UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, Inc.,	)	
Plaintiff,	)	
v.	)	Civ. No. 11-462 (RLW)
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFF LIBERTARIAN NATIONAL COMMITTEE'S OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND.

I. The FEC bears a heavy burden in asserting that the Court's certification, following substantial discovery, briefing, and argument, was "clear error.

This case is roughly two years old, and has occupied a great deal of both the Parties' and this Court's time and attention.[1] The legal question has always been whether Plaintiff's challenge is frivolous or insubstantial. This Court found that, as regards the specific bequest of Raymond Groves Burrington, it is not. Nevertheless, the FEC now asks this Court to reverse itself, because it committed *clear error* in finding Plaintiff's claim *non-frivolous.* The motion is without merit.

Under the law of the D.C. Circuit and this Court, a Rule 59(e) motion must meet a high burden. "A Rule 59(e) motion is discretionary and need not be granted unless the district court

[1] Plaintiff Libertarian National Committee ("LNC") filed an amended complaint seeking review under 2 U.S.C. § 437h on May 27, 2011. (Docket No. 13). The parties conducted extensive discovery, which concluded in February 2012. (Docket No. 21). Then, between May and September of 2012, the parties extensively briefed proposed findings of fact, and the FEC moved for summary judgment. (Docket Nos. 24-38). This Court held a three-hour hearing on the merits of that briefing on February 25, 2013. In March 18, 2013, this Court certified facts and the following question to the *en banc* Court of Appeals:

> Does imposing annual contribution limits against the bequest of Raymond Groves Burrington violate the First Amendment rights of the Libertarian National Committee? (Mem. Opp. at 28.)

finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004). A Rule 59(e) motion to reconsider is not "an opportunity to reargue facts and theories upon which a court has already ruled. The motion *must* address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions." *Amoco Prod. Co. v. Fry*, 908 F. Supp. 991, 993 (D.D.C. 1995) (emphasis supplied). Indeed, a district court may "grant a motion to reconsider *only if* the moving party can present new facts or clear errors of law that *compel* a change in the court's prior ruling." *Id.* (internal citations and quotations omitted) (emphasis supplied). Just last month, this Court noted that "[a]lthough somewhat broader [than a Rule 60(d)(3) motion for a court to set aside judgment for fraud on the court], motions to alter or amend under Rule 59(e) are similarly disfavored 'and relief from judgment is granted only when the moving party establishes *extraordinary circumstances*.'" *Montgomery v. Gotbaum*, 2013 U.S. Dist. LEXIS 35944, at *4 (March 15, 2013) (quoting *Neidermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001)) (internal citations omitted) (emphasis supplied).

In this case, the burden on the Commission is still greater, as the FEC must demonstrate this Court clearly erred on a question of frivolousness. "[T]he categories of cases that merit 2 U.S.C. § 437h certification a[re] those that are neither 'insubstantial nor settled.'" Mem. Op. at 11 (quoting *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.4). Given this low bar to certification under § 437h, if the Court committed clear error, it is far more likely that it did so by certifying only a narrowed version of Plaintiff's request.

The FEC's briefing does not provide any new factual evidence. Nor does it show alternative rationales under which this Court may reverse itself under Rule 59(e), such as

"manifest injustice" or "extraordinary circumstances." To the extent the Commission brings forward new legal theories, they are inadequate to support the motion,[2] which should be speedily denied so that this case may proceed to the Court of Appeals, where Congress intended these issues to be heard.

II. The Commission's concerns largely stem from a misunderstanding of as-applied Constitutional challenges.

A. Because as-applied rulings apply to similarly situated litigants, concerns that "most large contributors will seek individual exemptions" are overblown.

The FEC presents its motion as a defense of the Court of Appeals's valuable time. It argues that this "Court's ruling conflicts with the Supreme Court's command that the availability of section 437h review should be carefully limited, since…[this Court's] ruling opens the door for most large contributors to seek individual exemptions from FECA's limits in separate en banc Court of Appeals proceedings on the ground that their specific contributions will not cause corruption." Mot. to Alt. at 2. But this alarming statement is fundamentally incorrect.

