**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| LIBERTARIAN NATIONAL COMMITTEE, INC.,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | No. 13-5088<br><br>REPLY IN SUPPORT OF SUGGESTION OF MOOTNESS |

**DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS SUGGESTION OF MOOTNESS**

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Plaintiff Libertarian National Committee, Inc. ("LNC") confirms in its opposition brief that it received the remaining amount of the Raymond Groves Burrington bequest "[w]eeks ago." (LNC's Opp'n to FEC's Suggestion of Mootness ("LNC Opp'n") at 2 (Doc. No. 1480289).) Since the LNC is no longer suffering an alleged injury that can be redressed by a court ruling, the LNC's as-applied challenge to the Federal Election Campaign Act's ("FECA") limit on that bequest, *see* 2 U.S.C. § 441a(a)(1)(B) ("Contribution Limit" or "Limit"), is moot. (FEC Suggestion of Mootness ("FEC Sugg.") at 3-6 (Doc. No. 1478015).)

The LNC has failed to show that this matter qualifies for the "narrow exception" to mootness for cases that are both capable of repetition and evading review. *Bois v. Marsh*, 801 F.2d 462, 466 (D.C. Cir. 1986). This matter does not evade review for two independent reasons. First, the general validity of the Contribution Limit as applied to future bequests to national party committees is now under review by a panel of this Court in matter number 13-5094; the panel recently upheld the Limit in a *per curiam* order. Second, the LNC had seven years to fully litigate this matter, while the general rule in this Circuit is that challenged actions lasting just two years or longer do not evade review. The LNC nevertheless ran out of time due to its own delay — it did not file this suit until nearly *four years* after it could have. This matter thus does not evade review.

The LNC also has not shown that this matter is capable of repetition. It is an exceedingly rare event for the LNC to receive a bequest above the Contribution Limit — the LNC has received *just one* in 43 years — so there is no reasonable expectation that the LNC will receive another, let alone one that shares the material features of the Burrington bequest, as it must for this matter to repeat.

Because this matter is not capable of repetition yet evading review, the LNC resorts to arguing in effect about the applicability of that mootness exception to a dispute about the general constitutionality of limiting bequests. The LNC relies heavily on data showing that the Democratic and Republican parties receive bequests in excess of the Contribution Limit with relative frequency. Perhaps such data would have been relevant to matter number 13-5094 (though no one argued that was moot), but it is irrelevant here since all that is at issue is the bequest the LNC received from Burrington. Since that scenario is not capable of repetition yet evading review, this matter is moot and the Court lacks jurisdiction.

## ANALYSIS

### A. This Matter Does Not Evade Review Because the Contribution Limit's Validity as Applied to Bequests Other Than Burrington's Is Receiving Review

The LNC cannot demonstrate that this case evades review because this Court is currently reviewing the Contribution Limit's validity as applied to future bequests to all national party committees in matter number 13-5094. In contrast,

only the Burrington bequest is at issue in this matter. The LNC claims otherwise (LNC Opp'n at 1, 12), but it overlooks the plain language of the district court's opinion. The district court declined to certify the LNC's broad proposed question of law challenging the Contribution Limit "as applied to *all* bequests to *all* national political parties." *LNC v. FEC*, 930 F. Supp. 2d 154, 166 (D.D.C. 2013) (emphasis in original slip op.). The court then narrowed that broad question to the narrow question of whether imposing the Limit "against the bequest of Raymond Groves Burrington violate[s] the First Amendment rights of the [LNC]" and certified that question to this Court. *Id.* at 171. The district court divided the LNC's case this way because the evidence showed that "bequests *other than Burrington's* may very well raise the anti-corruption concerns" that the Supreme Court has held justify limiting contributions. *Id.* at 166 (emphasis added). The LNC appealed, and three weeks ago in matter number 13-5094, this Court summarily affirmed the district court's ruling that the non-certified portion of the LNC's original broad question — the validity of the Contribution Limit as applied to all bequests to all national political parties other than Burrington's bequest — was frivolous. (Order at 1, No. 13-5094 (D.C. Cir. Feb. 7, 2014) (Doc. No. 1478819).)

Apparently unable to find support in the district court's published opinion, the LNC distorts a portion of an oral argument transcript addressing the district court's discretion to amend the LNC's proposed question. (LNC Opp'n at 13.) At

oral argument, Federal Election Commission ("FEC") counsel merely agreed "that amending the [proposed certified] question was in the Court's discretion," as the district court itself explained. *LNC*, 930 F. Supp. 2d at 168. Contrary to the LNC's claim, the FEC did not state that the certified question applied to bequests other than Burrington's, and in any event, such a statement could not change the court's opinion. The LNC overlooks a second opinion by the district court, which reiterated that its "holding in *LNC* [was] that applying contribution limits does not violate the First Amendment with respect to bequests generally." (Mem. Op. at 2, No. 11-562 (D.D.C. June 17, 2013) (Doc. No. 59).)[1]

