UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 16-121 (BAH) MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Defendant Federal Election Commission moves this Court for an order dismissing the complaint of plaintiff Libertarian National Committee, Inc. pursuant to Federal Rule of Civil Procedure 12(b)(1). In support of its motion, the Commission is filing the attached Memorandum in Support of Its Motion to Dismiss and in Opposition to Plaintiff's Motion to Certify Facts and Questions and a Proposed Order.

Respectfully submitted,

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October 5, 2017

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 16-121 (BAH) MEMORANDUM SUPPORTING MOTION TO DISMISS AND OPPOSING MOTION TO CERTIFY

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION TO CERTIFY FACTS AND QUESTIONS

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INTRODUCTION

For more than forty years, the Libertarian Party has sought to have federal contribution limits subject to strict scrutiny and found to be impermissible content-based spending restrictions. The Supreme Court has repeatedly rejected those claims and instead held that restrictions on political contributions are a permissible response to the risk of corruption and its appearance, so long as the limits are set at levels that allow candidates and political parties to amass the resources necessary to engage in effective campaign advocacy. *Buckley v. Valeo*, 424 U.S. 1, 20-22 (1976) (per curiam). In this case, plaintiff Libertarian National Committee, Inc. ("LNC") once again seeks to have a contribution limit struck down as a content-based expenditure limit. But the LNC's claim is even more far-fetched here. The LNC now contends that Congress violated the First Amendment when it *relaxed* the burden of an annual contribution limit by permitting national party committees like the LNC to raise substantial additional funds for certain activities, even though that change obviously *increases* the pool of funds that are potentially available.

The LNC also challenges the application of that contribution limit to a testamentary bequest it has received. But in 2013, the LNC's claim that a contribution limit could not be constitutionally applied to bequests was rejected, with the Court of Appeals finding "[t]he merits of the parties' positions . . . so clear as to warrant summary action." *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5049, 2014 WL 590973, at *1 (D.C. Cir. Feb. 7, 2014). To avoid that decision, the LNC now simply asserts that it has a right to accept the one new bequest. However, the LNC offers no valid basis to distinguish that bequest from any other. Thus, there is no reason to grant an ad hoc exemption to a preventative contribution limit that has been repeatedly upheld.

To make these challenges, the LNC invokes a special review procedure in the Federal Election Campaign Act ("FECA") that provides for certification of constitutional claims raised by certain litigants to the *en banc* Court of Appeals. 52 U.S.C. § 30110. That procedure, however, does not permit certification of constitutional claims that are frivolous. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). All of the LNC's claims here are obviously frivolous because they are foreclosed by binding precedent and the LNC does not attempt to present a nonfrivolous argument to overturn that precedent. Instead, the LNC merely asks this Court to apply "the current state of First Amendment precedent," while invoking arguments that have been squarely foreclosed by that very precedent. (LNC's Mem. of P. & A. in Supp. of Pl.'s Mot. to Certify Facts and Questions ("LNC Mem.") at 17 (Docket No. 24-1).) Because the LNC's constitutional claims are wholly insubstantial, this Court should decline to certify its proposed questions to the *en banc* Court of Appeals. Instead, the Court should dismiss this case for lack of subject-matter jurisdiction, a decision that would not, of course, foreclose review of the LNC's claims under ordinary appellate procedures.

BACKGROUND

A. FECA's Contribution Limits and Challenges to Them

Defendant Federal Election Commission ("FEC" or "Commission") is an independent federal agency that is responsible for administering, interpreting, and civilly enforcing FECA, 52 U.S.C. §§ 30101-46. In 1974, in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure a political quid pro quo," *Buckley*, 424 U.S. at 26-27 & n.28, Congress enacted limits on contributions from individuals and other groups to candidates. *Id.* at 23-24. The Libertarian Party and other plaintiffs contended that the contribution limits needed to be justified by a "compelling governmental interest" and were a "regulation of the content of

speech" because groups were permitted to give higher amounts than individuals and only unions and corporations were permitted to spend without limits to communicate with and raise funds from associated persons. *See* Reply Br. of the Appellants, *Buckley v. Valeo*, 1975 WL 171458, *19, *50 (U.S. filed Nov. 3, 1975). Plaintiffs also contended that the contribution limits discriminated against challengers to incumbents to such an extent that they amounted to a regulation on "the quantity of political communication," *id.* at *53, and were overbroad because "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," *Buckley*, 424 U.S. at 29.

The Supreme Court rejected each of these contentions. Rather than the "compelling" interest associated with strict scrutiny, the Court held that contribution limits need be supported only by a "sufficiently important interest" as part of an intermediate, "closely drawn" scrutiny. *Id.* at 25. Congress's effort to "limit the actuality and appearance of corruption resulting from large individual financial contributions" was such an interest. *Id.* at 26. The Court found that rather than acting as a spending limit, the "overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons" and encourage direct political expression by some people. *Id.* at 21-22. The Court concluded that the plaintiffs' claims of discrimination were "without merit" and that Congress was justified in limiting all contributions even if it is "difficult to isolate suspect contributions." *Id.* at 29-30, 35.

After other FECA provisions that restrained campaign spending were struck down, in 1976 Congress added a limit to the amount that individuals may contribute each calendar year to any national political party committee. *See* FECA Amendments of 1976, Pub. L. No. 94-283, §

112(2), 90 Stat. 475 (May 11, 1976) (codified as amended at 52 U.S.C. § 30116(a)(1)(B)).[1] In 2002, Congress increased the limit from $20,000 to $25,000 and indexed it for inflation. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307(a)(2), (d), 116 Stat. 81 (Mar. 27, 2002) (codified as amended at 52 U.S.C. § 30116(a)(1)(B), (c)). Also in 2002, Congress banned the national party committees' then-practice of accepting "soft money" donations (*i.e.*, funds raised outside of FECA's limitations, prohibitions, and reporting requirements) by requiring that all contributions to those committees be subject to FECA's limits. *Id.* § 101(a) (codified at 52 U.S.C. § 30125(a)). At the same time, Congress generally prohibited state, district, and local committees of political parties from spending such nonfederal funds on "Federal election activity," although these groups may raise funds for activities falling outside the statutory definition of that term without regard to federal restrictions. *Id.* (codified as amended at 52 U.S.C. § 30125(b)(1)).

The following year, the LNC (a national committee of the Libertarian Party, Compl. ¶ 1) along with other plaintiffs renewed the Libertarian Party's effort to (a) have contribution limits be subjected to strict scrutiny and struck down for (b) regulating fundraising that purportedly could not corrupt federal candidates, (c) having a disproportionate impact on minor parties, and (d) discriminating against political parties in a manner "similar to that from content-based regulation." *See* Brief of the Political Parties, *McConnell v. FEC* (and consolidated cases), Nos. 02-1727; 02-1733; 02-1753, 2003 WL 21911213, *35-39, *50-57, *64-69, *91-98 (U.S. filed

[1] A "national committee" under FECA is the "organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission." 52 U.S.C. § 30101(14). Examples include the Libertarian National Committee, Inc., the Republican National Committee, the Democratic National Committee, and the Green Party of the United States, as well as committees of certain of those parties that are established specifically to elect candidates to Congress. *See* FEC, Types of Political Party Committees, https://www.fec.gov/help-candidates-and-committees/registering-political-party/types-political-party-committees/.