On the first point, the danger posed to the Court of Appeals's schedule is overstated. Since § 437h became law nearly forty years ago, *just thirteen cases have ever been certified* under that provision to *any* Court of Appeals.[3] This limited use of § 437h review should not be

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[2] For example, in a footnote on the last page of its briefing, the Commission suggests that "[b]ecause we are in a new calendar year and the certified case is narrower, all that is at stake before the Court of Appeals is whether the LNC can receive approximately $7,000 now or must wait until the end of this year, an off year in the election cycle." Mot. to Alt. at 13, n. 7. The Commission's concern is easily disposed of under the "capable of repetition, yet evading review" exception to mootness. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010), *Davis v. FEC*, 554 U.S. 724, 735 (2008); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007), *Bellotti v. First Nat'l Bank of Boston*, 435 U.S. 765, 774 (1978).

[3] *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Republican Nat'l Comm. v. FEC* (*In re Anh Cao*), 619 F.3d 410 (5th Cir. 2010) (hearing certified questions with appeal of dismissal of other claims); *Mariani v. United States*, 212 F.3d 761, 767 (3d Cir. 2000); *FEC. v. International Funding Inst., Inc.*, 969 F.2d 1110 (D.C. Cir. 1992); *Khachaturian v. FEC*, 980 F.2d 330 (5th

surprising. Congress has already appropriately limited the availability of such review by the very terms of the statute. *Bread PAC v. FEC*, 455 U.S. at 583 ("[T]he structure of the Act suggests that Congress knew how to specify that 'all' constitutional questions about 'any' provision of the Act may be raised, and therefore could as easily have directed that 'any' person might invoke the unique procedures of §437h. But Congress did not do so…"); *Cal. Med. Ass'n v. FEC*, 453 U.S. at 192, n. 14 (finding that §437h's statutory "restrictions…enable a district court to prevent the abuses of §437h envisioned by the Commission."). Furthermore, the district courts are forbidden from allowing cases that are mere "sophistic twist[s]" from reaching the *en banc* Court. *Goland v. FEC*, 903 F.2d 1247, 1257 (9th Cir. 1990). "Moreover, the Federal Election Campaign Act is not an unlimited fountain of constitutional questions, and it is thus reasonable to assume that resort to §437h will decrease in the future." *Cal. Med. Ass'n*, 453 U.S. at 192 n. 13.

Indeed, the Commission's warning of a tsunami of new §437h challenges only makes any sense in light of their misunderstanding of this Court's certified question. The Commission argues that it is "unaware of a court ever holding, as this Court did, that a contribution limit could be struck down as applied to *one* contribution due to a lack of evidence showing that the isolated contribution was actually or apparently corrupting." Mot. to Alt. at 7 (emphasis in original). The Commission goes on to postulate that "[i]f contributors were permitted to seek

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Cir. 1992); *International Ass'n of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092 (D.C. Cir. 1982); *Bread PAC v. FEC*, 635 F.2d 621 (7th Cir. 1980); *Cal. Medical Ass'n v. FEC*, 641 F.2d 619 (9th Cir. 1980); *Anderson v. FEC*, 634 F.2d 3 (1st Cir. 1980); *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980); *Republican Nat'l Committee v. FEC*, 616 F.2d 1 (2d Cir. 1979); *Buckley v. Valeo*, 519 F.2d 821 (D.C.Cir.1975); *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (*Clark v. Valeo* returned questions certified under § 437h to district court unanswered because en banc panel found that ripe "case and controversy" requirement was not satisfied. We give the benefit of the doubt to the FEC's argument that the en banc Courts of Appeal will be flooded with § 437h cases in counting *Clark v. Valeo* in this tally, even though the Court did not answer certified questions.)

individual as-applied exemptions from the contribution limits, it would undermine the clarity and dependability that prophylactic contribution limits provide." *Id.* at 8, n. 4.

This argument ignores the well-established rule that as-applied challenges, whether successful or otherwise, apply to the plaintiff and those "similarly situated." *See Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 698 ("However…our holding today extends only to the LBCRA as applied to the Chamber PACs and similarly situated entities"); *N.C. Right to Life v. Leake*, 525 F.3 274, 337 (Michael, J., dissenting) ("I conclude that §163-278.13 is constitutional as applied to NCRL-FIPE and similarly situated groups.")

Separating an as-applied challenge from a facial challenge is part of the routine work of the courts.[4] *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) ("Having found that the plaintiff could not raise a facial challenge, the Court remanded for consideration of an as -applied challenge."); *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) ("The considerations we have discussed support our further determination that these facial attacks should have not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge…In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."). The courts are well qualified to handle follow-on litigation, and determine if the new plaintiffs are similarly situated.[5]

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[4] In fact, courts often vindicate as-applied challenges to the most stringent of prophylactic rules. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *New York v. Quarles*, 467 U.S. 649 (1984).

