IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:16-CV-0121-BAH

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Libertarian National Committee, Inc. hereby submits its opposition to Defendant Federal Election Commission's motion to dismiss.

Dated: May 2, 2016

Respectfully submitted,

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PRELIMINARY STATEMENT

The Federal Election Commission restricts the Libertarian National Committee's access to contributions exceeding $33,400, including Joseph Shaber's sizeable bequest, unless the Party were to spend the money as the Government sees fit. The Party, having other priorities for the money—and a First Amendment right to access that money so that it may speak *freely* (i.e., not speak only as Congress might allow)— challenges the restrictions' constitutionality.

As far as Article III goes, this is a garden-variety dispute. The FEC bars a political party from accessing a monetary contribution, and from spending it as the Party sees fit. LNC's challenge of this prohibition easily establishes all three prongs of Article III standing under *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992):

1. LNC suffers a real injury-in-fact by being barred unrestricted access to donations, including (but not limited to) a particular gift bequested it by a deceased donor;
2. The injury is directly and uniquely traceable to the FEC, which is enforcing this prohibition; and
3. The injury is redressable by the D.C. Circuit, to which this Court must certify the dispute for resolution, per 52 U.S.C. § 30110.

If LNC does not have standing to challenge the Government's enforcement of a contribution limit, nobody has standing to challenge any application of any contribution limit. Indeed, although the Commission relegates this fact to a footnote, this lawsuit was filed not three years after Judge Wilkins certified to the D.C. Circuit en banc, over the Commission's strenuous and repeated objections, a similar First Amendment claim involving another sizeable bequest by one Raymond

Groves Burrington. *See Libertarian Nat'l Comm., Inc.* v. *FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013), *reconsideration denied*, 950 F. Supp. 2d 58 (D.D.C. 2013).

Judge Wilkins expressly upheld LNC's standing to bring this type of claim: "The LNC satisfies the core elements of Article III's case-or-controversy requirement, because it alleges an injury connected to the FEC's conduct—the prevention of obtaining immediate control of the entire Burrington bequest—that would be redressed by a favorable decision." *LNC*, 930 F. Supp. 2d at 163 (citing *Lujan*, 504 U.S. at 560).

On appeal, the Commission argued that the case had become moot when the last moneys at issue became unrestricted and were paid to the LNC. And notwithstanding Judge Wilkins's specific factual findings that the LNC solicits bequests, *id.* at 174 (facts 22 and 23); that the LNC regularly receives bequests, *id.* at 182 (fact 69); that political parties generally receive bequests, *id.* at 183 (facts 72 and 73); and that "many bequests of amounts far exceeding FECA's annual contribution limit, like the Burrington bequest, have been left for national party committees in recent years," *id.* at 184 (fact 78); *see generally* facts 76-86, the Commission confidently predicted that the issue was incapable of repetition yet evading review because "there is no reasonable expectation that the Contribution Limit will restrict a bequest to the LNC again." Suggestion of Mootness, *Libertarian Nat'l Comm., Inc.* v. *FEC*, D.C. Cir. No. 13-5088, at 7 (Feb. 3, 2014). The D.C. Circuit apparently agreed. *See* Order*, Libertarian Nat'l Comm., Inc.* v. *FEC*, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (en banc).

And yet here we are again, with another large LNC bequest, although this time, with much more litigation "runway" in the escrow account—and a facial challenge to FECA's revamped, content-based restriction structure that goes well beyond the law's impact on a single bequest.

Largely ignoring the facial challenge, and hoping to accelerate the earlier result here, the FEC has devised two novel standing arguments, neither of which has merit.

First, the Commission claims that LNC's injury is self-inflicted, in that the Party has voluntarily foregone access to Shaber's bequest. But the Commission errs in speculating that LNC should have constructively accepted Shaber's entire bequest for unrestricted purposes. Shaber's bequest, preceding by four years Congress's creation of the segregated accounts to which the FEC would seek to funnel his money, specifically provided that the Libertarian Party would receive its share "outright"—without qualification. It is doubtful that Shaber would have wanted the FEC to direct his gift's flow in the federal government's favor and against the Libertarian Party's interests.

