UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	
Plaintiff,	Civ. No. 11-562 (RLW)
v.	
FEDERAL ELECTION COMMISSION,	MOTION TO ALTER OR AMEND THE JUDGMENT
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO ALTER OR AMEND THE JUDGMENT

Pursuant to Federal Rule of Civil Procedure 59(e), defendant Federal Election Commission respectfully moves this Court for an order altering or amending this Court's March 18, 2013 Order (Docket No. 42). That Order certified a question of the constitutionality of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57, to the *en banc* United States Court of Appeals for the District of Columbia Circuit pursuant to 2 U.S.C. § 437h. A Memorandum of Points and Authorities in support of the Commission's motion and a Proposed Order are submitted with this motion.

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April 15, 2013

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Plaintiff,	)	Civ. No. 11-562 (RLW)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO ALTER OR AMEND THE JUDGMENT

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Defendant Federal Election Commission ("Commission" or "FEC") respectfully requests, pursuant to Federal Rule of Civil Procedure 59(e), that the Court alter or amend the March 18, 2013 judgment (Docket Nos. 41-42) erroneously ruling that contributors can seek constitutional exemptions from the limits of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57, for each individual contribution they make.

The Court's ruling granted in part the motion under 2 U.S.C. § 437h of plaintiff Libertarian National Committee, Inc. ("LNC") to certify a question of the constitutionality of FECA to the *en banc* Court of Appeals for the District of Columbia Circuit. The LNC's proposed question asked whether FECA's $32,400 limit on the amount that a person can annually contribute to a national political party committee is constitutional when applied to a bequeathed contribution. This Court correctly declined to certify that question, holding that large bequests to parties, in general, threaten to cause corruption and the appearance of corruption. However, the Court also held that the contribution limit could be unconstitutional as applied to *one* bequest — a $217,734 bequest made by Raymond Groves Burrington to the LNC — because the record contained no evidence that this particular bequest was corrupt. And on that basis, the Court narrowed the LNC's section 437h question and certified it to the *en banc* Court of Appeals. These two rulings cannot stand together.

The certification of that narrow question was clear error for three reasons. First, as the Court's opinion recognizes, contribution limits are bright-line prophylactic rules designed to prevent the threat of corruption and the appearance of corruption, which stem from the opportunity for abuse that is inherent in all large contributions. Thus, the Supreme Court has held FECA contribution limits to be valid both facially and as applied to various classes of contributions while recognizing that most contributions do not in fact lead to *quid pro quo*

exchanges. The Commission is aware of no case holding that a party can obtain an after-the-fact, as-applied exemption from the contribution limits for one isolated contribution. And it was error to require that the Commission present evidence that the Burrington bequest was corrupting, because it has in fact been made in installments subject to the FECA contribution limit, which has been in effect at some amount for more than 35 years.

Second, the Court's ruling effectively requires the contribution limit to be narrowly tailored to only contributions that pose the greatest danger of corruption, contrary to the longstanding rule, recognized by this Court, that contribution limits are subject to intermediate scrutiny, not strict scrutiny. Finally, the Court's ruling conflicts with the Supreme Court's command that the availability of section 437h review should be carefully limited, since the 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.

Accordingly, the Commission respectfully requests that the Court alter or amend its judgment to hold that the LNC has failed to present any substantial constitutional question under section 437h for review by the *en banc* Court of Appeals.

I. BACKGROUND

Plaintiff LNC filed this action claiming that FECA's annual limit on contributions to national political party committees violates the First Amendment when applied to bequeathed contributions.[1] (*See* First Am. Compl. (Docket No. 13).) In April 2007, LNC supporter

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[1] 2 U.S.C. § 441a(a)(1)(B) ("[N]o person shall make contributions . . . to the political committees established and maintained by a national political party . . . in any calendar year which, in the aggregate, exceed [$32,400].") (hereinafter, "Contribution Limit" or "Limit"); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling

Raymond Groves Burrington died, and his will contained a bequest for the LNC that amounted to $217,734. (FEC Mem. in Opp'n to Pl.'s Mot. to Certify Facts and Questions and in Supp. of FEC's Mot. for Summ. J. ("FEC SJ Mem.") at 3 (Docket No. 29).) To comply with the Contribution Limit, the estate deposited the bequest into an escrow account, from which it has since made annual, FECA-compliant contributions to the LNC. (*Id.*)

After the parties completed discovery, the LNC moved under 2 U.S.C. § 437h to have the following question of FECA's constitutionality certified to the *en banc* United States Court of Appeals for the District of Columbia Circuit:

> Does imposing annual contribution limits against testamentary bequests directed at, or accepted or solicited by political party committees, violate First Amendment speech and association rights?

