to the First Amendment's protection from content-based discrimination.

The decision below radically departs from the bedrock concept that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). It upholds content-based limits on the speech of political parties who would spend over 10% of their donors' maximum annual contributions. When parties lack offsetting privileged expenses, these content-based restrictions deny them significant potential support. A content-based campaign finance regulation that effectively limits the LNC's donations to $35,500 while allowing its Republican and Democratic competitors to rake in $355,000 per donor impacts the national political conversation in a manner warranting this Court's urgent attention.

This Court should not wait to see what inspiration campaign finance regulators draw from this opinion. FECA's cromnibus amendment might have only been a ruse to allow the two incumbent parties to raise vast new sums of essentially unrestricted cash. But now that the D.C. Circuit has blessed content-based spending restrictions on speech, look out. Congress, and legislatures around the country, will assuredly develop new views as to which speech purposes should, as a matter of law, draw more—and less—support. The time to examine this phenomenon is now.

2. The FEC frequently interferes with bequests. "[T]he district court found that since 1978 donors have contributed more than $3.7 million in bequeathed funds, not infrequently in five- and six-figure amounts. And that figure is likely underreported." App.19a (citations omitted). It bears recalling the district court's earlier finding that "many bequests of amounts far exceeding FECA's annual contribution limit . . . have been left for national party committees in recent years." *LNC I*, 930 F. Supp. 2d at 184 (CF78). Immediately upon the D.C. Circuit's disposition of the Burrington dispute as incapable of repetition, Shaber's death proved the court wrong. The record also reflects a third LNC bequest exceeding the base limit thus far. App.194a-96a (CF170-78).

There will be more bequests, left to all parties. Every bequest restricted by the FEC significantly interferes with American legal tradition and its respectful efforts to honor the wishes of the deceased. Considering the serious First Amendment issues that the FEC's practice implicates, this Court's intervention is needed.

II. The D.C. Circuit's Decision Is Wrong.

A. Limiting Shaber's Bequest Violates the First Amendment.

1. As Judge Katsas demonstrated, the outcome of the LNC's bequest claim does not turn on whether the standard of review is strict or "closely drawn." But the LNC is nonetheless constrained to note that courts should never merely assume the standard of review. If a court does not *know* the answer to an important legal question, it should exercise judgment, not guess. The majority acknowledged that this Court's decisions have "left open the [standard of review] question" respecting bequests. App.15a. But rather than reason an answer, it "assume[d] without deciding" that "closely drawn" scrutiny governs the bequest issue. App.15a-16a.

This assumption was wrong. Underlying this Court's more relaxed treatment of contribution limits is the notion that such laws "entail[] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. Contribution limits "limit one important means of associating with a candidate or committee, but leave the contributor free" to associate in other ways. *Id.* at 22. Normally, "contribution limits may bear more heavily on the associational right than on freedom to speak," *McConnell*, 540 U.S. at 135 (internal quotation marks omitted). But they do not implicate associational rights *at all* when applied against testamentary bequests, because the dead do not engage in political association. "[I]n the literal sense, the FECA restriction (as enforced by the FEC) on [testamentary bequests] is not a

contribution limit involving significant interference with associational rights [that] must be closely drawn to serve a sufficiently important interest." *LNC I*, 930 F. Supp. 2d at 169.

The majority acknowledged that the LNC's as-applied challenge implicates only "the speech-recipient box." App.13a. The associational predicate for reducing the standard of review to "closely drawn" is thus absent.

2. The majority's denial of any difference between the corruption abilities of deceased and living donors denies the known distinction between life and death itself. Death disrupts all individual capabilities in this world—including the ability to corrupt a political party.

In the majority's view, "political favors *now* for the promise of money *later*" is a form of corruption, App.17a-18a; a corrupt donor could promise to remember a party in his will. But so what? As the FEC admitted, "[n]ational committees of political parties, candidates for federal office, and federal office holders, may grant preferential treatment and access to potential donors in the unilateral hope that such preferential treatment and access would be remembered with a donation." *LNC I*, 930 F. Supp. 2d at 177 (CF46). It can hardly be illegal for a party to hope that it will be remembered by those who appreciate its efforts. "Ingratiation and access, in any event, are not corruption." *Citizens United*, 558 U.S. at 360.

