SET FOR EN BANC ORAL ARGUMENT ON NOVEMBER 30, 2018

NO. 18-5227

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Libertarian National Committee, Inc.,
Plaintiff-Appellant

v.

Federal Election Commission,
Defendant-Appellee

Upon Questions Certified to This Court by the
United States District Court for the District of Columbia
Pursuant to 52 U.S.C. § 30110 in Case No. 1:16-cv-00121-BAH
Hon. Beryl A. Howell

Brief *Amicus Curiae* of the Goldwater Institute In Support of the Appellant

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Certificate as to Parties, Rulings, and Related Cases

Pursuant to D.C. Cir. R. 28(a)(1), *Amicus* certifies the following:

Parties and *Amici*: Except for *Amicus* Goldwater Institute, all parties appearing before the district court and in this Court are as listed in the Brief for Appellant.

Rulings Under Review: Appellant seeks review under 52 U.S.C. § 30110 upon questions certified to this Court by the district court in an order (Doc. 34) and memorandum opinion (Doc. 35) both dated June 29, 2018. References to the rulings at issue appear in the Brief for Appellant.

Related cases: This case has not previously come before this Court or any other court. Counsel for *Amicus* is not aware of any other related cases pending before this Court or any other court within the meaning of D.C. Cir. R. 28(a)(1)(C).

Corporate Disclosure Statement

Per Fed. R. App. P. 29(a)(4)(A) and 26.1, the Goldwater Institute certifies that it is a 501(c)(3) nonprofit corporation. No parent corporation or any publicly held corporation owns 10% or more of its stock.

Statement Regarding Consent to File and Separate Briefing

Per Fed. R. App. P. 29 and D.C. Cir. R. 29, the Goldwater Institute respectfully files this brief *amicus curiae* with the consent of all parties.

The Institute certifies that a separate brief is necessary because it intends to address the issues of content-based speech restrictions, appropriate remedies, and other constitutional problems that arise out of the provisions challenged here: 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), 30125(a)(1).

No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the *Amicus*, its members, and counsel, contributed money that was intended to fund preparing or submitting this brief.

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CM/ECF	Case Management / Electronic Case Filing
Doc. xx	Docket record number in the court below
ep.	Electronic page number generated by the court's CM/ECF system
FEC	Federal Election Commission
LNC	Libertarian National Committee
UTC	Uniform Trust Code

Interest of the *Amicus Curiae*

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of freedom of speech. The Institute has litigated and won important freedom-of-speech victories, such as *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (matching funds provision is unconstitutional); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (tattoos are pure speech); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (bans on corporate contributions to political candidates likely violate the Equal Protection Clause). The Institute has appeared as *amicus curiae* in First Amendment cases, such as *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), and *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). *Amicus* believes its litigation experience and policy expertise will aid this Court in consideration of this case.

Statutes and Regulations

All applicable statutes and regulations are contained in the briefs of the parties or addenda attached thereto.

Summary of Argument

The specific-purpose provisions of 52 U.S.C. § 30116(a)(9) are unconstitutional content-based restrictions on speech that are subject to strict scrutiny. This *Amicus* proposes that the appropriate remedy is to declare the specific-purpose provisions unconstitutional, which will have the effect of extending to third parties like the Appellant the ability to spend up to $339,000 in inflation-adjusted dollars on speech that matters to them. This remedy also allows the two major parties to spend up to the same limit from their general or special-purpose accounts on speech that matters to them.

Argument

I. Limiting how someone can spend money based on the message expressed thereby is a kind of content-based restriction on speech that disproportionately harms third parties like the LNC.