[5] *E.g. Dobbert v. Florida*, 432 U.S. 282, 301 (1977) ("But petitioner is simply not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to *Furman*…"); *Jackson v. Thornburgh*, 907 F.2d 194, 203 (D.C. Cir. 1990) ("We know that there are large numbers of D.C. Code offenders who are serving time in the federal system. We also know that prisoners who are convicted of exactly the same crimes, even under like circumstances, may be assigned to either a federal or D.C. correctional facility. In addition, we know that these similarly-situated persons will receive different sentences *solely* on the basis of whether they serve their time in a federal or D.C. institution."); *United States v. Jones*, 480 Fed. Appx. 969, 971 (11th Cir. 2012) ("We also conclude that it was not unconstitutional as applied, because Jones's codefendant was not convicted of violating § 924(c)(1)(C) and was not similarly situated to him.")

Indeed, were LNC to lose this case before the D.C. Circuit, and a subsequent suit were brought involving a different bequest that is nonetheless similarly situated to the LNC here, that case would likely be frivolous within the meaning of §437h. *Goland*, 903 F.2d at 1258 ("Under [§437h]…a single judge could dismiss constitutional claims which already ha[ve] been decided."). But LNC has not lost this case, nor has any remotely similar case involving any bequest been decided by the Court of Appeals. And were LNC to prevail before the D.C. Circuit, presumably no materially similar cases would arise, as the Commission would conform its conduct to the Court's decision and implement rules for similar, non-corrupting bequests.

B. Contrary to the Commission's assertion, the mere fact that a regulation is "prophylactic" in nature does not immunize it from as-applied constitutional challenge.

The Commission asserts that "prophylactic contribution limits validly apply to *all* contributions, including those with no actual corrupt practice or effect;" thus immunizing the limits at issue here from the as-applied question certified by this Court. Mot. to Alt. at 7. As a preliminary matter, this case is not the first time that the Commission has declared campaign finance rules immune to as-applied challenge as a result of a facial ruling. After the Supreme Court handed down *McConnell v. FEC*, the Commission argued that the Bipartisan Campaign Reform Act's "electioneering communication" definition, having been upheld against a facial challenge, was no longer subject to serious as-applied challenges. FEC Mem. in Opp., *Wisconsin Right to Life v. FEC* (D.D.C. 2004) ("*McConnell* upheld the primary definition of 'electioneering communication' as to all communications it reached, not just 'sham issue ads,' as plaintiff contends. The Court thus precluded a flood of as-applied challenges based on any supposedly 'genuine' issue ad that a claimant like WRTL could engineer, an eventuality that could wholly undermine the bright-line objective test BCRA employs.") But this argument was ultimately

rejected by the U.S. Supreme Court in a unanimous *per curiam* opinion. *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"). The plaintiffs prevailed in their as-applied challenge one year later. *FEC v. Wisconsin Right to Life*, 554 U.S. 449 (2007) ("*WRTL II*").

The *WRTL* cases were not a unique phenomenon. In *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986) ("*MCFL*"), the High Court found an as-applied exception allowing qualified nonprofit groups to issue independent expenditures from their general treasury funds. *MCFL*, 479 U.S. at 263. The *MCFL* Court noted that the law's broad sweep—a prophylactic rule banning all corporate independent expenditures was designed to counter "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *Id.*, at 257. But the Court also noted that "[t]he resources available to *this* fund [MCFL], as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee." *Id.* at 258. The FEC presented numerous challenges to MCFL's ability to conduct independent expenditures, but the Court squarely rejected them all. *Id.* at 256-265. After thorough analysis of the organization's structure, internal rules on contributions, and activities, Justice Brennan, writing for the Court, concluded that "[i]t is not the case…that MCFL merely poses less of a threat of the danger that has prompted regulation [of corporate independent expenditures]. Rather it does not pose such a threat at all*." Id.* at 268.

Such is the case here. The FEC argues that the complete ban on *all* bequests over a certain number is a prophylactic rule that fights "the danger of actual quid pro quo arrangements and the appearance of corruption stemming from public awareness of the opportunities for abuse." Mot. to Alt. at 7. But this Court correctly found that, on the record developed by the parties here, "the Burrington bequest does not implicate any valid anti-corruption concerns." Mem. Op. at 27. Put differently, because there was no *possibility* of corruption surrounding the Burrington bequest,

the usual arguments supporting a prophylactic rule are inapplicable. The state may not create a prophylactic rule, in support of a state interest, when the rule ensnares entities posing no risk to that interest.