July 8, 2003). The Supreme Court once again rejected each of the LNC's claims and upheld the constitutionality of the limits on contributions to political parties. *See McConnell v. FEC*, 540 U.S. 93, 133-89 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310, 366 (2010). The Court found that the limits on contributions to political party committees are (a) subject to closely drawn scrutiny, (b) serve to prevent corruption and its appearance for all funds raised and spent, (c) do not unduly infringe the rights of minor parties, and (d) do not unconstitutionally discriminate against political parties. *Id.* at 144-45, 155, 158-59, 161, 187-88.

After adjusting for inflation, the annual limit on contributions a person may give to a national party committee's general fund now stands at $33,900. 52 U.S.C. § 30116(a)(1)(B); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10904, 10905-06 (Feb. 16, 2017).

B. FECA's Treatment of Bequeathed Contributions

The Commission has determined that FECA's contribution limits apply to testamentary estates just as those limits would have applied to the decedent were he or she still living. *See, e.g.*, FEC Advisory Op. ("AO") 2015-05 (Shaber), 2015 WL 4978865, at *2 (Aug. 11, 2015) (citing AOs). As a result, when an estate distributes a decedent's bequest to a political party, the distribution must comply with the relevant FECA contribution limit. *See Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 165 (D.D.C. 2013) ("*LNC I*") ("The FEC's interpretation of the statute to include a testamentary bequest appears reasonable . . . and is entitled to deference under *Chevron*."), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. 2014). In cases where a decedent's will instructs an estate to give an amount that is in excess of the relevant contribution limit, the FEC has advised that the estate or an independent third party (such as a trustee or escrow agent) may retain the funds and contribute them to the recipient in

subsequent years in amounts that comply with FECA's limits until the bequeathed sum is depleted. *See, e.g.*, AO 2015-05 (Shaber), 2015 WL 4978865, at *2-3.

C. The Segregated Account Limits

In 2014, Congress amended two campaign finance provisions that affect the ability of national party committees to raise money. In April 2014, Congress terminated a program that had provided public funding for presidential nominating conventions to national political parties that met certain criteria. *See* Gabriella Miller Kids First Research Act, Pub. L. No. 113-94, 128 Stat. 1085 (2014) (codified at 26 U.S.C. §§ 9008-09, 9012). That repeal put all national political parties on a level playing field in that no party receives public funding for conventions, but the change required each party to finance its own presidential nominating conventions exclusively through contributions.

Later that same year, Congress amended FECA to increase the amount national political party committees could raise into three types of "separate, segregated account[s]" which could be "used solely to defray expenses incurred with respect to" three categories of activities. 52 U.S.C. § 30116(a)(9)(A)-(C); *see* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (Dec. 16, 2014) (codified at 52 U.S.C. § 30116(a)-(d)). The national committees are now permitted to raise additional money for these accounts to defray expenses incurred with respect to: (1) "a presidential nominating convention"; (2) "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party"; and (3) "the preparation for and the conduct of election recounts and contests and other legal proceedings." 52 U.S.C. § 30116(a)(9). For contributions to each of these accounts, the relevant limit is "300 percent of the amount otherwise applicable" to contributions to national political party committees. *Id.* § 30116(a)(1)(B). That calculation currently amounts to $101,700. *See* 82 Fed. Reg. 10904, 10905-06 (Feb. 16, 2017). The

Commission will refer to the limits applicable to these accounts collectively as the "segregated account limits."[2] Notwithstanding the segregated account limits, a national party committee may still use funds raised through the general party limit on any expenses it wishes, even if it also raises money through the segregated account limit. Moreover, FECA does not require national party committees to establish these accounts if they elect not to do so.

D. The LNC and Its 2011 Lawsuit Challenging FECA's Limit on Bequeathed Contributions to Political Parties

In addition to its other challenges to FECA's contribution limits, the LNC has also filed a lawsuit against the Commission arguing that FECA abridges its constitutional rights specifically with respect to bequeathed contributions. In 2011, the LNC challenged the constitutionality of applying the general party contribution limit to testamentary bequests. *See Libertarian Nat'l Comm. v. FEC*, Civ. No. 11-562-RLW (D.D.C. filed Mar. 17, 2011). In that case, the LNC alleged that it had been the beneficiary of a $217,734 bequest from deceased donor Raymond Groves Burrington, and it sought a court order permitting it to accept the entire amount in one lump sum. *LNC I*, 930 F. Supp. 2d at 156. Based on these facts, the LNC asked the district court to certify to the *en banc* Court of Appeals the question whether "imposing annual contribution limits against testamentary bequests directed at, or accepted or solicited by political party committees, violate First Amendment speech and associational rights." *Id.*

The district court held that the LNC's challenge as stated was "[f]rivolous and/or [i]nsubstantial," and thus the court declined to certify it to the *en banc* D.C. Circuit. *LNC I*, 930 F. Supp. 2d at 165-67. The court explained that the LNC's case "raise[d] issues that the Supreme Court has already addressed." *Id.* at 166. The court first pointed out that the Supreme Court had

[2] The LNC's shorthand for these statutory limits is "the cromnibus expressive purpose restrictions." (LNC Mem. at 17; Pl.'s Facts Submitted for Certification (Docket No. 24-3) ("LNC Proposed Facts") ¶ 22.) That shorthand is argumentative and misleading. The Commission will refer to the limits by the above term, which is drawn from the provision itself.

previously held, in *Buckley* and *McConnell*, that FECA's contribution limits validly apply to minor political parties like the Libertarian Party. *Id.* at 165. The district court also determined that bequests to political parties "may very well raise the anti-corruption concerns that motivated the *Buckley* and *McConnell* Courts to dismiss a facial attack on contribution limits." *Id.* at 166-67 (citing the FEC's record evidence). On appeal, the D.C. Circuit summarily affirmed that aspect of the district court's ruling, *Libertarian Nat'l Comm. v. FEC*, 2014 WL 590973, at *1, which means the Commission had met the "heavy burden of establishing that the merits of [its] case [we]re so clear that expedited action [wa]s justified," *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The district court did also reframe the question proposed by the LNC to exclude the aspects of it that the court deemed ineligible for certification. *LNC I*, 930 F. Supp. 2d at 168-71. The greatly narrowed question that the court certified addressed whether FECA's contribution limit violated the LNC's First Amendment rights solely as applied to the Burrington bequest. That bequest was distinguishable from other bequests, the Court found, because during Burrington's life he had made only a single $25 contribution to the LNC, had no known interaction with the party other than that single contribution, and had not indicated to the LNC that he planned to leave money to the organization in his will. *Id.* at 170-71. Misperceiving the import of broader arguments the Commission had made, the court's understanding was that "the FEC did not really respond to [the LNC's arguments about the Burrington request] in its briefs." *Id.* at 170. After the issuance of this order reframing the question, the FEC asked the district court to reconsider, arguing that FECA's contribution limits were preventative rules that were not amenable to individualized exceptions. *See Libertarian Nat'l Comm. v. FEC*, 950 F. Supp.