The trial court voiced concerns that the special-purpose regime constitutes a content-based restriction on speech. Doc. 35 at eps. 22–23. Those concerns are well founded. Under that regime, annual expenditures of bequests above $33,900 may be used for only three purposes: presidential nominating conventions, party headquarters buildings, and recount expenses. 52 U.S.C. § 30116(a)(9). This is a content-based restriction on speech because whether or not the restriction applies is determined by reference to the content of the message communicated (or sought to be

communicated) by the bequest. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) (content-based speech "applies to particular speech because of the topic discussed or the idea or message expressed."). Consequently, the rule is presumptively unconstitutional and subject to strict scrutiny. *Id.* The burden is therefore on the Federal Election Commission to show that the specialized-purpose regime is narrowly tailored to serve a compelling governmental interest. *Id.*

The question for this Court is whether limiting the purposes for which money can be expended actually involves speech. It does, as the trial court correctly noted, Doc. 35 at eps. 22–23, because the LNC may only spend $33,900 of the bequest, annually, for *unlimited* purposes, which include speech, but may annually spend *nine times that amount* for the three specified limited purposes: $101,700, *each*, on nominating conventions, a headquarters building, and recounts, for a total of $339,000.[1] That means that if the LNC wishes to purchase TV or radio advertisements, develop a website, develop a cadre of door-knockers, print yard signs, or do any of the numerous things that political parties do to communicate with voters—all forms of speech that are the lifeblood of politics—it may only spend $33,900 of the bequest, annually, to do so. By contrast, if the LNC wants to spend money on the three approved purposes, it may spend vastly more on those purposes.

This is plainly a restriction on speech, since "the conduct triggering coverage under the statute consists of communicating a message," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)—and it is a content-based one, since it "target[s]

[1] All general- or special-purpose contributions or expenditures get reported to the FEC under the existing disclosure regime, which is unaffected by this lawsuit.

speech based on its communicative content," *Reed*, 135 S. Ct. at 2226. Limitations on purchasing advertisements or hiring door-knockers are direct limitations on the type and quantity of speech in which the LNC may engage.

More to the point, if the LNC does not need to hold a nominating convention, is not building a new headquarters, or does not need to conduct a recount, any contribution exceeding $33,900 will have no effect on that year's election at all. And the reality is that these restrictions place a greater burden on smaller political parties like the LNC than on the Republican and Democratic parties, which are large enough that they hold nominating conventions and recounts in every election year. Finding ways to allocate restricted funds is likely no great burden to them. But in some years, the LNC needs to spend little to nothing on a nominating convention, and demands no recounts, at all.[2] It does not need hundreds of thousands of dollars to do these things. What it needs is the ability to convey its message to voters and to convince them to vote for a third-party candidate. By restricting this type of spending, the rule challenged here places a disproportionate burden on third parties like the LNC.

This is not a content-neutral time, place, or manner restriction, where courts have allowed disproportionate burdens on different speakers. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes *unrelated to the content* of expression is deemed neutral, even if it has an incidental effect

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[2] The Libertarian Party has "never spent money litigating election recounts." Doc. 24-3 ¶ 57. It has a small outstanding balance on its headquarters building mortgage. *Id.* at ¶ 58. Its nominating conventions "are much smaller and more modest affairs than are the presidential nominating conventions of the two major legacy parties." *Id.* at ¶ 64.

on some speakers or messages but not others." (emphasis added)). Rather, this regulation imposes different burdens on large and small parties due precisely to the content of the expression.

Imagine, for instance, a regulation that only allowed political committees to purchase television advertising during the Super Bowl, and at no other time. A thirty-second Super Bowl ad costs at least $5 million. Matthew Michaels, *The Price of a 30-Second Super Bowl Ad Has Exploded*, BUSINESS INSIDER, Jan. 25, 2018.[3] There is simply no way that third parties like the LNC could afford them, but the two major parties could. Such a restriction would immediately be recognized as unconstitutional due to this disproportionate impact.

