No. 19-234

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The FEC correctly notes that courts are limited "to addressing only the matters certified" in cases arising under 52 U.S.C. § 30110. BIO 19 (citations and punctuation omitted). But it ignores this rule from page I, pretending that the courts below certified and decided its rejected formulation of the issues. Additional errors follow.

As the dissents demonstrated, Petitioner should prevail even under "closely drawn" scrutiny. Like *Thompson* v. *Hebdon*, No. 19-122, this petition offers the Court a compelling vehicle by which to provide much-needed clarification as to the standards governing contribution limits. It also raises important questions about the hitherto-unexplored field of political testation, and offers a unique opportunity to excise content-based speech restrictions from the Nation's basic federal campaign finance law. It should be granted.

I. The FEC Cannot Relitigate the Scope of FECA-Certified Questions.

The questions Petitioner presents are "expressed concisely in relation to the circumstances of the case." Sup. Ct. R. 14.1(a). The straw-man questions targeted by the FEC's brief in opposition are not. The parties have already litigated the precise scope of the questions per Section 30110. Petitioner's questions here reflect the questions certified and answered below. The

FEC's proposed questions were rejected. The Commission failed to move for reconsideration of the certified questions, as it did in previous litigation, App.95a, and it failed to otherwise seek relief from certification via petition for writs of mandamus or prohibition. The brief in opposition, tracking the FEC's failed and now-forfeited proposals, is largely inapposite.

1. The first question certified below asked, "Does imposing annual contribution limits against the bequest of Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?" App.198a. The first question presented here asks whether "limiting the size of Joseph Shaber's uncoordinated testamentary bequest to [Petitioner] violate[s] the party's First Amendment right to free speech." Pet.i. But the FEC's reformulation of the question omits reference to Shaber's bequest, asking generally about "a particular bequest that has not been shown to be a part of a corrupt exchange." BIO i. The omission is inappropriate.

Shaber's bequest cannot be excised from the as-applied challenge concerning . . . Shaber's bequest. What else would that first question concern? The FEC would substitute an abstraction for Petitioner's specific claim, because the general rule is more defensible than the as-applied challenge. But the general rule is not before this Court.

The FEC's effort to re-shape the as-applied challenge in this fashion failed. It fought the Shaber question's certification by arguing that application of

FECA's contribution limits to testamentary bequests had been previously approved, but the District Court rejected the claim. "*LNC I* merely held 'that it is possible for a bequest to raise valid anti-corruption concerns.'" App.99a (quoting *Libertarian Nat'l Comm., Inc.* v. *FEC*, 930 F. Supp. 2d 154, 166 (D.D.C. 2013)). The FEC did not challenge that determination. Of course, this Court might decide the case in broader fashion, as "no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as applied' cases." *Citizens United* v. *FEC*, 558 U.S. 310, 331 (2010) (quotation marks omitted); App.62a. But this is not the time and place to change the subject of the litigation.

2a. The FEC's re-imagination of the second question re-writes Petitioner's facial challenge, certified and decided below, as one to FECA's "amendments enacted in 2014." BIO I; *see also* BIO 12, 21. But the FEC already lost this fight.

Petitioner challenges Section 30125(a)(1), which bars it from spending money raised outside FECA's restrictions, because FECA limits contributions according to the content of the funded speech. Pet.ii; *accord* App.198a (second and third certified questions); Compl. ¶¶ 31, 34. As to the remedy, Petitioner observed that the choices are to either (1) enjoin Section 30125(a)(1) and let Congress fix the statute, or (2) sever the unconstitutional content-based restrictions while respecting Congress's choice to raise the overall limit. LNC C.A. Br. 59-63. Nonetheless, the FEC

argued that Petitioner's claim should be restricted to challenging the segregated account structure's creation. Reciting the complaint's clear language, the District Court declared the FEC's argument "baseless." App.123a. The FEC did not press the matter further.