2d 58, 60 (D.D.C. 2013). Applying the "clear error" standard of review applicable to post-judgment motions, the district court denied the FEC's motion. *Id.* at 63.

While the case was pending before the Court of Appeals, the remainder of Burrington's bequest was distributed to the LNC through the annual application of the general party limit. As a result, the *en banc* D.C. Circuit vacated the district court's ruling related to the Burrington bequest specifically and dismissed that portion of the LNC's case as moot. *See* Order, *Libertarian Nat'l Comm. v. FEC*, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (*en banc*) (Doc. No. 1485531).

E. Joseph Shaber's Bequest to the LNC

Joseph Shaber was a long-time LNC donor who had made contributions to the LNC dating as far back as 1988. (FEC Exh. 13; Compl. ¶ 15.) While he was alive, Shaber made 47 contributions totaling $3,315 to the LNC, with $1,900 of that total contributed in 2011 and 2012. (FEC Exh. 13.) Shaber's contributions made him eligible to be a "life member" of the LNC. (FEC Exh. 6, at 78:5-20.) And Shaber's contributions led the LNC to send him regular solicitations and an invitation to at least one VIP event. (*Id.*; FEC Exhs. 5, 14.)

Shaber died in August 2014, leaving a bequest to the LNC that was eventually determined to be worth $235,575.20. (Compl. ¶ 17.) Shaber did not restrict how the LNC could use this bequest, and at one point the representatives of his estate requested that the LNC accept the full amount of the bequest all at once, pursuant to the segregated account limits. (FEC Exhs. 16, 28.) The LNC declined to do so. Instead, the trustee of Shaber's estate entered an agreement with the LNC to hold the remaining funds in escrow, to be distributed to the LNC each year at the maximum general party limit pursuant to 52 U.S.C. § 30116(a)(1)(B). (*See* Compl. ¶¶ 19-20; FEC Exh. 27.) As the LNC's Chair later explained in an internal communication, one of the reasons the LNC did not want to take money from the Shaber bequest for its building fund was

that the LNC was "suing the Federal government over the limitations on how much we can take from a bequest in a particular year." (FEC Exh. 17, at 1.) The LNC's treasurer was in favor of accepting an additional $100,200 to pay down the principal on the LNC's building in 2016, but the LNC did not do so after the party's governing body deadlocked 8-8 on the treasurer's proposal. (*Id.*; FEC Exh. 26, at 3.)

Accordingly, to date the LNC has reported receiving $100,200 from the Shaber bequest in three distributions of $33,400 each. These contributions were received by the LNC on February 25, 2015, January 29, 2016, and January 3, 2017. (*See* FEC Exhs. 18-20.)

F. The LNC's Claims in This Case and Its Motion to Certify Facts and Questions

Although the LNC acknowledges that the general limits on contributions to national political party committees have been upheld as consistent with the First Amendment as a facial matter (Compl. ¶ 24), the LNC nevertheless seeks to enjoin the Commission from enforcing the limits either generally or as applied to the Shaber bequest (Compl. at 10, Prayer for Relief ¶ 1). The LNC asserts three specific claims here. In count I, the LNC claims that the general party limit is invalid under the First Amendment as applied to the Shaber bequest. In counts II and III, the LNC claims that Congress's creation of the segregated account limits transformed the pre-existing annual party contribution limit, currently $33,900, into a "content-based restriction on a national party's speech" that violates the First Amendment, either facially or as applied to the Shaber bequest. (Compl. at 2; *see id* ¶¶ 21-34.)

Invoking the special procedures for judicial review of the constitutionality of FECA pursuant to 52 U.S.C. § 30110, the LNC now asks this Court to certify three questions to the *en banc* D.C. Circuit:

1. Does imposing annual contribution limits against the bequest of Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?

2. Do 52 U.S.C. §§ 30116(a)(1)(B) and 30125, on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its money?

3. Does restricting the purposes for which the Libertarian National Committee may spend the bequest of Joseph Shaber violate the Committee's First Amendment rights?

(LNC Mem. at 3.)

The LNC also submits proposed facts for certification (Docket No. 24-3), and the Commission submits herewith its own proposed factual findings, as well as a response to the LNC's proposed facts. Should the Court decide to certify any question to the Court of Appeals, it should also make factual findings sufficient to aid in review by that court. *Cal. Med. Ass'n*, 453 U.S. at 192 n.14 (recognizing that "immediate adjudication of constitutional claims" under the predecessor to section 30110 "would be improper in cases where the resolution of such questions required a fully developed factual record").

ARGUMENT

I. STANDARD OF REVIEW

In this lawsuit, the LNC has invoked the special procedures for judicial review of the constitutionality of FECA under 52 U.S.C. § 30110. As relevant here, that section permits the "national committee of any political party" to bring suits "to construe the constitutionality of any provision of" FECA, and it provides that the "district court shall immediately certify all questions of constitutionality of [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." *Id.* As construed by the Supreme Court, however, section 30110 does not mandate automatic certification of all constitutional questions a plaintiff seeks to raise. The provision does not "require certification of constitutional claims that are frivolous." *Cal. Med. Ass'n*, 453 U.S. at 192 n.14; *see also Holmes v. FEC*, 823 F.3d 69, 71 (D.C. Cir. 2016) ("Under § 30110, district courts do not certify 'frivolous' constitutional

questions to the en banc court of appeals."). A district court should, therefore, dismiss a claim for lack of subject-matter jurisdiction for the same reasons that single judges do when asked to seek convening of a three-judge court under 28 U.S.C. § 2284, namely if a claim is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 89 (1998); *see also Shapiro v. McManus*, 136 S. Ct. 450, 455-56 (2015) (discussing this standard and citing *Steel Co.*); *cf. Johnson v. Comm'n on Presidential Debates*, No. 1:15-cv-1580, 2017 WL 3708097, at *5 (D.C. Cir. Aug. 29, 2017) (holding that court lacked subject-matter jurisdiction over First Amendment claim because it was frivolous).

II. THE LNC'S CLAIM THAT THE SEGREGATED ACCOUNT LIMITS ARE UNCONSTITUTIONAL IS FRIVOLOUS

A. Closely Drawn Scrutiny Applies to the General and Segregated Account Limits Because They Are Contribution Limits, Not Expenditure Limits

Binding First Amendment precedent forecloses the LNC's claim that strict scrutiny applies to the segregated account limits. As the LNC acknowledges and as explained above, the Supreme Court has squarely held that limits on contributions to political party groups are subject to closely drawn scrutiny and are constitutional. *See, e.g.*, *McConnell*, 540 U.S. at 144-45, 161; LNC Mem. at 17; Compl. ¶ 24. The LNC, therefore, limits its current challenge to Congress's recent amendment to FECA that set higher limits for contributions to certain segregated accounts of the national party committees. Compl. ¶¶ 5-6, 29, 33; *see* 52 U.S.C. § 30116(a)(1)(B), (9).

Longstanding Supreme Court precedent distinguishes the standard of review for the constitutionality of limits on campaign expenditures from the standard applied to limits on campaign contributions. Limits on campaign expenditures are subject to strict scrutiny. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). In contrast, limits on campaign contributions are subject to "closely drawn" scrutiny — "a lesser but still 'rigorous standard of

review.'" *Id.* (quoting *Buckley*, 424 U.S. at 29 (1976)); *see also Wagner v. FEC*, 793 F.3d 1, 5-6 (2015) (en banc), *cert. denied sub nom. Miller v. FEC*, 136 S. Ct. 895 (2016). Under the closely drawn standard, "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotation marks omitted).