(Docket No. 25.) In response, the Commission concurrently moved for summary judgment and opposed certification on the ground that the LNC's proposed claim was not substantial and thus did not warrant review by the *en banc* Court of Appeals. (Docket Nos. 28-29.) The Commission argued that unlimited bequeathed contributions to political parties would present the same threat of corruption and the appearance of corruption that the Supreme Court has held supports the validity of contribution limits generally. (FEC SJ Mem. at 15-35 (Docket No. 29).)

On March 18, 2013, the Court issued a Memorandum Opinion (Docket No. 41) and Order (Docket No. 42) granting the parties' motions in part and denying them in part. First, the Court held that the LNC's proposed section 437h question, as stated, is insubstantial. (Mem. Op. at 18 (Docket No. 41).) The Court found the Commission's arguments that unlimited bequests would threaten corruption and its appearance "sensible and persuasive," and the Court concluded

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Disclosure Threshold, 78 Fed. Reg. 8530-02, 8532 (Feb. 6, 2013) (adjusting section 441a(a)(1)(B)'s limit for inflation).

that bequests "may very well raise the anti-corruption concerns." (Mem. Op. at 19-20.) The LNC has appealed this portion of the Court's ruling. (Docket No. 43.)

Despite finding the LNC's question insubstantial, however, the Court certified the following narrowed and reframed 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. Op. at 28.) The Court found persuasive the LNC's argument that the "Burrington bequest does not implicate any valid anti-corruption concerns," since in the record "there are no facts to indicate that the LNC solicited a large bequest from Burrington, provided any benefit or special access to Burrington while he was alive, or provides any special benefit or access to Burrington's heirs or representatives now." (*Id.* at 27.)

As of the date of the Court's ruling, the Burrington estate had contributed the entire $217,734 bequest to the LNC except for approximately $7,534. In each year from 2007 to 2013, the Burrington estate has contributed to the LNC the maximum (or almost the maximum) that FECA allows.[2] On January 1, 2014, the LNC will be able to accept the remaining balance of the Burrington bequest, as the LNC desires. (*See* First Am. Compl. ¶¶ 15, 24 (Docket No. 13).)

II. THE COURT MAY ALTER OR AMEND A JUDGMENT TO CORRECT A CLEAR ERROR OF LAW

Under Rule 59(e), a party may file a motion to alter or amend a judgment. Such motions are properly granted if "the district court 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

[2] Reports reflecting the Burrington estate's contributions to the LNC can be found by searching for identification number "C00255695" on the Commission's website at http://www.fec.gov/finance/disclosure/candcmte_info.shtml.

injustice." *Ciralsky v. C.I.A.*, 355 F.3d 661, 671 (D.C. Cir. 2004) (internal quotation marks omitted); *see also Firestone v. Firestone*, 76 F.3d 1205, 1208-09 (D.C. Cir. 1996) (finding Rule 59(e) motion should have been granted to correct "erroneous" ruling). "Clear error" exists where there are either "errors of fact appearing on the face of the record or errors of law." *Ramseur v. Barreto*, 213 F.R.D. 79, 81 (D.D.C. 2003) (explaining that Rule 59(e) relief is warranted if the movant "clearly establish[es] . . . a manifest error of law") (internal quotation marks omitted).

III. CERTIFICATION OF A CONSTITUTIONAL QUESTION SOLELY ABOUT BURRINGTON'S BEQUEST WAS CLEAR ERROR

The Commission respectfully requests that the Court withdraw its certification of the narrow question of FECA's constitutionality to the *en banc* Court of Appeals because it was based on a clear error of law. This Court correctly concluded that the Contribution Limit validly applies to bequeathed contributions to parties, and on that basis the Court declined to certify the LNC's stated section 437h question. The Court nevertheless held that it is possible that the Limit could be invalid as applied to *just one* bequeathed contribution — Burrington's bequest to the LNC. On this basis, the Court certified a narrowed section 437h question.[3] This unprecedented holding was erroneous for three reasons, as set forth below.