More to the point, there is no need to speculate as to whether the LNC *could* have constructively accepted Shaber's bequest for general purposes by manipulating its segregated purpose accounts. The facts, absent from the Commission's motion but supplied here, show that LNC could not have done so. Nor can the LNC now accept the remainder of the Shaber bequest for unrestricted purposes, an intriguing suggestion but for the fact that LNC cannot do so per the terms of the FEC's various advisory opinions—including an advisory opinion concerning, specifically, the Shaber bequest. Nor would the lawsuit be moot even if the FEC's prohibition on strategic withdrawals, which prohibition the FEC applied to Shaber's bequest, were suddenly lifted.

Second, the Commission misconstrues the LNC's injury. The LNC is not suing the Commission because of the Party's electoral misfortunes; it is suing the Commission due to the Party's lack of access to fortunes great and small, exceeding $33,400, including but not limited to the Shaber bequest. That is a redressable injury-in-fact caused by the FEC, regardless of whether the LNC would speak effectively with that money.

STATEMENT OF FACTS

1. *The FEC's Treatment of Testamentary Bequests*

As the Commission recounts, it applies political contribution limits to testamentary bequests. FEC Br. at 3; Complaint, ¶ 10. But its description of exactly how it does so is materially incomplete. It is an oversimplification for the FEC to claim that an independent third-party may hold bequeathed funds and "contribute them to the recipient in subsequent years in amounts that comply with FECA's limits until the bequeathed sum is depleted." *Id.* at 4 (citations omitted). The FEC has long required that the donee political committee not exert any form of control of the escrowed bequest, including by making strategic withdrawals or obligating the funds before they are disbursed in any manner that would augment its existing funds.

Prior to 1999, the FEC allowed political committees to receive lump sum testamentary gifts in excess of annual contribution limits, "provided that the political committee did not withdraw more than [the contribution limit] (including principal and interest) in any calendar year, and did not pledge, assign, or otherwise obligate the escrow account balance in any manner to augment its funds." Exh. A, FEC Advisory Opinion 2004-02 (Nat'l Comm. for an Effective Congress), at 3 n.3 (citations omitted). But in 1999, the FEC deemed these restrictions insufficient. "Commission regulations provide that, for the purposes of the limits, a contribution is considered to be made when the contributor relinquishes control over the contribution; this would be when it is delivered to the political committee or its agent." Exh. B, FEC Advisory Opinion 1999-13 (Council for a Livable World) (citing 11 C.F.R. § 110.1(b)(6)). A political committee could thus not accept a bequest exceeding contribution limits into its own escrow account:

> Not only would the estate relinquish control of all the funds at the time of the delivery or distribution, but the committee would exercise control over the funds upon its receipt, and this control would not be negated by placing the funds in an escrow account. The committee

> would have the power to decide which investments were best for the escrowed funds and to modify these investments in order to maximize growth. The committee could also decide to withdraw less than [the limit] in a particular year as part of an investment strategy.

Id. at 3; *see* Complaint, ¶ 11.

The touchstone for the FEC is control—a political committee receiving a testamentary bequest cannot have any control over the bequeathed funds. If excess funds from a bequest are placed in escrow, the political committee cannot direct the funds' investment, alter the amount it would withdraw each year, or do any other thing with the escrowed funds to augment its existing funds. The FEC's advisory opinions reflect the accepted practice requiring political committees to withdraw a fixed amount from bequested, escrowed funds—typically, and at least until now, the legal annual limit for general purpose funds—until the entirety of the gift is received.

2. *The Relevant Contribution Limits*

An individual may donate up to $33,400 per year to the national committee of a political party, to be spent without restriction. Complaint, ¶ 9; FEC Br. at 3; 52 U.S.C. § 30116(a)(1)(B). On December 16, 2014, Congress amended the contribution limits to allow individuals to donate up to $102,000 per year to a political party's national committee, to be used for each of three specific purposes: presidential nominating conventions, headquarters buildings, and expenses for election contests and other legal proceedings. Complaint, ¶ 6; FEC Br. at 5-6; 52 U.S.C. § 30116(a)(9).