The LNC suggests that the parties "could be expected to dispute" whether the segregated account limits are restrictions on expenditures subject to strict scrutiny or contribution limits subject to closely drawn scrutiny (LNC Mem. at 18), but that question is neither novel nor substantial enough to merit certification to the *en banc* Court of Appeals. The Supreme Court clearly rejected this argument when the Libertarian Party made it previously, and the Court instead defined how to distinguish between a contribution limit and an expenditure limit. The hallmark of a contribution limit is that it "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. This is so because a "limitation on the amount of money a person may give to a [political party] involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* Exemplifying the LNC's attempted relitigation of these binding holdings, the LNC contests all of these propositions in this case. (FEC Exh. 2 ¶¶ 1-4.)

The Supreme Court Court has also held that from the perspective of the *receiver* of the contribution, "restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 22. But so long as the limits are not set so low as to prevent effective advocacy, the "overall effect" of a contribution limit "is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id.* at 21-22.

In contrast to contribution limits, limits on the amount a person may spend — expenditure limits — "impose direct and substantial restraints on the quantity of political speech." *Buckley*, 424 U.S. at 39. That is because a limit "on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached." *Id.* at 19. In *McConnell*, the Court considered the LNC's challenge to the constitutionality of a statutory provision that "prohibit[ed] national parties from receiving *or spending*" money that was not subject to FECA's amount and source requirements, and that also "prohibit[ed] state party committees from *spending*" such money "on federal election activities." 540 U.S. at 139 (emphases added). Although the statute restricted how national and state party committees could spend money raised outside of FECA's amount and source requirements, the Court nonetheless concluded that the limits were contribution restrictions, not expenditure limits. *Id.* at 138 ("[I]t is irrelevant that Congress chose . . . to regulate contributions on the demand rather than the supply side."). As the Court explained, the "relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to

prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not." *McConnell*, 540 U.S. at 138-39.

As with the limits considered in *McConnell*, there is no credible argument that the segregated account limits at issue here restrict expenditures. The statutory language is framed as a limit on the amount an individual may give to a political party, not a restriction on how much the party may spend. *See* 52 U.S.C. § 30116(a)(1)(B) ("[N]o person shall make contributions . . . to the political committees established and maintained by a national political party . . . which, in the aggregate, exceed $25,000, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year."). The segregated account limits, moreover, do not "in any way limit[] the total amount of money parties can spend." *McConnell*, 540 U.S. at 139.[3] If anything, the segregated account limits permit *increased* spending by parties by providing additional sources of funds they may use to finance certain operations. Parties remain free to spend as much or as little as they wish on their conventions, headquarters, legal proceedings, or for any other expenses they wish to incur. *See id.* (noting that contribution limits "simply limit the source and individual amount of donations"); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010) ("*RNC*") (three-judge court) ("*McConnell* . . . squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money or to structure its finances."), *aff'd*, 561 U.S. 1040 (2010). And by making available more funds for those expenses, the

[3] One of the segregated account provisions provides that the "aggregate amount of expenditures the national committee of a political party may make from such an account may not exceed $20,000,000 with respect to any single convention." 52 U.S.C. § 30116(a)(9)(A). That provision does not set a maximum limit on the amount a party may spend on a single convention, however, because national parties may spend in excess of that amount using contributions subject to the general limit, and in any event the LNC has not challenged that part of the statute.

segregated account limits end up potentially increasing funds available to parties that can be used to discuss a greater "number of issues," further explore the "depth[s]" of those issues, and raise the "size of the audience reached." *Buckley*, 424 U.S. at 19.

Because they are contribution limits, the segregated account limits bear "more heavily on the associational right than on freedom to speak." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000). As a facial matter, the segregated account limits "both 'leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates,' and allow associations 'to aggregate large sums of money to promote effective advocacy.'" *McConnell*, 540 U.S. at 136 (quoting *Buckley*, 424 U.S. at 22).

The application of the segregated account limits to a testamentary bequest does not change the standard of review. Although those who have died obviously cannot continue to actively associate with a political party, that does not call for a higher standard of review; on the contrary, as the LNC admits, it has no associational rights in play with respect to potential bequests because it does not "knowingly associate with dead people." (LNC Proposed Facts ¶ 90.) The LNC previously suggested that applying contribution limits to testamentary bequests should be subject to strict scrutiny because "individuals acting in a testamentary capacity are not exercising their associational rights, but their right of free speech in desiring to leave a political legacy." (Compl. ¶ 24.) But as the *LNC I* court concluded, deceased individuals lack any First Amendment rights. 930 F. Supp. 2d at 169-70. As for the living, because contribution limits are only a marginal infringement on the speech rights of the contributor, the Supreme Court has made clear that "a contribution limitation surviving a claim of associational abridgement would survive a speech challenge as well." *Nixon*, 528 U.S. at 388.

With respect to the LNC's own rights, its assertion that it relies only upon the current state of First Amendment precedent is belied by its invocation of strict scrutiny, a position that has been squarely rejected through more than forty years of Supreme Court cases. The reasons the LNC offers to apply a higher level of scrutiny have all been expressly rejected. The LNC argues that the segregated account limits are "especially problematic" because "major parties . . . have far larger expenses" than minor parties and therefore are poised to benefit more. (LNC Mem. at 18.) But *Buckley* clearly rejected that argument when the Libertarian Party made it there, noting that FECA's contribution limits do not discriminate against minor parties when they "treat[] all candidates equally with regard to contribution limitations." 424 U.S. at 33-34 & n.40. The LNC similarly suggests that it needs more money for "ballot access" than the major parties. (LNC Mem. at 6.) Again, *Buckley*'s and *McConnell*'s holdings to the contrary when the Libertarian Party pursued this argument previously foreclose it here. 424 U.S. at 33; 540 U.S. at 159 ("It is therefore reasonable to require that all parties and all candidates follow the same set of rules designed to protect the integrity of the electoral process.").

In truth, this case is simply the latest in a string of constitutional challenges in which the Libertarian Party has sought to have strict scrutiny applied to contribution limits. While the LNC is free to continuing making this argument, it is frivolous to claim that it can do so while merely seeking to have this Court apply "the current state of First Amendment precedent." (LNC Mem. at 17.)

The D.C. Circuit's holding in *Holmes* does not require certification of this claim that has been foreclosed by repeated decisions of the Supreme Court. In *Holmes*, the court suggested that the mere fact that "the plaintiff is arguing against Supreme Court precedent" was not a basis to decline certification "so long as the plaintiff mounts a non-frivolous argument in favor of

overturning that precedent." 823 F.3d at 74. If that part of the *Holmes* opinion were a binding holding, plaintiff would still be required to actually make a nonfrivolous argument to overturn precedent. *Id.* The LNC does the opposite by asking this Court to "apply the current state of First Amendment precedent." (LNC Mem. at 17.) That statement in *Holmes* was in fact dictum, however, as the court went on to hold that the Supreme Court had not actually foreclosed the claim at issue. *Holmes*, 823 F.3d at 74. As a subsequent panel of the D.C. Circuit clarified, claims "foreclosed by prior decisions of [the Supreme] Court" deprive the lower courts of jurisdiction to hear the claim. *Johnson*, 2017 WL 3708097, at *5 (quoting *Steel Co.*, 523 U.S. at 89).