A. The Court's General Holding Regarding Bequests Compels the Conclusion That the Contribution Limit Also Validly Applies to Burrington's Bequest

This Court correctly held that the Contribution Limit validly applies to bequests to national party committees because bequests "may very well raise the same anti-corruption concerns that motivated the *Buckley* and *McConnell* Courts to dismiss a facial attack on contribution limits." (Mem. Op. at 20; *see also id.* at 19-22.) The Limit promotes the anti-

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[3] The Commission does not challenge the Court's authority to narrow and reframe a proposed section 437h question. (*See* Mem. Op. at 23-25.)

corruption interests when applied to bequests, this Court explained, even though "there is not a record replete with well-documented problems associated with corruption from large bequests." (*Id.* at 20.) That is because, as the Court emphasized, the limits are "'preventative,'" given that "[t]he scope of the 'pernicious practices' involved in large direct contributions to political committees 'can never be reliably ascertained.'" (*Id.* at 21 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010)).)

For that same reason, specific evidence regarding actual and apparent corruption stemming from Burrington's particular bequest — or any other particular bequest — should not be required in order to uphold application of the Contribution Limit to the bequest. As with any preventative, bright-line prophylactic rule, the Contribution Limit's validity is not undermined by the fact that the Limit will inevitably regulate some conduct that does not directly implicate the underlying purpose of the rule. *See, e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 776 (1975) (explaining that while a prophylactic rule might prove "in particular cases to be 'under-inclusive' or 'over-inclusive,' in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate [government] interests"). Thus, the Court's ruling that the Contribution Limit could be invalid as applied to Burrington's bequest even though it was valid as applied to bequests generally was clearly erroneous. (*See* Mem. Op. at 27-28.)

As this Court's opinion explains, the Supreme Court in *Buckley* acknowledged that "most large contributors do not seek improper influence." Mem. Op. at 5; *see Buckley*, 424 U.S. at 29. Nevertheless, *Buckley* upheld the facial validity of contribution limits, explaining that

> [due to] the difficulty in determining suspect contributions, "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."

(Mem. Op. at 5-6 (quoting *Buckley*, 424 U.S. at 30).) Accordingly, prophylactic contribution limits validly apply to *all* contributions, including those with no actual corrupt purpose or effect, in order to remove "*the danger* of actual quid pro quo arrangements" and "*the appearance* of corruption stemming from public awareness of the opportunities for abuse." *Buckley*, 424 U.S. at 27 (emphases added); *see also Citizens United*, 130 S. Ct. at 908 ("[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (declining to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared" even though FECA limits contributions by corporations "without great financial resources, as well as those more fortunately situated").

Since *Buckley*, courts have entertained as-applied challenges to FECA's contribution limits, such as the LNC's challenge in this case. But in view of the prophylactic nature of the limits, we are not aware 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. Instead, to uphold the limits, courts have required only that the particular *class* of contribution at issue would present a danger of corruption and its appearance similar to that described in *Buckley* if the relevant limit were lifted. For example, *McCutcheon v. FEC* upheld the validity of aggregate contribution limits by pointing out scenarios where corruption would result if the limits were lifted, and did not examine whether the specific contributions made or planned would actually result in a *quid pro*

quo exchange. *See* --- F. Supp. 2d ---, No. 12-1034, 2012 WL 4466482, at *1-*6 (D.D.C. Sept. 28, 2012) (three-judge court), *prob. juris. noted*, 133 S. Ct. 1242 (2013).[4]

Courts 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 rules. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 159-60 (2003) (rejecting argument "that on a class-wide basis [nonprofit political advocacy] corporations pose no potential threat to the political system" when making contributions); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (rejecting as-applied exemption for contributions made by nonprofit corporations even though they "might not exhibit all of the evil that contributions by [for profit] corporations exhibit," in order to give "proper deference to a congressional determination of the need for a prophylactic rule"); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 198 n.19 (1981) (rejecting as-applied exemption for contributions to a political committee that are earmarked for administrative support, rather than for influencing elections); *Buckley*, 424 U.S. at 53 n.59 (rejecting as-applied exemption for contributions to candidates from "immediate family members," even though the "risk of improper influence is somewhat diminished"); *Goland v. United States*, 903 F.2d 1247, 1258-59 (9th Cir. 1990) (rejecting as-applied exemption for contributions where the contributor keeps his identity a secret by using

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[4] If contributors were permitted to seek individual as-applied exemptions from the contribution limits, it would undermine the clarity and dependability that prophylactic contribution limits provide. Contributors would be left to guess when they could permissibly make above-limit contributions, and there could be considerable uncertainty about whether they would face an FEC enforcement action as a result. Individual as-applied exemptions would also make the contribution limits administratively unworkable, as evidence of corruption and its appearance — likely in the form of depositions, document requests, and opinion polls — would be required to determine if *each* of the potentially thousands of desired above-limit contributions each year could lawfully be made.