3. *Joseph Shaber's Bequest*

On August 23, 2014, Joseph Shaber passed away, leaving a bequest to the LNC that would eventually be determined to amount to $235,575.20. Complaint, ¶¶ 16, 17. Shaber's instructions were clear: "Any share created for . . . The National Libertarian Party *shall* be distributed *outright* to such beneficiary." Shaber Trust, Section 5.4, Exhibit A to Letter from Michelle M. Lauer, John C. Lincoln Law Offices, to FEC Office of General Counsel, at AOR010 (June 15, 2015) (emphasis

added).[1] "LNC would accept and spend the entire amount of the Shaber bequest for its general expressive purposes, including expression in aid of its federal election efforts." Complaint, ¶ 18. But

> Owing to Defendant FEC's application of federal contribution limits, Plaintiff LNC could not accept this entire bequest at once, as it would use at least some if not all of the money on federal election efforts and for its other desired expressive purposes. Rather, the LNC accepted a single payment of $33,400 in 2015, and agreed that the remaining $202,175.20 would be placed in an escrow.

Complaint, ¶ 19.

The FEC's brief in support of its motion to dismiss throws around various figures gleaned from outside the Complaint, suggesting but not proving that the LNC could have accepted the entirety of Shaber's bequest through the specific segregated purpose accounts, thereby freeing an identical amount of money for general purposes. The Commission's speculation is off base.

First, with respect to 2014: The LNC did not learn of Shaber's bequest until October 14, 2014. The amount of this bequest was not finally determined until September, 2015. The LNC did not voluntarily forego any payments in 2014. Kraus Decl, ¶¶ 2, 3. The bequest did not become available to the LNC until 2015, the year in which LNC accepted a partial, interim distribution in the maximum general purpose annual amount of $33,400 in February, seven months before the final figures would be determined. *Id.* ¶¶ 3, 4.[2]

The total amount that LNC would spend in 2015 for the purposes favored by the two major parties that enacted the segregated account structure—presidential nominating convention, party headquarters building, and legal proceedings—was $80,087.72. "In 2015, the LNC did not hold a

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[1] Available at http://saos.fec.gov/aodocs/1317218.pdf (last visited May 1, 2016).

[2] Had Shaber passed away earlier in 2014, allowing enough time for his bequest to be received before year's end, the Commission would not be heard to complain about the segregated account structure not enacted until December 16, 2014.

presidential nominating convention. The LNC spent no money on a presidential nominating convention in 2015." *Id.* ¶ 5. "In 2015, the LNC spent $7,260.61 with respect to the preparation for and the conduct of legal proceedings." *Id.* ¶ 6. "In 2015, the LNC spent a total of $72,827.11 on its headquarters, including mortgage payments, utilities, property taxes, maintenance, cleaning, insurance, and association fees." *Id.* ¶ 7.

Thus, even had LNC placed the entirety of Shaber's bequest in one or several of the segregated purpose accounts, doing so would not have liberated an equal amount to be spent for general purposes. And had LNC perfectly calculated, to the penny, that it could use the segregated accounts to liberate $80,872.72 for general purposes, it would have still been required to receive the balance in an escrow account beyond its control, to maintain the balance for general purposes.

As the Commission notes, the Trustee requested an advisory opinion as to the legality of the proposed escrow arrangement. In its opinion, the Committee noted that the relevant annual contribution limit is the one for general purposes, currently in the amount of $33,400. *See* Exh. C, FEC Advisory Opinion 2015-05 (Shaber), at 3 & n.2. "The Commission notes that the [LNC] may not pledge, assign, or otherwise obligate the anticipated contributions before they are disbursed." *Id.* at 4 n.5 (citation omitted).

4. *The Current Contribution Limits and the LNC*

The LNC is not as interested in spending money for the segregated account purposes as are other parties. Complaint, ¶ 13.

> But for the Party Limits, the LNC would accept sums in excess of the annual contribution limit, from living donors as well as from testamentary bequests, and spend those funds for its general expressive purposes, including expression in aid of its federal election efforts. LNC would accept and spend such sums in amounts that are otherwise within the limits it could accept and spend for the segregated account purposes of 52 U.S.C. § 30116(a)(9).

Complaint, ¶ 14. This is not the first case LNC has brought asserting its right to the immediate receipt of a gift in excess of the contribution limit for general purposes.