There is, therefore, simply no basis for the LNC's argument that whether the segregated account limit is an expenditure limit subject to strict scrutiny is a substantial issue worthy of certification.

B. The Segregated Account Limits Easily Survive Closely Drawn Scrutiny

Congress's decision to allow political parties to raise additional funds for certain types of expenses is constitutionally permissible because it is closely drawn to serve important government interests. The LNC's basic claim is that it is unconstitutional for Congress to set one dollar limit for contributions for general use while adopting a different dollar limit for certain specific categories of expenses. But the Supreme Court has clearly held that Congress has the discretion to set the specific dollar amounts of contribution limits. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) ("[T]he dollar amount of the limit need not be fine tuned." (internal quotation marks and alterations omitted)); *Buckley*, 424 U.S. at 30. The Court has "deferred to the legislature's determination of" how to structure contribution limits "to carry out the statute's legitimate objectives" because "[i]n practice, the legislature is better equipped to make such empirical

judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248 (quoting *McConnell*, 540 U.S. at 137); *see Davis v. FEC*, 554 U.S. 724, 737 (2008).

Congress's adjustment of FECA to set contribution limits at a higher level with respect to certain types of political party expenses serves important government interests. Prior to 2014, the national committees of political parties could receive public funding to finance presidential nominating conventions if they met certain eligibility requirements. *See* 26 U.S.C. § 9008. In April 2014, however, Congress terminated that program and transferred the funds that had been devoted to convention funding to medical research. *See* Gabriella Miller Kids First Research Act, Pub. L. No. 113-94, 128 Stat. 1085 (2014) (codified as amended at 26 U.S.C. §§ 9008-09, 9012). Congress amended FECA to create the segregated account limits in December of that same year, before any presidential nominating convention would have occurred. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (Dec. 16, 2014) (codified as amended at 52 U.S.C. § 30116(a), (d)).

The legislative history confirms that Congress enacted the segregated account limits to provide national parties "with a means of acquiring additional resources" for presidential nominating conventions "because such conventions may no longer be paid for with public funds." 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014); *see also* 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014). The new convention account was intended to ensure that national parties would maintain access to sufficient funds to continue their operations after one source of funds was no longer available. Congress thus provided an increased contribution limit for funds "to be used in the same manner as the former public funds could have been used, as well as to pay for the costs of fundraising for this segregated account." 160 Cong. Rec. H9286 (daily ed. Dec. 11,

2014); *see also* 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014). At the same time, Congress also concluded that parties should be permitted to raise additional resources for two other types of expenses that tend to be less directly connected to most candidates or campaigns for federal office. *See* 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (noting that "many of" the activities that may be financed through these accounts "are not for the purpose of influencing Federal elections"); *see also* 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014). Because of this decreased connection, Congress decided to relax the contribution limits applicable to funds that can defray national committee expenses for headquarters buildings as well as for recounts and other legal proceedings.

Based on this history, it is frivolous for the LNC to suggest that Congress's decision to provide additional flexibility for national party committees to raise needed funds shows insufficient tailoring. Congress has a duty to ensure that the contribution limits it sets are closely drawn to prevent corruption and its appearance. *See, e.g.*, *Buckley*, 424 U.S. at 29. Where it concludes that the limits it previously set "are not needed in order to combat corruption, then the obvious remedy is to raise . . . those limits." *Davis*, 554 U.S. at 743. That Congress did so here *reduces* any burden that lower contribution limits place on the rights of contributors and party committees. The LNC can hardly argue that that reduction in burden somehow renders a previously permissible contribution regime constitutionally suspect.

The segregated account limits are closely drawn under Supreme Court precedent. The Court has readily affirmed the congressional judgment that differing contribution limits may apply to distinct categories of expenses. In *McConnell*, for example, the Supreme Court upheld a FECA amendment contained in the Bipartisan Campaign Reform Act ("BCRA") that prohibited state and local political parties from using contributions over $10,000 received from an

individual donor in a calendar year for any "Federal election activity" defined by the statute. 540 U.S. at 173. Yet federal law does not limit contributions to state political parties that are then used for expenses outside the definition of Federal election activity. *See id.* Similarly, before the "enactment of BCRA in 2002, federal law permitted national political parties to accept and use large, unlimited contributions" to fund state and local election activities even though those activities "could simultaneously influence federal elections." *RNC*, 698 F. Supp. 2d at 153. Yet the pre-BCRA contribution limits applicable to funds raised by national political parties for use in federal elections remained constitutional even though different rules applied to funds raised for use in those state and local elections. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 458 (2001). And in *Buckley*, the Court did not accept the Libertarian Party's argument that limits on individual contributions were "highly discriminatory and, in effect a regulation of the content of speech" in light of the ability of established groups to give more to candidates and corporations, and unions being permitted an exemption for fundraising and internal communications. Reply Br. of the Appellants, *Buckley v. Valeo*, 1975 WL 171458, *50 (U.S. filed Nov. 3, 1975). The Supreme Court instead concluded that the provisions did not "unconstitutionally discriminate against ad hoc organizations in favor of established interest groups and impermissibly burden free association." *Buckley*, 424 U.S. at 35.

To be sure, the Court has held that it is *permissible* for Congress to regulate all contributions to the national parties because "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *McConnell*, 540 U.S. at 155. The LNC latches on to this language to argue that Congress is *required* to regulate all contributions to political party groups in precisely the same way. (LNC Mem. at 19.) But the Court nowhere said that.

Accepting that *all* large contributions to political parties "are likely to create actual or apparent indebtedness" does not mean that all such contributions are equally suspect regardless of how they are used. *McConnell*, 540 U.S. at 155. Indeed, it is hard to see how *McConnell* would have upheld limits on contributions to state parties applicable to only some of their expenses if that were the case. And contrary to the LNC's assertion (LNC Mem. at 19 ("BCRA applies *depending* on how a national party might want to use its money")), limits apply to *all* national party committees equally, regardless of their policy positions, financial situation, or spending priorities. Congress merely determined that a higher limit was acceptable for certain types of party expenses.

The LNC's position in this case shows that Congress's decision to regulate general contributions more strictly than those raised to pay certain costs is closely drawn. The LNC's claims here demonstrate that political parties and their candidates tend to place more value on unrestricted contributions than those that may only be used for certain expenses. (Compl. ¶ 13.) Indeed, the LNC admitted that it values unrestricted funds more than those that may only be used for particular categories of expenses. (FEC Exh. 2 ¶ 18.) If the LNC is correct that unrestricted contributions are more valuable, then Congress was justified in concluding that such contributions create a higher risk of corruption or its appearance than other types of contributions. A party's candidates and officeholders are more likely to be corrupted by something the party values more highly than by something it does not need as acutely.