Such an approach is not unworkable. MCFL's victory created a class of corporate entities permitted to issue independent expenditures. This so-called "*MCFL* exception" was routinely applied by the courts, until *Citizens United v. FEC*, 130 S. Ct. 876 (2010) held that all corporations could make independent expenditures from their general treasuries.[6] The *MCFL* exception was applied without trouble at the state level as well.[7] In fact, from 1986 until 2010, only one case went before the U.S. Supreme Court with any question as to whether the plaintiff qualified for the *MCFL* exception, and the Court found it did not. *Austin v. Mich. Chamber of Commerce*, 439 U.S. 652, 665 (1990).

Furthermore, the FEC suggests that all contribution limits are exempt from as-applied challenges by the mere virtue that they are contribution limits. The Commission claims that "[c]ourts have almost universally rejected such as-applied challenges to FECA's contribution limits—even in cases where the threat of corruption was concededly somewhat diminished—and have sometimes explicitly relied on the interest in maintaining clear, bright-line prophylactic

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[6] *E.g. Day v. Holahan*, 34 F.3d 1356, 1363-1364 (8th Cir. 1994) ("The analysis in *MCFL*…is an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*…Should these facts change, however, particularly as to the amount of revenue MCCL [Minnesota Citizens Concerned for Life] receives from its business activities, the business activities that produce the revenue, or the amount of contributions it receives from for-profit corporations or labor unions, the state may wish to revisit MCCL's qualification for the exemption."); *FEC v. NRA of Am.*, 254 F.3d 173, 188 (D.C. Cir. 2001) ("In support of this conclusion, the Court pointed to several characteristics of the *MCFL* that made it look more like a 'voluntary political association' than a traditional business corporation" and found the NRA applied for the *MCFL* exemption in 1980, but not in 1978 or 1982).

[7] *See State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 612 (Ak. 1999) ("We therefore read Alaska Stat. 15.13.135 in accordance with the three conditions *Austin* discussed in describing the *MCFL* exception.").

rules." But no court may uphold a prophylactic rule just to save the prophylaxis.[8] Such jurisprudence would do great harm to our Constitution.

The strongest case the FEC cites in its favor is *FEC v. Beaumont*. 539 U.S. 146, 160 (2003). In that case, the Court rejected an effort by a nonprofit corporation to obtain an *MCFL*-like exception to the ban on direct corporate contributions. But the Court did not uphold the corporate ban merely to protect a prophylactic rule. Other facts *precluded* an as-applied challenge. The Court recognized that "[n]ot all corporations that qualify for favorable tax treatment under §501(c)(4)…lack substantial resources, and the category covers some of the Nation's most politically powerful organizations." *Id.* at 160. Only after finding that nonprofits, by their nature, still maintained the "state-created advantages" underlying the rationale for the general corporate contribution ban, the Court decided against an exception. *Id.*

But *Beaumont* is inapposite here. The *en banc* Court of Appeals could easily find that the Burrington bequest and other "similarly situated" bequests pose no *risk* of corruption. After all, Mr. Burrington is dead, and had little to no interaction with the LNC before his death. This is *precisely* the sort of as-applied question reserved for the *en banc* Court of Appeals, with its particular depth of expertise in matters of constitutional significance, under 2 U.S.C. §437h.

[8] Furthermore, the FEC's citation to *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) is simply odd. The full two sentences it selectively cites read: "In *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit. But this proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized does not suffice to establish the validity of § 9012(f), which indiscriminately lumps with corporations any 'committee, association or organization.'"

III. The FEC's reading of the "closely drawn" constraint collapses all standards of constitutional scrutiny, effectively eviscerating the requirement of any tailoring whatsoever.

The FEC's discussion of the tailoring required in constitutional challenges to contribution limits misreads and muddies the law. The Supreme Court articulated the applicable standard in its seminal *Buckley v. Valeo* decision: "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25. The Court reaffirmed the requirement that contribution limits be "closely drawn to serve a sufficiently important interest" in *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2817 (2011) (quotations omitted), and this Court recognized and articulated this requirement in its Memorandum Opinion. Mem. Op. at 15.