Accordingly, LNC brings this action, comprising of three counts asserting First Amendment violations. *First*, LNC raises an as-applied challenge contesting the application of contribution limits to its receipt of Shaber's bequest. Complaint, ¶¶ 21-27. This is essentially the same type of claim that Judge Wilkins certified with respect to the bequest at issue three years ago. *Second*, LNC raises a facial challenge to the modern FECA contribution limits. Complaint, ¶¶ 28-31. The Party appreciates that the previous scheme for limiting contributions, which operated generally, might have been upheld. But privileging large donations based on their purposes—as if a party would be corrupted by a $33,401 donation for general purposes, but not by a $312,000 donation for conventions, buildings, and lawyers, is an irrational content-based speech restriction. *Third*, the LNC challenges the application of the segregated account structure to Shaber's bequest. Contrary to the Commission's reading, the Complaint does not seek to relitigate the categorical application of general purpose contribution limits to testamentary bequests.

SUMMARY OF ARGUMENT

The Commission's first standing claim, only partially plausible but factually impossible, reasons that LNC is not truly injured because it *could* have elected to receive, and still might elect to receive, the entire bequest, if only the LNC would comply with all of the attendant speech restrictions and spend the money for the Government-defined "segregated account" purposes.

Of course, LNC's injury is that it cannot accept money—from Shaber's bequest *and from other donors*—for spending *as it wishes*. The Government cannot force the LNC to buy a fancy headquarters building, spend lavishly on a presidential nominating convention (in a non-presidential year, no less), or hire attorneys for election contests (in a year with few elections, nevermind disputes

involving a minor party), when the LNC has better uses for that money. It is black-letter law that compliance with a regulation is not voluntary conduct that eliminates standing, because compliance is coerced by the law being challenged. But the FEC asserts the axiom that money is fungible. And to be sure, if funds in the amount of the Shaber bequest would have been spent anyway in 2015, after the bequest became available, the LNC might well have accepted the bequest, received it through the segregated purpose accounts and thereby freed an equal amount of money for general purposes. The same might be true of any donation that does not exceed one years' worth of spending that could be classified under a segregated purpose account.

If only it were so. Alas, the LNC's funds were not unlimited. Contrary to the FEC's murky suppositions, the LNC did not have anywhere near $235,575.20 in segregated purpose expenses in 2015. Spending Shaber's bequest for segregated purposes would not have magically generated an equal sum of money available for unrestricted purposes. The LNC could not have legally opted to receive and spend the entire bequest for general purposes. It had less money available for general purposes because of the challenged laws. That was, and remains, a redressable injury-in-fact.

Facing the impossibility of accepting and spending the entire bequest amount for general (as opposed to Government-privileged) purposes, as LNC wished to do, LNC did the only thing it legally *could* do to preserve its rights—it had Shaber's bequest placed in an FEC-authorized trust for general spending purposes and brought suit. Not to worry, claims the FEC—in 2016, the LNC can *choose* to spend on the segregated purposes an amount that would exhaust the remainder of Shaber's bequest. Putting aside that such a choice would at least violate the spirit of Shaber's instructions, this logic has surface appeal until one considers that the FEC bars political parties from making strategic withdrawals from testamentary bequest trusts. Indeed, the FEC reiterated this prohibition in its advisory opinion relating to the Shaber trust. If LNC cannot control "undonated"

money by making strategic withdrawals from testamentary bequest trusts, it cannot be "allowed" to do so only for the purpose of defeating its standing to challenge the scheme's constitutionality.

But even were the Commission allowed to conveniently reverse its approach to the control of excess bequested funds, its argument is not that the LNC lacked standing to bring this lawsuit, but that the dispute has become moot because the LNC's anticipated segregated purpose spending for 2016 exceeds the Shaber remainder. Assuming that were true, and that the money can now be accessed for these purposes, this case supplies a classic example of "capable of repetition, yet evading review." This is, after all, the second case brought within five years asserting an as-applied challenge to the application of contribution limits against testamentary bequests. FEC reduces to a footnote Judge Wilkins' certification of the prior as-applied challenge, but that certification was not done lightly. If discovery in the previous case proved anything, it proved that large donors keep dying. And so, the LNC will keep suing. The issue might as well be settled now—especially as this case, unlike the previous one eventually certified, is not limited to a single bequest.

The FEC's second standing argument misconstrues the Complaint. The Government inflicts an Article III injury when it bars people from speaking, regardless of whether the speech would have achieved the speaker's desired outcome. It is not the case that putative recipients of disputed campaign contributions must prove that they would attain electoral success but for the prohibition. LNC is not suing the FEC for lack of electoral success. LNC is suing the FEC for barring access to a donation. The motion should be denied.