The LNC claims that the Commission's discovery responses show Congress "could not have . . . concluded" that unrestricted contributions warrant greater restrictions (LNC Mem. at 20), but the FEC merely acknowledged the uncontroversial principle that the value of a particular contribution to the recipient and its appearance of corruption will depend on the circumstances

surrounding that contribution. For example, a lower contribution to a political party might appear more corrupt than a higher one if the party changes its position on a policy matter close in time to the lower contribution. That multifaceted question is precisely why courts defer to the legislature's judgment on the dollar amounts to be applied in connection with contribution limits — if it "is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (internal quotation marks omitted).

Because the segregated account limits apply the same way to all national committees of political parties, there is no basis for any claim of differential treatment. *See Davis*, 554 U.S. at 743-44 (2008) (invalidating contribution limit that imposed "different contribution . . . limits on candidates vying for the same seat"). The LNC suggests that the segregated account structure is unconstitutional because of its *effect* on minor parties, but the Supreme Court foreclosed that basis for challenging a contribution restriction when the Libertarian Party previously brought it as well. *McConnell*, 540 U.S. at 159 ("It is . . . reasonable to require that all parties and all candidates follow the same set of rules designed to protect the integrity of the electoral process."); *Buckley*, 424 U.S. at 33 (rejecting argument that contribution limits discriminated against minor parties because the limits "treat[ed] all candidates equally with regard to contribution limitations").

The LNC's suggestion (LNC Mem. at 6, 18) that the segregated account limits are unconstitutional because the LNC does not need the extra money it could receive into those accounts for its conventions, headquarters, or legal expenses is similarly frivolous. "There is . . . no constitutional basis for attacking contribution limits on the ground that they are too high." *Davis*, 554 U.S. at 737. Because "Congress has no constitutional obligation to limit

contributions at all," a party that "wishes to restrict" a political opponent's "fundraising cannot argue that the Constitution demands that contributions be regulated more strictly." *Id.*

Regardless of how the LNC frames its challenge to the current FECA structure of contribution limits applicable to national party committees, such limits would only be invalid if they "prevent candidates from 'amassing the resources necessary for effective campaign advocacy.'" *Randall*, 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 21) (alteration omitted)). They do not. Far from *reducing* the resources available to national parties to engage in campaign advocacy, the segregated account limits instead *expand* the parties' ability to amass resources by enlarging the potential pool of funds available to them. The more permissive current structure easily survives closely drawn scrutiny, and the LNC's claims to the contrary are frivolous.

III. THE LNC'S CLAIM THAT APPLICATION OF CONTRIBUTION LIMITS TO THE SHABER BEQUEST VIOLATES THE FIRST AMENDMENT IS FRIVOLOUS

In *LNC I*, the district court held that the LNC's claim that it is generally unconstitutional to apply contribution limits to testamentary bequests was "[f]rivolous and/or [i]nsubstantial" under section 30110, and therefore the court declined to certify that question to the D.C. Circuit. *LNC I*, 930 F. Supp. 2d at 165-67. That decision was summarily affirmed by the Court of Appeals. *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5049, 2014 WL 590973, at *1 (D.C. Cir. Feb. 7, 2014). The LNC chose not to seek further review of the decision.

In the current case, the LNC states that it disagrees with the general ruling in *LNC I*, but it concedes that it has "lost that battle" and that the "issue is not before the Court" in this case. (LNC Mem. at 11 (noting as an aside that "[t]he LNC continues to believe that it is unconstitutional to apply any campaign contribution limits to testamentary bequests).) Thus, the LNC does not and cannot argue that it is unconstitutional to apply campaign contribution limits to testamentary bequests as a general matter because it is issue-precluded from relitigating that

issue in this action and because it has affirmatively waived the argument. *See Gulf Power Co. v. FCC*, 669 F.3d 320, 322 (D.C. Cir. 2012) (holding that issue preclusion was "a fatal bar" to the relitigation of a "constitutional issue").

The LNC instead asks this Court to certify the question whether "imposing annual contribution limits against the bequest of Joseph Shaber violate[s] the First Amendment rights of the" LNC, relying heavily on the *LNC I* district court's certification of a question as to one prior bequest. (LNC Mem. at 3, 12.) In light of the LNC's affirmative waiver of any challenge to the broader ruling in *LNC I*, however, the question the LNC seeks to have certified here is frivolous. If it is constitutional to apply contribution limits to bequeathed contributions, as the Court of Appeals confirmed in 2014, then there is no plausible argument that it is unconstitutional to apply that limit to the bequest at issue here.

A. Contribution Limits Are Preventative Rules Designed to Deter Corruption and So Their Constitutionality Does Not Depend on Whether There Is Evidence of Corruption for Any Individual Application of the Limits

The Supreme Court explained long ago that contribution limits are prophylactic rules that target not just the "actuality" of corruption but also its "appearance." *Buckley*, 424 U.S. at 26; *see also Citizens United*, 558 U.S. at 357 ("The Court . . . has noted that restrictions on direct contributions are preventative . . . ."). Because they are prophylactic rules, contribution limits are constitutional even though the result is to limit many contributions that are not part of any *quid pro quo* corruption scheme. *See FEC v. Beaumont*, 539 U.S. 146, 157 (2003) (observing that the Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared" (internal quotation marks omitted)). Thus, the Court in *Buckley* upheld FECA's contribution limits despite acknowledging "the proposition that most large contributors do not seek improper influence over a candidate's position or an

officeholder's action." 424 U.S. at 29; *see also Citizens United*, 558 U.S. at 357 ("[F]ew if any contributions to candidates will involve *quid pro quo* arrangements.").

Of course, courts have considered as-applied challenges directed at exempting certain classes of entities from contribution limits. *See, e.g.*, *Beaumont*, 539 U.S. 146 (rejecting challenge to FECA's ban on corporate contributions to candidates as applied to nonprofit corporations). The LNC does not even, however, assert an as-applied challenge to FECA's contribution limits with respect to the Shaber bequest on a nonfrivolous basis to differentiate it (and those like it) from the mine run of testamentary bequests to which the LNC concedes contribution limits may be permissibly applied under current law. Without identifying some categorical basis to differentiate the Shaber bequest, the LNC's claim is "not so much an as-applied challenge as it is an argument for overruling a precedent," and so it is wholly foreclosed. *RNC*, 698 F. Supp. 2d at 157; *see also In re Cao*, 619 F.3d 410, 430 (5th Cir. 2010). And as noted above, the LNC does not make such an argument here.

The LNC has admitted that it is not entitled to certification of constitutional claims based on reasoning that has been previously rejected. In *LNC I* post-judgment briefing, the LNC conceded that if it had lost "any remotely similar case involving any bequest" before "the Court of Appeals," cases involving different bequests that were "similarly situated . . . *would likely be frivolous* within the meaning of" 52 U.S.C. § 30110. Pl. Libertarian Nat'l Committee's Opp'n to Def's Mot. to Alter or Amend at 6, No. 11-562, (Docket No. 51) (D.D.C. April 29, 2013) (emphasis added). Of course, the LNC did lose its claim that the party contribution limit may not be constitutionally applied to testamentary bequests in general, as it concedes. (LNC Mem. at 2, 11.) So it cannot argue now that the same contribution limit is unconstitutional as applied to a particular bequest without providing some basis for distinguishing that specific one from the

general category of bequests. The LNC's failure to do so renders its first claim illogical and frivolous.