A. It is true that a degree of flexibility inheres in the "closely drawn" requirement, but this is the essence of tailoring, and is inevitable in all analyses requiring proportionality.

Any meaningful assessment of the constitutionality of a government action that burdens constitutional freedoms, particularly in an as-applied context, requires a degree of flexibility to allow reviewing courts to balance competing interests. Campaign finance cases are no exception. Indeed, even the Supreme Court has characterized the scrutiny applicable to burdens upon associational freedoms—and contribution limits in particular—in multiple, somewhat ambiguous, ways. In *McConnell*, for example, the Court noted, "[w]hen the Government burdens the right to contribute, we apply *heightened scrutiny*." 540 U.S. at 231 (emphasis supplied). In *Randall v. Sorrell*, the Court invalidated Vermont's contribution limits because "they fail to satisfy the First Amendment's requirement of *careful tailoring*." 548 U.S. at 237 (citing *Buckley*, at 25-30) (emphasis supplied). And an important First Amendment ruling, *NAACP v. Alabama*,

noted that "[s]tate action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny*." 357 U.S. 449, 460-61 (1958) (emphasis supplied). Thus, the standard for constitutionality is fact-bound and not a bright-line test.

The Supreme Court noted as much in the specific context of *Buckley*'s "closely drawn" requirement, recognizing that "[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley* per curiam opinion…Under *Buckley*'s standard of scrutiny, a contribution limit involving significant interference with associational rights could survive if the Government demonstrated that contribution regulation was closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be *fine tuned*." *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 386 (2000) (quotations and citations omitted) (emphasis supplied).

B. The presence of such flexibility does not eliminate the tailoring requirement, but rather, reinforces it.

Not in spite of, but because of, a flexible approach to intermediate constitutional scrutiny, courts should be vigilant in considering the contours of a particular as-applied challenge. *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) (objecting, in the First Amendment context, to "mechanical jurisprudence through the use of oversimplified formulas"). Thus, a requirement of proportionality between the government's anti-corruption interest and the extent to which contribution limits burden First Amendment rights pervades the Court's construction and application of the "closely drawn" requirement.

For example, in the disclosure context, the *Buckley* Court noted that "[t]hese are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation." 424 U.S. at 68. Similarly, *Randall v. Sorrell*'s invalidation of Vermont's contribution limits turned on the fact that "they

impose burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe." *Id.* at 236-237 (2006) (parenthesis in original). *See also Davis v. FEC*, 554 U.S. 724, 744 (2008) (in applying exacting scrutiny to disclosure requirements, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.")

Appellate courts hearing as-applied challenges to contribution limits further illustrate that tailoring is required to survive a "closely drawn" analysis. For example, the Fourth Circuit recently found a $4,000 contribution limit unconstitutional as applied to an independent expenditure committee because the limit was improperly tailored. The court noted, "[a]s one moves away from the case in which a donor gives money directly to a candidate…the state's interest in preventing corruption necessarily decreases. This is because the danger that contributions will be given 'as a quid pro quo for improper commitments from the candidate' is simply not as real when the candidate himself is removed from the process." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291-292 (4th Cir. 2008) (quoting *Buckley*, 424 U.S. at 47).

Thus, although there is some ambiguity in the standard, that ambiguity exists precisely to allow courts to review a law that burdens a First Amendment right in the particular context of both that law's severity and the proximity of the abridged right to "the state's interest in preventing corruption." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291-292 (4th Cir. 2008).

Nevertheless, there is no way to grant the FEC's motion without eliminating the requirement of any tailoring whatsoever, despite the clear recognition that government action in furtherance of its anti-corruption interest must not be "disproportionately severe" in light of the First Amendment rights at stake. *Randall v. Sorrell* at 236-237. The Commission cannot demonstrate the requisite proportionality, as it has provided no evidence of tailoring. In the

words of the Supreme Court, while it is true that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny…will vary up or down with the novelty and plausibility of the justification raised…[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo.*, 528 U.S. at 391-393. Yet that is all the FEC offers here.

C. The FEC further mangles the "closely drawn" analysis by alleging that this Court engaged in "something akin to narrow tailoring."

The FEC devotes considerable space in its Motion to arguing that this Court applied "something akin to narrow tailoring" to its review of 2 U.S.C. § 431-57. Mot. to Alt. at 11. This argument misreads the pleadings, the law, and the opinion of this Court.

i. Neither the parties nor this Court argued for or applied "something akin to narrow tailoring."