straw donors, allegedly precluding the opportunity to exert undue influence); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 158-59 (D.D.C.) (three-judge court) (rejecting as-applied exemption for soft-money donations where the political party promises not to link its officeholders with the donors), *aff'd*, 130 S. Ct. 3544 (2010). Each court analyzed the danger of corruption for the entire class of contributors, and in no case did a court find that the circumstances of a particular contribution warranted an exemption.

In other First Amendment contexts, the Supreme Court has likewise upheld objective, prophylactic rules that it acknowledged would regulate some speech that might not implicate the government interests involved in order to address the practical difficulty and chilling effect of case-by-case analysis. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 729 (2000) (upholding law banning "unwelcome demonstrators" from coming closer than eight feet to people entering health care facilities, while acknowledging that the law's "prophylactic approach . . . will sometimes inhibit a demonstrator whose approach in fact would have proved harmless"); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 633 (1995) (upholding rule prohibiting lawyers from targeting victims for 30 days after an accident to protect grieving victims, even though some injuries or grief of some victims may be "relatively minor").[5]

Here, the Commission argued extensively in its briefs that bequeathed contributions, if unlimited, would present the same risks of corruption and its appearance as other contributions. (*See* FEC SJ Mem. at 15-35 (Docket No. 29); FEC's Reply Mem. in Supp. of Mot. for Summ. J. at 11-17 (Docket No. 38).) The Court agreed. Finding the Commission's arguments "sensible

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[5] It is not hard to imagine other troubling ramifications if bright-line prophylactic rules in the public interest are susceptible to case-by-case exemptions. For instance, traffic safety would quickly be undermined if a motorist were permitted to seek an exemption from a speed limit on the grounds that he or she had a good driving record and would promise to drive 120 miles per hour only on a major highway during the middle of the night.

and persuasive" (Mem. Op. at 20), this Court concluded that the Contribution Limit is valid as applied to bequests to national party committees, and thus the Court declined to certify the LNC's section 437h question as stated (*id.* at 18-22). That ruling should have sufficed as a matter of law to uphold the prophylactic Limit as applied to *all* bequests, including Burrington's bequest.[6] *Cf. supra* pp. 7-9 (citing cases in which courts upheld contribution limits against as-applied challenges because the class of contribution at issue threatens corruption and its appearance). If, as this Court correctly concluded, the prophylactic Contribution Limit promotes anti-corruption interests when applied to bequests, it therefore must be valid even though "most large contributors [of bequests] do not seek improper influence." *Buckley*, 424 U.S. at 29. That the record contained "no facts to indicate" (Mem. Op. at 27) Burrington's bequest resulted in a *quid pro quo* is beside the point.

The limited evidence of corruption in the record relating to bequests generally, and to Burrington's bequest in particular, is due "in large part [to the fact that] the FECA contribution limit has applied to [bequests] for the last 35 years." (Mem. Op. at 21.) Striking down FECA as applied to Burrington's bequest — which was *not* received in amounts exceeding the Limit — for lack of corruption evidence would make the Contribution Limit a victim of its own success. *See, e.g.*, *Wagner v. FEC*, --- F. Supp. 2d ---, No. 11-1841, 2012 WL 5378224, at *7 (D.D.C. Nov. 2, 2012) ("Congress need not roll back its longstanding [contribution limit] and wait for a scandal to arise in order to provide evidence that [the limit] prevents corruption."). The Limit on Burrington's six-figure bequest properly served its purpose of preventing "the *danger*" of

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[6] Thus, the FEC *did* respond to the LNC's argument that Burrington's bequest did not implicate anti-corruption concerns. (*See* Mem. Op. at 27.) Although there was not extensive explicit discussion of whether that specific bequest was corrupting, the Commission's broader arguments generally subsume the narrower question of whether the Act could validly be applied to the Burrington bequest.

corruption and "the *appearance* of corruption stemming from public awareness of the opportunities for abuse" inherent in all large contributions. *Buckley*, 424 U.S. at 27 (emphases added).