ARGUMENT

I. THE COMMISSION'S MOTION FAILS TO ADDRESS LNC'S FACIAL CHALLENGE.

Whatever might be said of LNC's claims relating specifically to the Shaber bequest, that bequest is but the second recent example of a phenomenon thoroughly documented by Judge

Wilkins in the previous litigation: "many bequests of amounts far exceeding FECA's annual contribution limit [for general purposes], [that] have been left for national party committees in recent years." *LNC*, 930 F. Supp. 2d at 184 (fact 78). LNC does not relitigate the categorical challenge to FECA's application against bequests, but it does bring a facial claim against the application of the radically-revamped FECA, with its new segregated purpose account structure. *See* Complaint, ¶¶ 14, 28-31. Shaber's bequest is but the first donation to the LNC that exceeds the old, general purpose limit of $33,400 and is thus impacted by the new structure. It will assuredly not be the last. The Commission's motion to dismiss does not seem to acknowledge, let alone respond to, this claim.

It will be interesting to see how the Commission would defend the preferential treatment of massive donations directed to favored purposes under a corruption-fighting rationale. For now, it hardly requires annotation that LNC is injured-in-fact because the FEC attaches strings to donations exceeding $33,400, something that this Court can help remedy by certifying the issue for resolution.

II. LNC'S INJURIES ARE NOT SELF-INFLICTED, BUT ARE PLAINLY INFLICTED BY THE FEC.

To the extent that LNC complains about the Shaber bequest's treatment, the Commission appears to argue that the LNC lacks standing because it *chose* to receive the Shaber bequest in a restricted trust. The argument lacks merit.

A. Compliance with A Challenged Regulation Does Not Moot the Challenge.

Plaintiffs always have the choice of doing what the Government has ordered. Any law can be suffered in silence, but that doesn't mean that there is no redressable injury in the infliction of the restriction. "The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Medimmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007). Reviewing a variety of declaratory judgment actions, the Supreme Court explained, "the plaintiff had eliminated the

imminent threat of harm by simply not doing what he claimed the right to do . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced." *Id.* (citations omitted).

The LNC entered into an escrow arrangement for general purpose funds because that was the only avenue available by which it could receive funds *for unrestricted purposes*. It is no answer to claim, without more, that the LNC could have accepted the Commission's restrictions. LNC is not interested in having the Shaber bequest restricted—it wants to vindicate the right to access these funds—and others—without restriction.

B. Shaber's Bequest Exceeded the Sums LNC Spent for Segregated Account Purposes.

The interchangeability of general account dollars with segregated purpose dollars is akin to that of dollars and rubles—something may be lost in the translation, as it were, were they exchanged on a 1:1 basis. LNC would have found no solace in accepting Shaber's bequest into restricted rather than general purpose accounts, and it would rather accept other donations without these governmental strings. Recognizing that something more is needed to buttress its argument that LNC suffered no harm owing to the availability of segregated accounts, the Commission draws upon the axiom that money is fungible. What does it matter, claims the Commission, that the Party's use of Shaber's bequest would be restricted, if accepting it for restricted purposes would free a like amount of general purpose money to be used without restriction.

There is something to the logic that "[i]f the LNC were to use Segregated Account funds for these types of expenses, its General Account funds would remain available for advocacy and other electoral uses," FEC Br. at 14, but that only works if the LNC would have spent at least as much money on segregated account purposes in a given year as it would have received from the gift at issue. "[E]ven a full refund," eventually, of segregated accounts into the LNC's general purpose

coffers "would not undo the violation of First Amendment rights" of being forced to sequester that money, because that would deprive the LNC of the present value of unrestricted funds. *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2292-93 (2012).

In 2015, the year that Shaber's bequest would have become available but for the FEC's contribution limits, the bequest vastly exceeded the amounts that LNC would spend on segregated account purposes. The Commission throws around various numbers about what the LNC has spent in other years, or during "election cycles," including what the LNC had spent years ago on conventions not used to nominate presidential candidates. But FECA's limits apply per annum. And in 2015, the "Shaber year," LNC spent zero on presidential nominating conventions, $72,827.11 on its headquarters, and $7,260.61 on legal proceedings, for a total of $80,872.72 in segregated purpose spending. *See* Kraus Decl. Sure, LNC could have banked $102,000 from Shaber's bequest into the segregated legal fee account, which at 2015's pace would not have been completely spent by the party until 2029. But doing so would not have liberated $94,739.39 in unrestricted funds.