In fact, the Supreme Court addressed a similar situation in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), when it ruled that an Ohio law placing a short deadline on filing to run for President violated the First Amendment. The law required candidates to file by March 20 in order to appear on the ballot. *Id.* at 782. This, the Court noted, had a disproportionate impact "on independent-minded voters," because it "prevent[ed] persons who wish to be independent candidates from entering the significant political arena … and creating new political coalitions … after mid-to-late March," which was a time at which the major parties had not yet chosen their nominees. *Id.* at 790. As a result, third-party candidates, who often run in reaction against the nomination decisions of major parties, would be unable to do so, meaning that "[c]andidates and supporters within the major parties thus have the political advantage of continued flexibility; for independents, the inflexibility imposed by the

[3] goo.gl/tE2uo5.

March filing deadline is a correlative disadvantage." *Id.* at 791. This "particular burden on an identifiable segment of Ohio's independent-minded voters" violated the First Amendment because it "limit[ed] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Id.* at 792–93.

The special-purpose regime at issue in this case is no more constitutional. By limiting annual unrestricted expenditures to one-tenth the permitted amount—and allowing nine-tenths of the expenditures only on matters that are of the least importance to small parties that are seeking to persuade the public—the regulations violate the First Amendment rights of the LNC. *See* Bradley A. Smith, *Newsflash: First Amendment Upheld*, WALL ST. J., Jan. 22, 2010 (discussing the extent of injuries to the freedom of speech under the guise of imposing time, place, or manner restrictions).[4]

II. Striking down the specific-purpose component of the challenged provisions will enable contributors and political parties to speak on what matters most to them.

The three challenged provisions—52 U.S.C. §§ 30116(a)(1)(B), (a)(9), 30125(a)(1)—block *nine-tenths* of contributors' and political parties' speech as established in the record. Doc. 35 ep. 10. These provisions divert a large chunk of the money that would otherwise be used to speak on topics that matter most to the contributors and political parties to be used instead for three specific purposes on which these parties and individuals may or may not want to spend any money. The

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challenged provisions tell Appellant: if you speak, only ten percent of your speech can be devoted to what you really want to speak about; the remainder shall be on these three listed topics. The First Amendment forbids such a restriction.

The issue of the appropriate remedy, however, needs close attention. There are two ways of striking out statutory language that this Court should reject outright:

- If the whole contribution limit is struck down—*i.e.*, 52 U.S.C. §§ 30116(a)(1)(B) and 30116(a)(9)—that will eliminate *all* contributions to "political committees established and maintained by a national political party," 52 U.S.C. § 30116(a)(1)(B), which amounts to a complete *speech ban*. That is because, with such a strikethrough, there would be no statute under which political parties could raise and spend money.
- If the "300 percent [in three segregated accounts]" language is struck down, the result would be *a drastic reduction* of speech. *Id.* The total permissible speech under such a remedy will be reduced *by ninety percent*. Such a strikethrough would keep in place only the portion of the statute that allows $33,900 worth of inflation-adjusted contributions, instead of the $339,000 currently allowed.

Both of these options[5] would severely limit speech and achieve the opposite of what Congress established and intended. And they would go against the First Amendment's inexorable command that "more speech, not less, is the governing rule."

[5] *Amicus* takes no position on a third possible option: eliminating the challenged limits altogether, thus enabling unlimited contributions to and expenditures by political parties.

Citizens United v. FEC, 558 U.S. 310, 361 (2010). Congress and the FEC have already determined that, as relevant here, contributing up to $339,000 per year (in current inflation-adjusted dollars) does not raise corruption concerns.

Therefore, striking down the specific-purpose component is the only remedy that comes close to keeping Congress' design intact—and the only remedy that does not curtail speech. Such a declaration would enable contributors and political parties to speak on topics that matter most to them, and would also leave political parties free to spend money on presidential nominating conventions, party headquarters, and recounts, as and if needed.

This Court has the option to consider all "remedies [that] are necessary to resolve" the content-based superstructure created by the provisions challenged here. *Id.* at 331. When faced with "two remedial alternatives," "a court may either declare the statute a nullity and order that its benefits not [be] extend[ed] … or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (cleaned up; bracketed text added). "Ordinarily … 'extension, rather than nullification, is the proper course.'" *Id.* at 1699 (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)).