Neither the LNC nor this Court's Memorandum Opinion argues for or applies "something akin to narrow tailoring." The LNC recognizes that the challenged statute is not subject to strict scrutiny, and this Court noted that "limits on campaign *expenditures* are subject to strict scrutiny. But limits on *contributions* to candidates and political parties are subject to less rigorous scrutiny and are valid if they are closely drawn to meet a sufficiently important governmental interest."[9] Mem. Op. at 15 (internal citations and quotation marks omitted) (emphasis in original).

The FEC offers two points to support its argument that this Court applied "something akin to narrow tailoring." First, it alleges that "this Court's ruling would require the Commission

[9] Indeed, this Court suggested that the applicable standard is "intermediate scrutiny," Mem. Op. at 15, though it is not at all clear from the campaign finance jurisprudence whether the "closely drawn to a sufficiently important government interest" requirement is akin to "intermediate scrutiny" as conventionally understood. *See infra* (noting the myriad ways the Supreme Court has characterized the constitutional scrutiny applicable to contribution limits). This is particularly so in the context of both as applied challenges and the unique nature of bequests.

to prove an actual *quid pro quo* arrangement, or special access or benefits that make such an arrangement more likely, to justify applying the Contribution Limit to Burrington's bequest." Mot. to Alt. at 11. This is not so. This Court instead found that the "LNC makes a persuasive argument that the Burrington bequest does not implicate any valid anti-corruption concerns, and the FEC did not really respond to this argument." *Id.* In this as-applied challenge, certification was not clear error, given that the FEC failed to allege *any* facts to indicate that the anti-corruption interest would be furthered by prohibiting the LNC from receiving the entire Burrington bequest at once. Mem. Op. at 27-28. This, again, suggests that there may be no *possibility* that the Burrington request would further valid anti-corruption concerns.

ii. The FEC's badly misstates the law in claiming that, if a court even considers the existence of "less restrictive means to address the government interest at issue," it engages in narrow tailoring.

In support of its contention that this Court applied the incorrect standard of review, the FEC also asserts that a "search for less restrictive means to address the government interest at issue is…a hallmark of narrow tailoring." Mot. to Alt. at 12. The Commission then concludes that it was clear error for this Court to even consider such alternatives, since, "[n]either Congress nor the Commission was required to explore alternative methods for combating corruption and its appearance." *Id*. But mere consideration of less restrictive alternatives does not transform a "closely drawn" analysis, or any other type of non-strict-scrutiny review, into narrow tailoring analysis.

It is true that a "least restrictive means" test pervades strict scrutiny jurisprudence. But courts have also considered the *less* restrictive means available to further a particular government interest in assessing constitutionality in various contexts that do *not* implicate strict

scrutiny. Indeed, this can prove crucial in determining whether any measure of tailoring—narrow or otherwise—is present.

For example, in the Fourth Circuit's *N.C. Right to Life, Inc. v. Leake* "closely drawn" analysis, the court considered that "the state neglected the use of a more narrowly tailored regulatory option: applying contribution limits to independent expenditure committees shown to have abused their corporate form." 525 F.3d at 306. This was one factor in reaching a ruling that a particular contribution limit was unconstitutional as applied to an independent expenditure committee. *See also, e.g., McConnell v. FEC*, 540 U.S. 93, 231-232 (2003) (in facial challenge invalidating certain limits on contributions by minors, the Court considered, *inter alia*, that "[s]tates have adopted a variety of more tailored approaches--e.g., counting contributions by minors against the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children. Without deciding whether any of these alternatives is sufficiently tailored, we hold that the provision here sweeps too broadly."); *United States v. Alvarez*, 132 S. Ct. 2537, 2540 (2012) (invalidating the Stolen Valor Act under the First Amendment exacting scrutiny, holding, "when the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives.") (internal citations and quotation marks omitted).

Finally, the FEC's cavalier attitude toward tailoring is particularly problematic in a constitutional context which Congress took pains to recognize as exceptionally important. Indeed, the very existence of § 437h's provision for certifying questions to the en banc Court of Appeals demonstrates the importance of the issues within the statute's reach. *See, e.g.*; *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

Conclusion

For the foregoing reasons, the Commission's motion to alter or amend should be denied.

Dated: April 29, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April 2013, I caused the foregoing documents to be filed electronically using the CM/ECF system, causing notice to be sent to the parties listed below:

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