This is not the case where a plaintiff creates a "'self-inflicted' budgetary choice" by choosing to spend money on litigation, and thereby claims an injury. *ASPCA* v. *Feld Entm't, Inc*., 659 F.3d 13, 25 (D.C. Cir. 2011). LNC did not choose for Shaber to remember it, and it most certainly did not choose for Shaber to die. Faced suddenly with a bequest totaling $235,575.20, LNC wanted to spend the entirety of that gift for general purposes in 2015, and there was no way for it to legally do so. At best, it might have "liberated" $80,872.20 using segregated accounts, but it would have still faced a loss of access to $121,303 for the current year for general purposes (the balance less the $33,400 that it could, and did, accept). LNC would have been injured in losing general purpose funds regardless of what it would have done in 2015.

C. The LNC Cannot Be Required to Moot Its Case.

Some significant injury to the LNC, in having its access to unrestricted Shaber funds impeded, was unavoidable in 2015. FEC therefore makes what is essentially a mootness argument, claiming that LNC should have committed to mooting its case by placing the bequest funds unrecoverable in 2015 in the segregated accounts to be accessed this year, or, claiming that LNC should now withdraw the remaining Shaber funds for deposit into the Party's segregated purpose accounts, from where they might be spent in this presidential election year.

But Shaber, a Libertarian, would have doubtless wished this case would proceed.[3] More to the point, as outlined above, the Commission does not allow political parties to play games with bequested funds. "The Commission notes that the [LNC] may not pledge, assign, or otherwise obligate the anticipated contributions before they are disbursed." FEC Advisory Opinion 2015-05 (Shaber), at 4 n.5 (citation omitted). Its advisory opinion appears to have instructed the escrow disbursements to be limited by the general purpose contribution limit.

But now, wishing to make the lawsuit disappear, the Commission demands that LNC exercise the very form of control over bequested funds, the Commission's restriction of which caused this problem in the first place. Were its position to prevail here, parties could manipulate their receipt of bequested funds by manipulating their spending, deferring or accelerating expenditures on the segregated purposes. Before Congress's creation of the segregated account structure allowing additional contributions for favored purposes—conventions, buildings, lawyers—no tension existed between requiring that parties commit to disbursing escrowed bequests in "amounts that comply with FECA's limits," FEC Br. at 4, and the Commission's goal of assuring

[3]Lawsuits such as this are themselves a recognized form of First Amendment activity. *See NAACP* v. *Button*, 371 U.S. 415 (1963).

that political committees not manipulate the process. But with FECA's new structure, the Commission claims that "amounts that comply with FECA's limits" depend on the parties' self-determined needs.

The FEC cannot have it both ways, restricting the LNC's access to bequested funds for general purposes lest the Party exercise any control over those funds, and then demanding that the LNC exert control over those funds to specifically moot a case challenging those very restrictions.

LNC was injured when it could not accept Shaber's bequest for general purposes in the year it was offered. It took what it could for general purposes, and pursuant to the FEC's rules, had the remainder placed in an escrow account, the manipulation of which the FEC strictly forbids. Had the Commission wanted the LNC to control the Shaber bequest in the first place, for the LNC's benefit, that would have been welcomed.

D. The Dispute Would Be Capable of Repetition, Yet Evade Review.

Even were the balance of Shaber's bequest to be paid out tomorrow, through a sudden relaxation of the FEC's rules or otherwise, the case could not be dismissed for lack of standing. LNC still asserts a facial challenge to FECA in its new, segregated account structure form. That challenge is broader than the dispute involving one bequest. But should FEC carry its "heavy burden of establishing mootness" with respect to the Shaber dispute, *Honeywell Int'l* v. *NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (quotation omitted), and the case concerned only the Shaber dispute, this case would nonetheless provide the classic example of one "capable of repetition, yet evading review," *id*.

The Commission routinely claims that controversies arising from its regulation of First Amendment speech and association must be dismissed as moot. These claims fail because elections and political speech still recur in our country. *Davis* v. *FEC*, 554 U.S. 724, 735-36 (2008); *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007); *see also Citizens United* v. *FEC*, 558 U.S. 310,

334 (2010); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774-75 (1978).