B. The LNC's Suggestion That There Must Be Evidence of Corruption for Each Particular Bequest Is Frivolous

The sole basis the LNC offers for distinguishing the Shaber bequest and the others it identifies is the conclusory assertion that there "is no evidence of quid pro quo corruption" with respect to those bequests. (LNC Mem. at 12.) But that argument cannot be reconciled with *LNC I* and it merely reframes the overbreadth claim that has been foreclosed by the Supreme Court in the context of contribution limits generally. *Buckley*, 424 U.S. at 29-30. When reviewing a particular application of a contribution limit, the government is not required to show evidence of corruption as to that contribution. Such a requirement would be flatly inconsistent with the very concept of a preventative contribution limit. *See Citizens United*, 558 U.S. at 357; *Buckley*, 424 U.S. at 27.

If accepted, the LNC's suggestion that limits on bequeathed contributions could only be permissible if there is evidence of *quid pro quo* corruption with respect to the specific bequest would also eliminate any distinction between preventative contribution limits and the criminal statutes proscribing corruption. Where a particular contribution — whether it is made through a bequest or not — is part of a *quid pro quo* corruption scheme, that contribution would be illegal under the criminal code. *See Wagner*, 793 F.3d at 25 & n.28 (citing 18 U.S.C. § 201); *cf. United States v. Menendez*, 132 F. Supp. 3d 635, 638 (D.N.J. 2015) ("Defendants here have been charged with engaging in a *quid pro quo* bribery scheme, not with exceeding limits set by a prophylactic campaign finance regulation."). But "the Supreme Court has repeatedly dispatched" the argument that campaign contribution limits are unconstitutional because they go beyond "criminal statutes that directly ban quid pro quos and coercion." *Wagner*, 793 F.3d at 25

(footnote omitted). This is because "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Buckley*, 424 U.S. at 27-28. The Supreme Court has repeatedly held that Congress may go beyond such statutes and apply preventative contribution limits to stem potential corruption even when no *quid pro quo* could be proven. *Id.*; *see also Citizens United*, 558 U.S. at 356-57 (noting that the Court has approved contribution limits as a "preventative" measure even though *quid pro quo* arrangements "would be covered by bribery laws" if proven); *McConnell*, 540 U.S. at 143 ("In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits . . . .").

The LNC's erroneous view of the evidence required to justify such limits also ignores the fact that the Supreme Court has consistently deemed the *appearance* of corruption to be a sufficient basis to support such limits. *McConnell*, 540 U.S. at 143 (discussing "the Government's interest in combating the appearance or perception of corruption engendered by large campaign contributions"); *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.") In other words, if the LNC has "lost [the] battle" over whether it is unconstitutional to apply any campaign contribution to testamentary bequests (LNC Mem. at 11), then it has also lost the war over whether such a limit may apply in the absence of evidence of actual corruption as to that bequest.

C. There Is No Viable Categorical Basis to Differentiate the Shaber Bequest

The LNC's Motion to Certify fails to provide any basis to distinguish Shaber's bequest from any other bequest it might receive. As the LNC argues, its contacts with Shaber during his life were "not . . . unusual" and his contributions "unspectacular." (LNC Mem. at 15.) In fact,

Shaber contributed 47 times and more than $3,000 to the LNC while he was alive — an amount that qualified him to be a "life member" of the party and which led the LNC to send routine solicitations and invitations to Shaber. (FEC Exh. 6, at 78:5-20.) Shaber's bequest, therefore, has no distinguishing characteristics that would make an appropriate basis for an as-applied claim. And to the extent the LNC's assertions imply that Shaber's contacts with the party would need to have been "unusual" or "spectacular" to be constitutionally subject to the contribution limit, such a claim would plainly be foreclosed by the broad ruling of *LNC I* and other precedent.

Moreover, the LNC's assertion of an as-applied claim with respect to the Shaber bequest is belied by its belated identification of other potential future bequests as presenting similar constitutional issues. (*See* LNC Mem. at 9 ("LNC's claims are not limited to Shaber's bequest.").) Even though the LNC's complaint (Docket No. 1) stated that its claims applied only to the Shaber bequest, the LNC's current factual offering identifies three other actual or potential testamentary bequests that it now contends are affected by FECA's contribution limits. (*See* LNC Proposed Facts ¶¶ 110, 118, 123-130.) These other factual situations encompass potential bequestors who remain living, as well as those whose bequests have matured due to their death. They cover individuals who have given hundreds of thousands of dollars to the LNC (*id.* ¶ 96), as well as individuals who gave less than $2,000 (*id.* ¶ 124). They include individuals who have informed the LNC of their intentions as well as those who did not. (*Id.* ¶¶ 70, 110.) They also include an individual who has served as an LNC official and has "repeatedly run" for political office "as a Libertarian." (*Id.* ¶ 115.) The only similarity among these bequests is that they are bequests. Thus, even if the attempted expansion of the LNC's claims here did not go beyond the claims in its complaint, the bequests that the LNC has now attempted to place at issue in this

case are not categorically distinct from any other potential bequeathed contribution, and they underline even more strongly the frivolous nature of its claims.

D. The Certification Order in *LNC I* Does Not Require Certification of the LNC's Claims Here

The LNC relies heavily on the certification of an as-applied challenge based on one specific bequest by the district court in *LNC I* (LNC Mem. at 12), but that certification order did not say that bequests of the sort that the LNC presents in this case would qualify for certification, and it did not address the arguments the Commission makes here as to why such a single-bequest certification is inappropriate. In its motion to certify in *LNC I*, the LNC sought to certify only a single, broad question whether applying contribution limits to testamentary bequests violated "First Amendment speech and associational rights." 930 F. Supp. 2d at 156. The district court concluded that because bequests as a general matter "may very well raise the same anti-corruption concerns that motivated the *Buckley* and *McConnell* Courts to dismiss a facial attack on contribution limits," the LNC's question as drafted was frivolous. *Id.* at 166. However, the district court reframed the question presented by the LNC and certified only the far narrower question whether the limits could be constitutionally applied to the one particular bequest the LNC had placed before the court. *Id.* at 171.

The initial question presented for certification in *LNC I* asserted a claim as applied to bequests generally, and the court did not connect the Commission's grounds for opposition to that claim with the particular bequest at issue there. *Id.* at 170. As a result, the district court's initial opinion did not enjoy the benefit of sufficiently clear briefing regarding whether it was permissible to assert an as-applied claim with respect to a single bequest that could not meaningfully be distinguished from the general category of bequests to political parties. That question was more squarely presented after the Commission made a post-judgment motion

pursuant to Federal Rule of Civil Procedure 59(e) asking the court to reconsider the narrower question it had certified. *See Libertarian Nat'l Comm., Inc.*, 950 F. Supp. 2d 58. But as these arguments were presented in a post-judgment motion, the *LNC I* court considered only whether it had committed "clear error" in certifying the question, and the court concluded that it had not. In so ruling, the court found that "the FEC never previously argue[d] that individualized as-applied challenges to contribution limits are foreclosed as a matter of law." *Id.* at 62.