2b. Also impermissible is the FEC's characterization of the segregated account structure as one that "allow[s]" parties "to accept contributions beyond the otherwise applicable limit." BIO I. This strained construction asserts that FECA imposes not one contribution limit, with strings attached, but four separate contribution limits per donor. As the District Court admonished in rejecting this formulation, "[f]raming the specialized purpose regime as one that 'permit[s]' the LNC 'to accept 300% of the otherwise applicable contribution limit' is argumentative and question-begging." App.126a. The FEC did not seek relief from this decision either.

II. Clarifying that the FEC Cannot Restrict Shaber's Uncoordinated Bequest Will Provide Needed Guidance in the Political Testation Field.

1. The FEC stresses that this Court has upheld contribution limits aimed at preventing the appearance of corruption. From this, it jumps to the conclusion that *any* as-applied challenge to these limits "is therefore inconsistent with [precedent]." BIO 14-15.

This Court has previously explained to the FEC the difference between facial and as-applied challenges. *Wis. Right to Life, Inc*. v. *FEC*, 546 U.S. 410 (2006) (per curiam). That is also a precedent. When parties challenge a law's "application to a particular person under particular circumstances," *United States* v. *Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (citations omitted), the challenged rule's broader validity is of limited relevance.

2. Petitioner shares the FEC's asserted preference for having campaign-finance restrictions "generally operate through clear rules." BIO 15. The FEC's loss here would present it a golden opportunity to draft such rules, as it has done before upon losing as-applied challenges. Pet.29-30. Safeguarding First Amendment rights against poorly-considered speech restrictions cannot be too big a hassle for an agency charged with regulating political speech. As Judge Katsas offered, "the FEC routinely determines whether disputed expenditures were coordinated or independent. The FEC offers no reason why it cannot make the same determination as to bequests." App.69a.

3. As far as the FEC is concerned, expenditure limits trigger "exacting scrutiny," contribution limits warrant "closely drawn" scrutiny, and there the matter ends. Q.E.D. BIO 15-16. The majority below did not share the FEC's confidence. It 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; Pet.16.

But as Judge Katsas demonstrated, Petitioner's as-applied claim succeeds even under "closely drawn" scrutiny. The FEC chides Petitioner for its skepticism regarding the prospect of corrupt bequests, but the Commission has zero evidence of corruption as to Shaber. App.182a. The as-applied challenge concerns Shaber's bequest, not the merits of Petitioner's other views.

4. Having improperly deleted Shaber from the first question presented, the FEC offers a bizarre argument that the case is a poor vehicle for deciding the Shaber question because *Petitioner* "makes a series of broader contentions about bequests in general." BIO 18. Conflating the Shaber argument that Petitioner litigated, and the generalized claim that it did not, the FEC even suggests that certiorari is inappropriate because the question was allegedly not presented below. BIO 19-20. The FEC documents Petitioner's various statements emphatically disclaiming a generalized challenge, and then turns around and claims the case cannot be heard because Petitioner allegedly offers a generalized challenge.

The FEC should read the Petition for Certiorari, and pause to reflect on the words "Joseph Shaber" in Petitioner's first question presented. It is *the FEC* that seeks to make this a case about bequests generally, notwithstanding Petitioner's persistent emphasis on Shaber's bequest. That has been the pattern for years.

As Judge Katsas noted, "the fact that the LNC sought relief only as to Shaber's bequest did not prevent it from making substantive arguments that sweep more broadly." App.72a (citations omitted). Are we to pretend that there are *no* differences between the living and the dead? Petitioner "has preserved its First Amendment challenge . . . as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise . . . that is itself in doubt." *Citizens United*, 558 U.S. at 331 (citation omitted). In evaluating whether Joseph Shaber's bequest involves the potential for corruption, his death is at least slightly relevant, even as Petitioner acknowledges the theoretical existence of *other*, corrupt bequests, such as "a coordinated deathbed bequest closely timed to some political favor." Pet.28.