> The "capable of repetition, yet evading review" exception to mootness has two requirements: (1) the challenged action must be too short to be fully litigated prior to cessation or expiration; and (2) there must be a reasonable expectation that the same complaining party [will] be subject to the same action again.

Honeywell, 628 F.3d at 576 (quotation omitted). The record establishes both factors.

The LNC will continue being offered bequests or other gifts in amounts exceeding $33,400, and it will continue wishing to spend those moneys for purposes other than those allowed by the segregated purpose account structure. Complaint, ¶ 14. If committed to escrow, these donations would be reduced each year by annual contribution limits (however the FEC might calculate these), until the litigation runway at some point expires, mooting any case based on that gift that is yet to elicit the Supreme Court's mandate. That is the very definition of "capable of repetition, yet evading review." Indeed, this case concerns a bequest that essentially repeats a previous one that evaded review only two years ago.

A controversy is "capable of repetition" where there exists a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 551 U.S. at 463 (quotations omitted). Burrington and Shaber's bequests are the "demonstrated probability" that this controversy will recur. Indeed, "the test is not whether there is in fact a 'future relation' that will be affected, but rather whether 'resolution of an otherwise moot case . . . h[as] a *reasonable chance* of affecting the parties' future relations.'" *Honeywell*, 628 F.3d at 577 (quotation omitted) (alteration in original).

"[D]uring the pre-BCRA era when national party committees could accept soft money, estates donated more than $931,000 from bequests in just 15 separate donations to the national party committees. These soft-money donations of bequeathed funds averaged $62,117.23." *LNC*,

930 F. Supp. 2d at 184 (fact 76) (citations omitted). The exhaustive record of sizeable political quests that the Commission developed in the previous litigation, and found as fact by Judge Wilkins, speaks for itself. But while the only issue surviving certification in the previous case pertained to Burrington's single bequest, here, there is an issue over the facial constitutionality of the new FECA structure, and the Shaber bequest supplies just the first of many donations that would be impacted by this new law.[4]

"As to the 'evading review' requirement . . . the Supreme Court has meant evading Supreme Court review." *Christian Knights of Ku Klux Klan Invisible Empire, Inc.* v. *District of Columbia*, 972 F.2d 365, 369 (D.C. Cir. 1992) (citation omitted). With the general purpose contribution limit being $33,400, but the average bequest being $62,117.23, the litigation runway could be expected to expire in under two years. Of course, FECA's new structure impacts this calculation, if the Commission is correct in arguing that segregated purpose spending should count. In this case, involving a $235,575.20 bequest, the litigation runway could be seven years (235,575.20/33,400). But the Commission argues for mootness within two years because it wants to count the segregated account purposes, and this year happens to contain a presidential nominating convention. But the Commission argues against itself. "As a rule of thumb, 'agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical of the challenged action.'" *Ralls Corp.* v. *Comm. on Foreign Inv.*, 758 F.3d 296, 321 (D.C. Cir. 2014) (quotation omitted). The faster the Commission would exhaust the litigation runway, the

[4]The Commission's previous litigating position has invited additional sizeable bequests. The Commission declined to defend LNC's challenge to 52 U.S.C. § 30116(a)(1)'s prohibition on the solicitation of large bequests, and instead "denie[d] that this provision forbids national political parties from soliciting a bequest that exceeds FECA's annual limits" so long as the bequests were subjected to the contribution limits upon receipt. *FEC*, 930 F. Supp. 2d at 168; Complaint, ¶ 8.

more apparent it is that this is the type of dispute that might evade review, to the extent it depends on the live existence of escrowed testamentary bequests.

* * *

The LNC's injuries are not self-inflicted. The new FECA segregated account structure plainly impacts LNC, including by depriving LNC of the full benefit of Joseph Shaber's bequest. Nothing the LNC could have done would have provided it the full value of that bequest in 2015. Even if it could manipulate the segregated account structure today to take possession of the Shaber's bequest remainder, that might prove only that the recurring injuries that the FECA structure inflicts on "excessive" gifts and bequests would always evade review.