The dead cannot perform the "winks and nods" of *quid pro quo* policing. App.63a. As Judge Katsas observed, "a corrupt donor [who] seeks political favors during his lifetime, when the bequest is nothing more than a revocable promise," can easily renege. *Id.* While a corrupt donor's "surviving friends and family remain all too capable of accepting political favors that their deceased benefactor may have pre-arranged for their benefit," App.18a, that donor "will have no way to ensure delivery after death makes the bequest irrevocable and removes him from the picture." App.63a. "Once a political party receives a testamentary bequest, neither it, nor its candidates, risk offending the deceased donors." *LNC I*, 930 F. Supp. 2d at 177 (CF48).

Any theoretical corrupt bequest tests the limit of cosmic possibility; a coordinated deathbed bequest closely timed to some political favor, perhaps? "[T]he FEC does not point to even a single *quid pro quo* exchange—at any time in American history—allegedly effected through a bequest. Nor do the careful, extensive findings made by the district courts in the LNC cases." App.65a (citations omitted). And it "seems almost fantastic" that a testator would donate to competing political parties, as the living do to secure access. App.66a.

The majority's suggestion that the LNC could not establish an as-applied violation as to Shaber's bequest without seeking broader relief fares no better. The D.C. Circuit's summary affirmance in *LNC I* confirmed that corrupting bequests exist as legal fiction, if

not in the real world. But that decision did not make the dead and the living equals in the context of as-applied FECA challenges, and the LNC had no need to tilt against that windmill. "[U]pholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one." *Doe* v. *Reed*, 561 U.S. 186, 201 (2010) (citations omitted); *Wis. Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam). Indeed, the very opinion that *LNC I* affirmed, rejecting a categorical challenge to FECA's application against bequests, also certified the LNC's as-applied challenge respecting Burrington's bequest. Had the LNC sought relief as to *other* bequests based only upon the factual record made as to Shaber's gift, the majority would have doubtless—and properly—criticized it for doing so.

3. The majority's claim that prophylactic contribution limits are too difficult to subject to as-applied challenges because donor-donee relationships are unknowable, App.21-22a, is factually and legally deficient. Review of a party's relationship with a dead person is wholly retrospective. The majority did not need to rely on its generosity of spirit in "making the unremarkable assumption that Shaber's contribution was not, in fact, part of a corrupt quid pro quo exchange." App.20a. It had a record, built through adversarial and third-party discovery. And there is no reason why the FEC cannot apply lessons learned from Shaber's example. It has previously issued guidance tracking this Court's upholding of an as-applied challenge. *See* 72 Fed. Reg. 72899, 72899 (Dec. 26, 2007) ("The

Commission is revising 11 CFR parts 104 and 114 to implement the recent U.S. Supreme Court decision in *FEC v. Wis*[.] *Right to Life, Inc*., [551 U.S. 449 (2007)]").

4. The majority's claim that the LNC raised only the factual and legal arguments previously rejected in upholding the facial validity of contribution limits, App.23a, defies the record. Had the LNC done that, the district court would not have certified this case, or the previous one concerning Burrington's bequest. Indeed, the majority began by acknowledging that Shaber's condition makes this a case of first impression. "Because the typical donor is a living human being capable of both speaking and associating, neither the Supreme Court nor we have had occasion to untangle a recipient's rights from its donors'." App.15a.

The merits of the LNC's Shaber-bequest claim are not close. The FEC's prospects for meeting its heightened scrutiny burden—"closely drawn," "exacting," or something in between—ended when the district court found that "[t]he FEC is unaware at this time of any quid pro quo arrangement related to Mr. Shaber's bequest to the LNC." App.182a (CF125). When "there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo' . . . we must conclude that the government has no anti-corruption interest in limiting contributions. . . ." *SpeechNow.org* v. *FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010) (en banc). "Even a modest burden on one's ability to raise funds may be undue if such burden serves no corruption concern whatsoever." App.98a n.9.