5. Precisely because Petitioner's arguments would be consequential in future cases, the matter warrants this Court's review. Bequests may represent a small fraction of political donations, but that is no reason to disregard the wishes of the deceased and deprive political parties of funds urgently needed to conduct their expressive political missions. The Government can always belittle the relative worth of a single constitutional injury, BIO 18, but our system's allowance for as-applied claims reflects a different set of values, and acknowledges the broader role that such cases play in developing constitutional law.

III. This Court Should Clarify that Content-Based Restrictions on Political Speech Cannot Be Sustained Absent Strong Evidentiary Support.

1. The First Amendment presumes that people are free to speak. The FEC turns this presumption on its head, claiming that Congress did everyone a favor by allowing "additional" speech on its preferred subjects. BIO 21. Only in Orwell's world is every content-based speech restriction a permissive act of grace, allowing what has not (yet) been prohibited. The majority below adopted an equally wrong approach, holding that restrictions on how one might speak with money do not regulate speech at all, if they attach at the contribution stage. App.31a-32a. This view is not merely wrong, but ignores the challenged statutory language limiting how money is "used," Sections 30116(a)(9)(A), (B), and (C), and barring Petitioner from "spend[ing] any funds[ ] that are not subject to the limitations" of the cromnibus account scheme. Section 30125(a)(1).

2. The FEC argues that "differential contribution limits" (different, according to the content of funding speech) are nothing new. BIO 23. Perhaps. But Petitioner's content-based challenge is one of first impression. One wonders what version of *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) the FEC read when it claimed that this Court rejected Petitioner's challenge to FECA as imposing content-based speech restrictions. BIO 25. That holding is absent from the cited page, or any page of *Buckley*. And as Judge Griffith explained, "This is a new scheme. *McConnell* did

not address the propriety of a regime with these exceptions." App.44a (citing *McConnell* v. *FEC*, 540 U.S. 93 (2003)); *see also* App.117a-18a ("[*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").[1]

3. Ignoring the complete absence of a legislative record, and its own elaborately hypothesized justification, the FEC claims that "Congress did have justifications for" allegedly "loosening" speech restrictions by limiting contributions on the basis of what speech they would fund. BIO 22. Alas, these "justifications" amount to the circular argument that Congress wanted parties to have more money for presidential conventions, and that Congress "could have" believed that the privileged speech is less effective. *Id.* (citations omitted). But even "closely drawn" scrutiny demands that the government carry its burden with actual evidence, not perfunctory hand-waving.

4. In any event, the correct standard is not "closely drawn," but strict scrutiny, as the cromnibus scheme restricts speech on the basis of content. The FEC's claim that FECA's segregated spending account restrictions do not impose content-based speech limits, "as the ability to use the segregated accounts to defray

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[1] Even if the *Buckley*-era or *McConnell*-era versions of FECA contained content-based speech restrictions, it is not apparent that these were as problematic as the cromnibus scheme. Congress has a greater interest in regulating money directly spent on federal rather than state or local campaigns, App.119a-20a, and the evidence required to support different laws will vary.

expenses does not 'depend' on the 'communicative content' of any speech," BIO 24 (quoting *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2224 [sic] (2015)), is unserious.

For one thing, this is a new position for the FEC, which conceded below that "each category of [segregated] expenses serves a different purpose and frequently features a discussion of different issues and priorities." FEC C.A. Br. 48 (quotation marks and brackets omitted). The FEC had it right earlier. The function and purpose of a presidential nominating convention is to nominate a presidential ticket. Petitioner can spend segregated funds on *these* conventions, but not on its midterm conventions. Litigation for political ends is "a form of political expression," *NAACP* v. *Button*, 371 U.S. 415, 429 (1963), but this is the only form of political expression on which money in the segregated litigation account might be spent. Money in the segregated building account might be spent placing a sign in the window, but it cannot be spent printing pamphlets to be passed on the sidewalk outside. This Court should end, now, this new form of content-based political speech restrictions.