The *LNC I* post-judgment opinion also does not require the court to certify an as-applied claim in this case. Here, the Commission has continuously maintained that any argument that a contribution limit may be subject to an individualized, as-applied claim due to the absence of evidence of corruption is frivolous. Thus, this question comes before this Court outside the context of clear-error review. In addition, unlike the earlier court, this Court has the benefit of the D.C. Circuit's summary affirmance of the general ruling in *LNC I*. The LNC does not contest that decision, which as described above renders its current narrower claims frivolous.

The Burrington bequest at issue in *LNC I*, moreover, had fewer evident factual markers of the potential for apparent or actual corruption than the bequests the LNC has now tried to place at issue in this case. Burrington had only made a single donation to the LNC in the amount of $25 nearly a decade before his death, and he had no other recorded interaction with the party until his death. *LNC I*, 930 F. Supp. 2d at 156. Shaber, in contrast, gave 47 times and more than $3,000 to the LNC, was eligible to become a life member of the party, and received regular solicitations and invitations to events from the LNC, including a "VIP reception." (FEC Exh. 6, at 78:5-20; FEC Exhs. 13-14.) And the other individuals making potential and realized bequests that the LNC now identifies in its papers have had similar, and in some cases far more extensive, contacts with the party. (LNC Proposed Facts ¶¶ 110, 115-16, 124.) Thus, the factual

circumstances surrounding those bequests are distinct from those considered in *LNC I*, and that decision provides no support to the LNC here.[4]

E. The LNC's Purported First Amendment Right to Receive Campaign Contributions Does Not Support the Certification of Its Proposed Question

The LNC's framing of its legal arguments around a supposed "First Amendment right to receive campaign contributions" cannot save its first proposed certified question. (LNC Mem. at 13.) The constitutional test that the *Buckley* Court applied to FECA's contribution limits already accounts for the rights of individuals and entities on the receiving end of contributions by asking if contribution limits are so low that they prevent recipients from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; *see also Randall*, 548 U.S. at 248 ("Following *Buckley*, we must determine whether . . . contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" (alteration in original)). *Buckley* specifically considered whether FECA violated the First Amendment rights of those who would receive political contributions by forbidding the "receipt . . . of contributions on behalf of political candidates in excess of the amounts specified." *Buckley*, 424 U.S. at 59 n.67. The Court answered that question with a definitive "NO." *Id.* And in *Randall* the Court focused on "the ability of candidates to raise the funds necessary to run a competitive election." *Randall*, 548 U.S. at 253; *see also id.* at 261 (striking down a state contribution limit because it "threaten[ed] to inhibit effective advocacy by those who seek election, particularly challengers" and because it would "mute the voice of political parties"). Thus, any First Amendment interest the LNC has in receiving contributions is already reflected in the constitutional test the Supreme Court has applied to uphold FECA's contribution limits.

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[4] Even if the *LNC I* post-judgment ruling were directly applicable here, as a district court opinion it is not binding on this Court. *See In re Exec. Office of President*, 215 F.3d 20, 24 (D.C. Cir. 2000) ("District Court decisions do not establish the law of the circuit, nor, indeed, do they even establish 'the law of the district.'" (citations omitted)).

The LNC does not even try to meet that test. It nowhere alleges or offers evidence that FECA's contribution limits prevent it from "amassing the resources necessary for effective advocacy," either as a general matter or as applied to testamentary bequests or the Shaber bequest in particular. *Buckley*, 424 U.S. at 21. In fact, the LNC expressly concedes that it "does not claim in this litigation that the current contribution limit" applicable to political parties "is too low." (LNC Mem. at 17.) That concession establishes the frivolousness of the LNC's claim as to bequests.

IV. IF THE COURT FINDS ANY QUESTION REGARDING THE SEGREGATED ACCOUNT LIMITS WORTHY OF CERTIFICATION, IT SHOULD REFRAME THE LNC'S OVERBROAD PROPOSED QUESTIONS

For the reasons explained above, the LNC's complaint presents no questions that should be certified to the *en banc* Court of Appeals under 52 U.S.C. § 30110. Instead, the LNC's claims should be dismissed, which would not foreclose further review, but would mean that any appeal would proceed under ordinary procedures to a three-judge panel of the D.C. Circuit. *See Holmes*, 823 F.3d 69 (three-judge panel reviewing district court decision not to certify questions under section 30110). Assuming that the Court does deem any portion of the LNC's claims regarding the segregated account limits worthy to be certified, however, the LNC's proposed questions two and three should be limited because they are phrased in argumentative terms and go far beyond the claims asserted in its complaint.

Counts II and III of the LNC's complaint focused on the constitutionality of the segregated account limits, which permit national committees of political parties to accept more money into accounts for expenses related to a presidential nominating convention, a headquarters building, and for recounts and other legal expenses. Compl. ¶¶ 29, 33; *see* 52 U.S.C. § 30116(a)(1)(B), (9). This appeared to be the only aspect of the limit on contributions to political parties that the LNC challenged in its complaint, as the LNC confirmed in its discovery

responses. (FEC Exh. 2 ¶¶ 26, 28.) However, the LNC's proposed questions two and three are not expressly targeted at the segregated account structure, but instead broadly assert that the contribution limits applicable to national committees "restrict[] the purposes for which [the LNC] may spend" its money. (LNC Mem. at 3.)

That framing of the issue is argumentative because it begs the question whether the segregated account limits actually restrict the LNC's spending. As explained above, because the segregated account limits do not set maximum amounts of spending, there is no nonfrivolous argument that they restrict the LNC's speech. At a minimum, the questions should be reframed to avoid suggesting the answer.

Unlike the LNC's complaint, moreover, certified questions two and three are not limited to the segregated account structure. (LNC Mem. at 3.) Rather, they broadly implicate any possible hypothetical "purposes" for which the LNC might wish to incur expenses, even if they fall outside the three categories of expenses identified as to the segregated account limits. (*Id.*) In fact, question 2 as drafted could be read to present a broad facial challenge to the general account limit in section 30116(a)(1)(B) that is not connected to the segregated account limits. This Court should not "certify to the en banc Court of Appeals an as-applied question laden with hypotheticals about the constitutionality of contribution limits." *LNC I*, 930 F. Supp. 2d at 167. If any part of this case is to be certified, therefore, the questions should be limited to the challenge the LNC made in its complaint:

> 2. Do 52 U.S.C. § 30116(a)(1)(B) and (9) violate the First Amendment rights of the Libertarian National Committee by permitting it to accept 300% of the otherwise applicable contribution limit into segregated accounts used to defray expenses

with respect to its presidential nominating conventions, headquarters buildings, and election recounts and contests and other legal proceedings?

3. Do 52 U.S.C. § 30116(a)(1)(B) and (9) violate the First Amendment rights of the Libertarian National Committee by permitting it to accept 300% of the otherwise applicable contribution limit from the bequest of Joseph Shaber into segregated accounts used to defray expenses with respect to its presidential nominating conventions, headquarters buildings, and election recounts and contests and other legal proceedings?

CONCLUSION

For the foregoing reasons, the Court should dismiss this case and deny the LNC's motion to certify facts and questions. The LNC's claims are frivolous because they are foreclosed by Supreme Court precedent, and so they should not be certified to the *en banc* Court of Appeals.

Respectfully submitted,

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