Since "something outweighs nothing every time," *SpeechNow*, 599 F.3d at 695 (internal quotation marks and punctuation omitted), the "something" of the LNC's substantial First Amendment interest in accepting Shaber's contribution outweighs the FEC's nothing.

B. FECA's Content-Based Spending Restrictions Are Unconstitutional.

1. The majority's argument that FECA's content-based spending restrictions do not implicate speech contradicts this Court's precedent and strain credulity. *Buckley*'s holding that contribution limits infringe the recipient's speech rights when they are set too low, 424 U.S. at 21, supplies an important clue: contribution limits implicate speech.

Nobody should deny that a $0.00 contribution limit would implicate the recipient's First Amendment speech rights because it only hurts a "bank account balance," and without money, nothing can "become[] speech." App.31a. Laws limiting a political party's receipt of printing presses, broadcasting equipment, or internet servers would doubtless be viewed as implicating speech rights, even if nothing has "become speech" owing to these implements because their contribution has been barred.

Likewise, telling a political party that it can accept checks exceeding $300,000, so long as it does not spend a cent on pamphlets, or radio ads, or anything else that is not congressionally-approved, most certainly implicates First Amendment speech. And it implicates the

First Amendment by imposing content-based restrictions on speech.

2. The majority was reluctant to acknowledge that the cromnibus amendment created content-based speech restrictions, because doing so would raise questions about *"McConnell*-approved BCRA," App.32a, referring to other FECA amendments that accompanied the previous soft money ban. The majority's odd word usage, "*McConnell*-approved BCRA," elides an inconvenient fact. *McConnell* approved BCRA, so in that sense it can fairly be described as "*McConnell*-approved." But while *McConnell* may have upheld content-based provisions, it did not uphold them against content-based challenges of the sort made here. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (internal quotation marks omitted).

The FEC had advanced a version of this argument before the district court with respect to Section 30125(b)(1), which bars state, district, and local political committees from spending funds on federal election activity. *McConnell* upheld the provision, but the district court was unimpressed. "[*McConnell*] plaintiffs did not raise the argument that § 30125(b)(1) unconstitutionally conditioned a contribution's lawfulness on the purpose for which the contribution was made, which is the argument the LNC raises here. As such,

McConnell cannot be read to foreclose the LNC's claim." App.117a-18a (citations omitted).

3. The majority found that under *McConnell*, the LNC's speech was not subject to content-based restrictions. App.32a. But under *Reed*, "facial distinctions . . . defining regulated speech by its function or purpose . . . are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 135 S. Ct. at 2227. So are laws that "cannot be justified without reference to the content of the regulated speech." *Id.* (internal quotation marks omitted).

Rather than resist the fact that *Reed* perfectly describes the cromnibus scheme, the court asserted that *Reed* was in conflict with *McConnell*, a case having direct application, as the latter had upheld contribution limits. "Unless and until the [Supreme] Court expressly abrogates *McConnell*," the D.C. Circuit will not apply strict scrutiny to content-based restrictions contained in contribution limits. App.33a.

This Court should accept that challenge. It should not have become necessary, as *Reed* contains no "campaign finance exception" and *McConnell* did not address a content-based scheme of the type at issue here. As the district court acknowledged, the cromnibus scheme represents a new breed of restriction, "neither a pure contribution limit nor a pure expenditure limit, but contain[ing] elements of both." App.111a. Its content-based features mean that "the appropriate framework for review is that governing content-based restrictions

on speech, requiring narrow tailoring to serve a compelling state interest, rather than the contribution limit framework." App.113a. There is no logical reason, and the court of appeals offered none, to reduce the standard of review in content-based discrimination cases where political speech is concerned.

4. The majority offered that as long as the government deigns to allow more speech, it can restrict the speech's content as it wishes. How could the LNC complain about being "given" more speech?