In choosing among several remedial options, the Court's goal is to "measure the intensity of commitment to the residual policy … and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 1700 (cleaned up). The relevant "residual policy" here is indicated by two considerations: first, more speech, not less, is the governing rule; and, second, Congress considers the $339,000 total yearly limit as not having a corrupting

influence on elections. Thus, eliminating the content-based restriction would cause no "disruption of the statutory scheme." It would allow the two major parties to continue having separate segregated accounts used for the three listed purposes—or any other purpose they select—and would also afford parties, like the Appellant, the flexibility to spend money on what matters most to them—that is, speech—either through their general accounts or by creating separate accounts.

In other words, expanding the speech restrictions at issue here in a way that would reduce the speech rights of major parties would not remedy the content-based straightjacket that the statutes put upon parties like the Appellant. But striking down the specific-purpose component to allow parties to spend as they see best would remedy the injury suffered by the Appellant while leaving the rights of other parties intact.

III. Congress's use of content-based *cy près* distorts the speech and association of contributors and political parties.

The specific-purpose provisions are not only content-based speech restrictions. They are also a kind of Congressionally-mandated *cy près* that distorts the speech and association rights of contributors and political parties alike. The factual context established in this case helps highlight the issue.

- Contributors like Joseph Shaber desire that the LNC use the bequest "outright," and specifically place no condition or limitation on the bequest. Doc. 35 ep. 76, ¶¶ 123–24.
- Contributors like Chris Rufer, who specifically do *not* want their contributions spent on government-imposed purposes (nominating conventions, buildings,

recounts) and instead want the LNC to use their contributions for general purposes that the LNC sees fit. *Id.* at 79–81, ¶¶ 141–47.

- Contributors like Michael Chastain, who do not want the government to impose any strings on how the LNC would spend their contribution. *Id.* at 82, ¶ 154.
- Contributors like William Redpath, who have provided that a portion of their estates will go toward speaking about specific purposes but not toward the three purposes found in the challenged provisions. *Id.* at 85–86, ¶ 164–166.

This factual context highlights the heart of the matter: the *content* of each contributor's speech and each political party's speech can be different. In each of these examples, the contributor's and political party's speech is valid, lawful, and constitutionally-protected. The specific-purpose provisions, however, prevent or limit that speech, and divert the monies to three entirely different topics—topics on which neither the contributor nor the LNC wish to speak. This diversion of general-purpose funds to three specified purposes works as a sort of *cy près* (or diversion of funds specified for one purpose to another purpose) that fundamentally distorts speech.

Even under garden-variety *cy près* caselaw, money cannot be legally diverted to *another* purpose when the original purpose is valid and lawful. For example, the Uniform Trust Code (UTC) § 413 specifies that *cy près* diversion can be ordered only if "a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful." There is nothing *unlawful, impracticable, or impossible* in contributors' and political parties' speech on topics other than presidential nominating conventions, buildings, or recounts. (Whether speech on subjects other than these

three is *wasteful* is a content-based value judgment that shows the government's "disagreement with the message … convey[ed]," *Reed*, 135 S. Ct. at 2227, and would therefore be an improper consideration.)

This sort of *cy près* diversion does not comport with the basic tenets of the doctrine that have existed for centuries and goes against the American rule that *cy près* should be applied rarely, with extreme caution. *Cf.* Ronald Chester, Cy Près *or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U.L. REV. 41, 44 (1989) (discussing the *cy près* doctrine's historic development and the "American rule" that "precludes application of the *cy près* doctrine"); Alberto B. Lopez, *A Revaluation of* Cy Près *Redux*, 78 U. CIN. L. REV. 1307 (2010) (discussing the application and differences between UTC § 413 and the traditional *cy près* doctrine). It severely distorts the speech and association rights of contributors and political parties. *Amicus*'s proposed remedy of striking down the specific-purpose component, which would in turn allow third parties like Appellant to spend up to $339,000 on speech that matters most to them, helps avoid running into this problem.