IV. Resolution of the Questions Raised Here Is Urgently Needed.

1. The FEC misses the point in noting that the issues here can theoretically be relitigated in other circuits. BIO 21 (citations omitted), 25-26. Petitioner never meant to suggest that the problem is geographic. Living donors' challenges to bequest limitations are

unripe anywhere, whether the deceased have First Amendment rights is questionable, and estates do not spend their assets on this type of expensive and protracted litigation (executors are in the business of distributing and closing). Such litigation is thus likely feasible only if brought by political parties that receive bequests, and the two large incumbent parties have never needed to litigate bequest limitations. Likewise, it is primarily minor parties who are hamstrung by FECA's restrictions as to how money can be accepted, and once sitting in a segregated purpose account, how money could be spent. The fungible nature of money renders the content-based restrictions illusory as to the two major parties. Pet.36.

The notion that litigants can invoke regular federal question jurisdiction "where the Section 30110 procedure is unavailable," BIO 21, is far fetched. Section 30110 governs claims made by national committees of political parties and individuals eligible to vote for President. Not many potential litigants outside these categories would or could ever challenge FECA's political party contribution limit for individuals.

The FEC does not contest that Section 30110's structure, by design, frustrates the relitigation of claims. Pet.36-37. Theoretically, some small, poorly-funded party not bound by this decision as a matter of claim preclusion might shop these claims in another circuit. But that would not diminish the force of the FEC's inevitable argument—which it does not disclaim—that the matter ought not be certified because

it was settled here. The FEC identifies no circuit splits that have ever arisen under Section 30110.

2. The FEC claims that declaring FECA's content-based restrictions unlawful would benefit no one, wondering why that outcome might increase the amount of money that could be given "for general party activities." BIO 25. The answer is simple: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc*. v. *Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley*, 424 U.S. at 108).

Congress concluded that the parties (or at least the two major parties) needed more money. Especially considering the absence of a legislative record, this Court cannot decide that Congress would have preferred lower limits as the cost of forgoing the unlawful content-based restrictions. The other option is to dispense with Section 30125(a)(1) entirely and let Congress rewrite the scheme. But even if the remedy is to roll FECA back to 2014, Petitioner would benefit from not being subject to an unlawful restriction on its speech rights—a significant legal victory coinciding with one of its core beliefs. Petitioner would also welcome equal treatment, as a practical matter, with its larger competitors, and higher contribution limits when Congress immediately responds to such a decision. It is not the FEC's place to tell Petitioner that it ought not desire these results.

V. This Case Should At Least Be Held Pending *Thompson* v. *Hebdon*.

The FEC would sweep the decision below under the judicial rug before Petitioner might benefit from this Court's decision of *Thompson* v. *Hebdon*, petition for cert. pending, No. 19-122 (filed July 22, 2019). That would be improper, and contrary to the Court's established practice of holding related petitions.

The FEC seeks to distinguish *Thompson* on grounds that it concerns, specifically, a contribution limit's *level*. BIO 26. This is a strange argument, as the FEC has never suggested that contribution limit precedents in level cases are irrelevant in deciding this case. Were that true, it would be a powerful argument for granting certiorari. Equally frivolous is the FEC's attempt to distinguish *Thompson* on grounds that Petitioner does not "urge the Court to reconsider the standard of review that applies to contribution limits *generally*." *Id.* (emphasis added). Both cases question the standard of review currently applied to contribution limits. What happens in one will impact the other.

Indeed—the *Thompson* petitioners go so far as to suggest that *Buckley* be reconsidered (!), that strict scrutiny be applied to contribution limits, or that "closely drawn" scrutiny be ratcheted up. *See Thompson* Pet.8 n.1; *Thompson* v. *Hebdon*, reply br., No. 19-122 at 9-10 & n.3 (filed Oct. 9, 2019). Any of these outcomes, and many others plainly on the *Thompson* table, would control the outcome here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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