Finally, contrary to the LNC's claims, the district court's March 2013 decision to certify this matter says nothing about whether the matter became moot in 2014. (LNC Opp'n at 4-5, 11-12.) Because little of the Burrington bequest remained undistributed, the FEC pointed out this matter may have been factually too insubstantial to certify to this Court sitting *en banc* (*see* Reply Mem. in Supp. of FEC Mot. to Alter or Amend the J. at 2, No. 11-562 (D.D.C. May 9, 2013) (Doc. No. 54)), but did not argue that this case was moot at that time (because it

[1] The LNC points out (LNC Opp'n Br. at 14) that the FEC has argued that the district court's narrowed question risked inviting others to seek individual exemptions from FECA's contribution limits (*see* Mem. in Supp. of FEC Mot. to Alter or Amend the J. at 12-13, No. 11-562 (D.D.C. Apr. 15, 2013) (Doc. No. 48)). The FEC did not argue, however, that such claims would have merit. (*Id.*)

was not). So the district court had no occasion to address mootness, let alone whether the case was capable of repetition yet evading review.

### B. This Matter Does Not Evade Review Because Seven Years Was Enough Time to Fully Litigate This Case and the LNC Delayed Its Disposition by Waiting Four Years to File Suit

The LNC also cannot show that this matter evades review because the Limit's application to the Burrington bequest was not "too short to be fully litigated prior to cessation or expiration." *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010). The LNC had *seven years* to fully litigate this matter (FEC Sugg. at 2, 5, 7), and in the D.C. Circuit, "[a]s a general rule, *two years* is enough time for a dispute to be litigated," *Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005) (emphasis added) (challenged actions lasting "somewhat more than two years" and "at least three years" did not evade review).

Even if seven years were insufficient time to fully litigate this case, the LNC still could not claim that this matter evades review because the LNC delayed filing this suit nearly four years. (FEC Sugg. at 7.) Thus, it is the LNC's "lassitude that allowed [t]his case to become moot," and the LNC "cannot credibly claim [t]his case 'evades review' when [the LNC itself] has delayed its disposition." *Armstrong v. FAA*, 515 F.3d 1294, 1296 (D.C. Cir. 2008).

The LNC does not dispute that it could have filed earlier, nor does it give any reason for its delay; instead, it incorrectly insists that under *Armstrong*, a

litigant can be faulted only for delay of an "existing matter[]," not delay in initiating a matter. (LNC Opp'n at 16.) In *Armstrong* itself, however, this Court held just the opposite and found that a case did not evade review because the plaintiff delayed (just 79 days) in filing its federal lawsuit. *See Armstrong*, 515 F.3d at 1296-97 (plaintiff delayed filing a petition for review of an agency order); *see also Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71, 96-97 (D.D.C. 2013) (following *Armstrong*; holding that case did not evade review due in part to plaintiff's "delay filing its complaint"). Indeed, if delay in filing suit did not prevent a finding that a case evades review, any party could ensure that its potentially moot case would evade review by waiting as long as possible to file.[2]

Because this matter would not evade review, the LNC resorts to arguing that dissimilar cases might. First, the LNC complains at length about the pace of the pending *Palmer* litigation to make the unexceptional point that district court litigation can last five years. (LNC Opp'n at 17-19.) *Palmer* has nothing to do with this matter, however, and it is always possible to point to examples of unusually lengthy litigation. This case was before the district court for 27 months,

[2] Holding a plaintiff's delay in filing suit against that plaintiff does not threaten to "swallow the capable-of-repetition exception," as the LNC contends (LNC Opp'n at 16), since it not always "possible to hypothesize" (*id.*) that a plaintiff could have filed earlier — a claim must first be ripe to be justiciable.

not five years, and yet the LNC speculates that had it filed suit in 2007, it "might still be stuck in the District Court." (*Id.* at 19.) The facts are to the contrary.

Second, the LNC in effect argues that this matter would evade review because a dispute about bequests generally — *i.e.*, those at issue in matter number 13-5094 — would evade review. The LNC asserts that a typical future bequest to the LNC would be subject to the Contribution Limit for about two years by pointing to FEC data showing that the average-sized bequest made to national political parties before 2003 was $62,117.23. (LNC Opp'n at 14-15 (citing Clark Decl. (FEC Exh. 2) at ¶¶ 10-11, No. 11-562 (D.D.C. May 4, 2012) (Doc. No. 24-2)).) This figure, however, does not include a single penny bequeathed to the LNC. *See LNC*, 930 F. Supp. 2d at 182 (App. ¶ 69) (LNC received its only three bequests between 2007 and 2010). Instead, the $62,117.23 average reflects bequests made to the Democratic and Republican parties, which are far larger than the LNC and which receive large bequests with relative frequency, as the LNC points out.[3] (LNC Opp'n at 6-7 & n.1.) Thus, this figure does not show that the LNC will receive a bequest of any particular size in the future. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 264 F. App'x 10, 12 (D.C. Cir. 2008) (*per curiam*) (distinguishable cases fail to show a case evades review).

[3] The LNC has never elected a federal officeholder and has only about 14,500 dues-paying members and 270,000 registered voters. (First Am. Compl. ¶¶ 4, 13, No. 11-562 (D.D.C. May 27, 2011) (Doc. No. 13).)