Alas, free speech is a *right*, not a government-dispensed favor. And to justify restrictions on this right, the government requires actual evidence—even under "closely drawn" scrutiny. As Judge Griffith demonstrated, the record simply lacks any evidence carrying the FEC's burden on this point.

Worse still, there is no unraveling the FEC's soup of conflicting conjecture, supposition, and rationalization. The FEC claims that donations tied to individual candidates and officeholders are more potentially corrupting, but two of FECA's three favored speech categories—presidential nominating conventions and election contests—fall into this class. Congress "could" have thought this and Congress "may" have thought that, but the legislative history confirms that no one thought about it much at all, except as a means to enable the two incumbent parties to collect more money. "[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden," *McCutcheon* v. *FEC*, 572 U.S. 185, 210 (2014) (internal

quotation marks omitted), but conjecture, all of it internally inconsistent, is all that the FEC has offered.

And so the rationale for the Nation's basic federal contribution limit for political parties is either valid, or not, on a case-by-case basis, according to at least eight different factors—including the identity of donor and receiver and what each could use from the other. App.145a-46a (CF43). This is quite a distance from this Court's understanding that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used*." *McConnell*, 540 U.S. at 155 (emphasis added). When do these content-based restrictions on speech go too far? The FEC knows it when it sees it. If the goal of campaign finance regulation is to increase the public's confidence in our electoral system, the record here only casts doubt on that enterprise.

III. The Questions Presented Need Not Percolate Further in the Lower Courts, Nor Are They Likely To Do So.

The various opinions below, including "the careful, extensive findings made by the district courts in the *LNC* cases," App.65a, have thoroughly vetted the questions, providing this Court a sufficient platform for decision. The FEC has thrown every conceivable jurisdictional theory (and a few others) at this case. Eleven of the eleven judges who have examined these

theories have come away satisfied that jurisdiction exists.

But notwithstanding the decision's broad impact on our country's political conversation, this Court should not expect other parties to line up challenges to the FEC's restriction of bequests or FECA's new content-based spending limits. A living donor's challenge to the FEC's bequest practice would likely be considered unripe. No estate has ever dedicated its resources to bringing such an action through to this Court. Any such effort would face the claim that the deceased's speech rights did not survive death. App.12a-13a; *LNC I*, 930 F. Supp. 2d at 169-70. The incumbent parties may be less interested in immediate access to sizeable bequests and, unlike third parties, benefit from the content-based restrictions that they effectively evade. They have no incentive to support the litigation of these issues, and every incentive to leave in place their officeholders' handiwork.

Most problematic, cementing the decision below would fuel the FEC's arguments that these disputes should never be certified again as doing so would "involve settled principles of law." *Kachaturian* v. *FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (en banc) (per curiam) (citation omitted). "Once the statute has been thoroughly reviewed by the Court, questions arising under 'blessed' provisions understandably should meet a higher threshold." *Goland* v. *United States*, 903 F.2d 1247, 1257 (9th Cir. 1990).

Section 30110 was designed for speed and certainty. Inherent in that structure is a bias against repeatedly litigating the same issue. While FECA decisions can be revisited, *Holmes* v. *FEC*, 823 F.3d 69, 74 (D.C. Cir. 2016), a district court is less likely to certify a question already addressed by the en banc court, and a panel would be even less likely to reverse denial of a settled matter's certification. Even were this Court to reverse such a decision, that would call for quite the effort by a plaintiff only to start on the merits at square one. Section 30110 is meant to generate high-level review in important cases, not the percolation of circuit splits. The significant questions presented could not easily, if ever, return here. Accordingly, this petition should at least be held pending the outcome of *Thompson* v. *Hebdon*, No. 19-122 (petition for certiorari filed July 22, 2019), which calls upon this Court to clarify the standard for reviewing campaign finance restrictions under the First Amendment. Any guidance this Court might offer in *Thompson* would require re-examination of the decision reached in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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