III. RESTRICTIONS ON SPEECH, NOT CLAIMS OF COMPETITIVE DISADVANTAGE, FORM THE BASIS OF LNC'S INJURY.

As the Commission concedes, "the Court must accept as true all of the plaintiff's well-pled factual allegations and draw all reasonable inferences in favor of the plaintiff." FEC Br. at 9 (citing *Alexis* v. *District of Columbia*, 44 F. Supp. 2d 331, 336-37 (D.D.C. 1999)). Respectfully, the Commission does not afford the Complaint a fair reading. The LNC is not claiming some competitive disadvantage as the basis for its injury, but a violation of its right to speak freely. Obviously, restricting a political party's ability to speak impacts its competitive posture, but that does not convert any free speech case into one over some optimal level of competition.

LNC's complaint does not differ much, in essence, from that previously adjudicated by this Court. It bears repeating: "The LNC satisfies the core elements of Article III's case-or-controversy requirement, because it alleges an injury connected to the FEC's conduct—the prevention of obtaining immediate control of the entire Burrington bequest—that would be redressed by a favorable decision." *LNC*, 930 F. Supp. 2d at 163 (citing *Lujan*, 504 U.S. at 560). Here, counts I

and III relate to the prevention of obtaining immediate control of the Shaber bequest, and count II relates to the prevention of obtaining immediate control over funds, generally, because FECA's current structure imposes a content-based restriction on speech.

The Libertarian Party certainly does *not* argue that the First Amendment requires a level electoral playing field, free of the advantages that speakers may have owing to their resources. The Party's Complaint contains no such allegation. The LNC objects only to rules that make it hard to raise money for the speech it would like to exercise. Perhaps in a different case, not the one before the Court, some other party (not the LNC) might argue that the Commission's claim that "FECA's limits apply exactly the same to minor parties . . . and their candidates as they do to the Democratic and Republican parties and their candidates," FEC Br. at 16, recalls the observation that "[t]he law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." Anatole France, *Le Lys Rouge* (1894). That is certainly one way to look upon the campaign finance system.

But the issue here is different.

The LNC's explanations for *why* it needs money, and what it would like to do with that money, do not alter the fact that it complains of specific injuries in being unable to access money that it wishes to access—injuries caused by the Government and by the Government only. LNC argues that being deprived the Shaber bequest "significantly hampers the LNC in its ability to attract and advocate for its candidates and does not serve any valid governmental interest," Complaint, ¶ 27—a true statement regardless of LNC's size or electoral success. LNC claims that the segregated account structure "discriminates against LNC based on the content of LNC's speech," Complaint, ¶ 29, and that "[b]ecause they favor, on their face, the acceptance of funds based on the content of a political party's speech, 52 U.S.C. §§ 30116(a)(1)(B) and 30125 violate the First Amendment

speech and associational rights of the LNC and its supporters," Complaint, ¶ 31. And LNC complains that its First Amendment rights are violated "[b]ecause LNC prefers to spend [the Shaber] money to express itself generally," and consequently "it can access only a small portion of the Shaber bequest every year." Complaint, ¶ 33. It is not at all a fair reading of the Complaint to look at these allegations, and conclude that LNC wants any equal outcomes. It just wants money that the Commission is denying it.

The Commission's arguments along these lines misread the Complaint in other ways. The Commission argues that a world with higher or no contribution limits would be worse, not better, for the LNC's ability to compete with the major parties. In part, this is mere speculation. The FEC has no idea which Democratic and Republican donors will die next or otherwise give what amounts for their respective parties. A few million extra dollars may or may not make much difference to Democratic or Republican electoral prospects, but would dramatically leverage the impact of a currently minor party. And to some extent, this is a philosophical difference of opinion. The Commission believes that contribution limits help small parties by tamping down the financial advantages of incumbents. The LNC might argue that contribution limits stifle the growth of smaller parties and entrench the large incumbents, who enjoy many structural advantages. This debate is not one for the Court, which does not sit to determine whether the LNC really knows what is best for it in asking for the enforcement of its First Amendment rights.

One thing, however, is certain. LNC is injured in being denied full access to Shaber's bequest. But for the challenged provisions, the LNC would have had $235,575.20 in unrestricted funds in 2015. Instead, it has $168,000 in restricted funds for the next six years. And the LNC continues to face the segregated account structure, by which the Government restricts its access to money based upon how the LNC would speak and what it would say.

These are Article III injuries-in-fact, they are caused by the FEC and by the FEC only, and they are redressable.

CONCLUSION

The FEC's motion to dismiss should be denied.

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Respectfully submitted,

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