### C. Even if This Matter Could Evade Review, It Is Not Capable of Repetition

To be capable of repetition, the LNC must show that there is a "reasonable expectation that the same complaining party [will] be subject to the same action again." *Honeywell Int'l, Inc.*, 628 F.3d at 576 (alteration in original; internal quotation marks omitted). The LNC cannot make this showing for two reasons.

First, it is unreasonable to expect that the LNC will receive an above-limit bequest again. The LNC's opposition confirms that Burrington's bequest is the only above-limit bequest the LNC has received in its 43-year history and that it has received just two other bequests ever, both of which were below the Limit. (LNC Opp'n at 7, 9 n.2.) The LNC is a minor political party with no federal officeholders.[4] And the LNC concedes that it "cannot now point to a specific will that will leave it" a bequest in excess of the Contribution Limit in the future.[5] (*Id.* at 8.)

Given these facts, the LNC again resorts to relying upon data showing that the Democratic National Committee ("DNC") and Republican National Committee

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[4] Contrary to the LNC's strenuous claims (LNC Opp'n at 8), the fact that the LNC typically receives donations of only approximately $25 does illustrate its small size (FEC Sugg. at 7).

[5] Despite this concession, the LNC claims that it "continues to receive large testamentary bequests of which it has had no prior notice." (LNC Opp'n at 7.) But the LNC's record citation makes clear that it is merely referring to the two below-limit bequests it received years ago. (*Id.* (citing Doc. Nos. 25-11, 25-12 (FEC Exhs. I-J, No. 11-562 (D.D.C. May 4, 2012))).)

("RNC") have received above-limit bequests with relative frequency. (LNC Opp'n at 6-7 & n.1.) As the LNC acknowledges, however, to show that this matter is capable of repetition, there must be a reasonable expectation that "'the same complaining party'" (*i.e.*, the LNC) will be subject to the same action again. (*Id.* at 3-4 (quoting *Honeywell*, 628 F.3d at 576).) So evidence relating to the DNC and RNC has no relevance here.

The LNC gives no valid reason to believe it will be more likely to receive above-limit bequests going forward. The LNC repeatedly and incorrectly contends that the FEC has agreed "not to enforce" a FECA solicitation prohibition (LNC Opp'n at 2; *see also id.* at 4, 9 n.2, 10); in reality, that provision has *never* prevented the LNC from soliciting large bequests so long as it did not accept contributions from such bequests in amounts exceeding the Limit. In any event, there is no evidence that the LNC's newly-discovered ability to solicit large bequests has made a difference: The FEC first corrected the LNC's confusion about the solicitation provision nearly three years ago in June 2011 (*see* Answer ¶¶ 2, 25, No. 11-562 (D.D.C. June 13, 2011) (Doc. No. 15)), but the LNC still can identify no will that would result in an above-limit bequest (LNC Opp'n at 8).[6]

[6] The LNC notes that the will of William Redpath, its former national chairman and treasurer, currently provides for a bequest of 40 percent of his estate to the LNC. (LNC Opp'n at 7.) But the LNC claims only that this bequest will "probably" be in excess of the Contribution Limit, and with good reason. Redpath testified that he could "change [his] will and revoke [his] intent to bequeath money

Second, the LNC has not shown, as it must, that it is reasonable to expect the factual circumstances of the Burrington bequest to repeat even were it to receive another above-limit bequest. The district court bifurcated this matter from number 13-5094 because of particular, material aspects of the Burrington bequest: Burrington had just one interaction with the LNC while alive (a $25 donation) and the LNC was unaware that Burrington planned to leave the bequest.[7] *LNC*, 930 F. Supp. 2d at 170. Assuming *arguendo* that the district court correctly drew this distinction, the LNC must show that materially similar bequests will be made to it in the future for this matter — in contrast with other bequests at issue in matter 13-5094 — to recur. The LNC, however, does not even contend that it will likely receive future bequests that are materially similar to the Burrington bequest.

## CONCLUSION

For the foregoing reasons, this matter is moot and the Court lacks jurisdiction.

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to LNC at any time," and that he would do so if he became displeased with the Libertarian Party's platform. (Redpath Decl. ¶ 10, No. 11-562 (D.D.C. May 4, 2012) (Doc. No. 25-15).) Even if the bequest occurred, the value of Redpath's assets is not in the record, and in any event, estates can only pay bequests with assets that remain (if any) after satisfying creditors. As the LNC has acknowledged, "[t]here is simply no way for political parties to ensure that a promised or hoped-for bequest comes through," and "[p]robate courts routinely disappoint putative heirs." (Mem. in Supp't of LNC's Mot. to Certify Facts and Questions at 22, No. 11-562 (D.D.C. May 4, 2012) (Doc. No. 25-1).)

[7] In this regard, the district court did not simply cite a lack of evidence of "misconduct," as the LNC suggests. (LNC Opp'n at 12.)

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2014, I electronically filed defendant Federal Election Commission's Reply in Support of Its Suggestion of Mootness with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

Service was made on the following through the CM/ECF system:

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