B. The Court's Ruling Applies an Excessively Narrow Tailoring Test to the Contribution Limit Instead of a Closely Drawn Test

The Court properly recognized that contribution limits are examined to see whether they are "closely drawn to meet a sufficiently important governmental interest," *i.e.*, intermediate rather than strict scrutiny. (Mem. Op. at 14-15 (internal quotation marks omitted).) Under closely drawn scrutiny, the contribution limits need not be narrowly tailored to apply only to contributions that pose the highest danger of resulting in *quid pro quo* corruption. *See Buckley*, 424 U.S. at 27-28. *Buckley* rejected the argument that the limits are improperly tailored because bribery laws provide a less restrictive means of addressing "proven and suspected *quid pro quo* arrangements." *Id.* (internal quotation marks omitted); *see also Citizens United*, 130 S. Ct. at 908 ("The practices *Buckley* noted would be covered by bribery laws . . . if a *quid pro quo* arrangement were proved. . . . The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption."). But this Court's ruling would require the Commission 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. (Mem. Op. at 27-28.) The Court thus required something akin to narrow tailoring, a fit the Supreme Court held is unnecessary for contribution limits. *Buckley*, 424 U.S. at 27-28; *Citizens United*, 130 S. Ct. at 908.

The Court's ruling also suggested that even if the Burrington bequest could in the future raise anti-corruption concerns, a future reviewing court would nevertheless need to decide whether the Commission could otherwise address those concerns through its "disclosure and

rulemaking authority." (Mem. Op. at 28 n.8.) But that sort of search for less restrictive means to address the government interest at issue is, again, a hallmark of narrow tailoring under strict scrutiny.

This is clear error. Neither Congress nor the Commission was required to explore alternative methods for combating corruption and its appearance. *See Beaumont*, 539 U.S. at 160 n.7; *Cal. Med. Ass'n*, 453 U.S. at 199 n.20; *Buckley*, 424 U.S. at 27-28. The Court's scrutiny of each individual application of the Contribution Limit, and its suggestion that the Commission must explore means alternative to a contribution limit, are inconsistent with closely drawn review. The Court should correct this error of law.

C. The Court's Ruling Does Not Construe 2 U.S.C. § 437h Narrowly

Finally, the Court's ruling conflicts with the Supreme Court's teaching, recognized by this Court, that section 437h should be construed narrowly to minimize the number of cases coming before the *en banc* Court of Appeals:

> [T]he Supreme Court has stated that 2 U.S.C. § 437h should be construed narrowly, in part because it creates 'a class of cases that command the immediate attention of . . . the courts of appeals sitting en banc, displacing existing caseloads and calling court of appeals judges away from their normal duties for expedited en banc sittings.'

(Mem. Op. at 12 (quoting *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982).)

This Court's ruling that the Contribution Limit may be invalid as applied to one contribution absent evidence of actual corruption could well multiply the number of section 437h proceedings before the *en banc* courts of appeals. *The ruling opens the door for any contributor who desires to make a contribution in excess of FECA's limits to bring a section 437h action to put forth evidence that his or her particular contribution deserves an exemption under the First Amendment because it would not cause actual corruption*. Since "most large contributors do not

seek improper influence," Mem. Op. at 5; *see Buckley*, 424 U.S. at 29, and "any individual eligible to vote" in a Presidential election may bring a section 437h claim, 2 U.S.C. § 437h, the increased workload for the *en banc* courts of appeals could well be significant.

These potential proceedings could be lengthy and fact-intensive, given the necessity of discovery to ascertain evidence of corruption.[7] And they would likely occur with increasing frequency in the weeks leading up to a federal election and involve motions for preliminary injunctions and other requests for expedition, multiplying the complexity and costs of such litigation.

These consequences further illustrate why courts have consistently treated FECA's contribution limits as bright-line rules not subject to after-the-fact, case-by-case exceptions. Such exceptions would undermine the clarity the limits provide for contributors and create an administratively unworkable system for — and place a burden on — the Commission, district courts, and *en banc* courts of appeals.

[7] Take this case, for example. Because 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. The question as narrowed thus may be factually insubstantial at this time and unworthy of certification. In the future, district courts would need to weigh how far over a given limit a prospective contribution must be in order for it to present a substantial question worthy of *en banc* consideration. This Court also indicated that the danger of corruption for the Burrington bequest could change over time (*see* Mem. Op. at 28 n.8), and that could potentially require re-litigation of its permissibility.

IV. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court alter or amend its judgment to hold that the LNC has failed to present any substantial constitutional question under 2 U.S.C. § 437h for review by the *en banc* Court of Appeals.

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