IV. Congress and the FEC cannot intrude on state law of wills, trusts, and property transfers.

There is yet another problem that the proposed remedy avoids. The law of wills, trusts, and property transfers is firmly a "traditional role of the States." *Evans v. Abney*, 396 U.S. 435, 447 (1970). Congress cannot lightly upend this "virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). *See also* THE FEDERALIST NO. 33 at 206 (J. Cooke ed., 1961) (Alexander Hamilton)

("Suppose by some forced constructions of its authority (which indeed cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent [*i.e.*, wills] in any State; would it not be evident that … it had exceeded its jurisdiction and infringed upon that of the State?").

By diverting bequests, which are governed by the state law of wills, trusts, and property transfers, the provisions challenged here intrude on state prerogatives. The specific-purpose provisions rewrite the state law of *cy près* when it comes to bequests to "political committees established and maintained by a national political party." 52 U.S.C. § 30116(a)(1)(B).

In *Evans*, the testator placed property (a park) in trust limiting its use to white persons. The state court concluded that because the park could not be operated on a racially discriminatory basis, the trust failed and the property reverted to the heirs of the testator. The Georgia Supreme Court refused to apply *cy près* to open the park for use by blacks. 396 U.S. at 436–37. Both options—reversion or *cy près*—were possible remedies. Given the federal mandate of no racial discrimination, and the state law of wills, trusts, and property transfers, the state court chose to avoid the federal issue and apply the relevant *state* law—and the U.S. Supreme Court affirmed. *Id.* at 437. It concluded that "the Constitution imposes no requirement upon the Georgia courts to approach [the testator's] will any differently than they would approach any will creating any charitable trust of any kind." *Id.* at 446. The *cy près* remedy would have impinged on the "freedom of testation," and placed federal courts in the awkward position of "legislat[ing] social policy on the basis of [the court's] personal

inclinations." *Id.* at 447. Even with regard to so offensive a bequest, the Court found that it was a state matter under the Constitution.

The same is true here. This Congress-created *cy près* impinges on the freedom of testation—a matter that is left to the states. It also supplants the testator's wishes and intent with that of Congress. What's more, it is evidence of Congress' *disagreement* with the testator's choice to speak and with the content of the testator's and political party's speech—a disagreement that may not be given legal effect by the First Amendment. Indeed, if there were a state law prohibiting testators from making bequests to "political committees established and maintained by a national political party," 52 U.S.C. § 30116(a)(1)(B), such a law would likely violate the Constitution. *Cf. Estate of French*, 365 A.2d 621, 625 (D.C. 1976) ("the 'free exercise' of religion clause of the First Amendment forbids" state laws that bar testamentary bequests on the basis of religion). That would be a different case. But because freedom of testation is fully protected under state law, *cf.* UTC § 413, and the speech inherent in a testamentary bequest to a political party is fully protected under state and federal constitutions, Congress cannot tread upon these individual rights with impunity.

Conclusion

Amicus's proposed remedy of excising the specific-purpose provisions and allowing parties like the Appellant to spend up to $339,000 on speech that matters to them preserves the States' prerogatives and autonomy in establishing the law of wills, trusts, and property transfers. It protects the testator's freedom of testation. And it protects the testator's and political parties' freedom of speech and association. The specific-purpose provisions are unconstitutional content-based

restrictions on speech. That is the narrowest ground for decision available in this case. Concluding so also helps avoid other constitutional problems with the challenged provisions.

Respectfully submitted,

September 12, 2018

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Certificate of Compliance

Per Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(a), I hereby certify that the foregoing brief complies with the applicable type-volume limitations. This brief was prepared in proportionally spaced serif typeface using Microsoft Word in 14-point. The brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), contains 3,491 words. This certification is made in reliance on the word-count function of the word processing system used to prepare the brief.

September 12, 2018 /s/ Aditya Dynar
Aditya Dynar

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Aditya Dynar
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