EN BANC ARGUMENT SCHEDULED FOR NOVEMBER 30, 2018

No. 18-5227

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN NATIONAL COMMITTEE, INC.,
Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

On Certification of Constitutional Questions from the
United States District Court for the District of Columbia

REPLY IN SUPPORT OF FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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GLOSSARY

Add.	Addendum to Federal Election Commission's Motion to Dismiss for Lack of Subject-Matter Jurisdiction (Document # 1749853)
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
LNC	Libertarian National Committee, Inc.

I. THERE IS NO BAR TO THIS COURT'S CONSIDERATION OF THE COMMISSION'S JURISDICTIONAL ARGUMENTS

The Libertarian National Committee ("LNC") fails to respond to much of what the Federal Election Commission ("FEC" or "Commission") argued in its motion to dismiss, but the LNC does claim that this Court is barred from even considering its own jurisdiction. However, the constitutionally rooted jurisdictional arguments the Commission raises are foundational to the Court's authority. And the Court's rules permit doing so through early dispositive motions like this one, including in cases arising under 52 U.S.C. § 30110.

This Court's rules permitting early dispositive motions are not limited by subject matter or type of case. *See* Circuit Rule 27(g). The Commission filed its motion within the prescribed time period, as extended by Federal Rule of Appellate Procedure 26(a)(1)(C), and the motion is "dispositive," as granting it "would dispose of the" case "in its entirety." Circuit Rule 27(g)(1). This Court's practice guidance similarly contemplates an early jurisdictional challenge. *See* D.C. Circuit, Handbook of Practice and Internal Procedures at 28 ("Dispositive motions . . . include motions for summary affirmance or reversal, *motions to dismiss* (on any ground, *including jurisdiction*), and motions to transfer." (emphases added)). The Court's scheduling order did not alter these deadlines.

Consistent with this reading, this Court has granted several dispositive motions in cases coming to the Court pursuant to section 30110, including some

that questioned the Court's jurisdiction. *See, e.g.*, Order, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan 30, 2015) (en banc) (granting Commission dispositive motion for remand to develop record for appellate review); *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (granting Commission motion to remand); *cf.* Order, *Libertarian Nat'l Comm. v. FEC*, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (en banc) (dismissing case as moot on Commission's suggestion of mootness).

Nevertheless, the LNC claims that this Court is precluded from considering the Commission's standing motion because section 30110 places exclusive and unreviewable jurisdiction in the district court to certify constitutional questions. But nothing in section 30110 does that. Rather, the statute merely authorizes certain classes of plaintiffs to institute actions "as may be appropriate" in the district court, with certification to the *en banc* court of appeals. 52 U.S.C. § 30110. The statute does not direct the court of appeals to *answer* the questions as certified, it merely instructs the court to "*hear* the matter sitting en banc." *Id.* (emphasis added). And because nothing in the statute limits this Court's jurisdiction to consider preliminary motions, the Rules Enabling Act does not preclude the Court from considering the Commission's motion.

While section 30110 does enable constitutional questions to be placed before the *en banc* court of appeals more quickly than they would percolate under general procedures, that does not negate this Court's procedural rules. The LNC suggests

that section 30110 calls for "'expedited en banc sittings'" (LNC Opp'n at 11 (quoting *Bread PAC v. FEC*, 455 U.S. 577, 580 (1982))) but fails to explain that the provision was amended after *Bread PAC* to remove the requirement of expedition on this Court's docket, Pub. L. No. 98-620 § 402(1)(B), 98 Stat. 3335 (1984).

In this respect, section 30110 operates like other statutes that provide for specific consideration by higher courts. For example, courts of appeals may certify questions to the Supreme Court under 28 U.S.C. § 1254(2). But the Supreme Court does not answer questions that are "abstract," hypothetical, or "unrelated to the pending controversy." *Lowden v. Nw. Nat'l Bank & Trust Co.*, 298 U.S. 160, 162-63 (1936). Courts of appeals conduct interlocutory review of orders relating to injunctions under 28 U.S.C. § 1292(a)(1), but they routinely vacate injunctions for lack of standing. *See, e.g., Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 295-96 (D.C. Cir. 2000) (vacating district court preliminary injunction because plaintiffs failed "to allege facts essential for standing").

Moreover, the LNC's jurisdictional claim is inconsistent with *Bread PAC*, in which the Supreme Court considered whether certification was improperly granted because the plaintiffs were not among the three classes of parties Congress enumerated in section 30110. 455 U.S. at 580-85. There, the Supreme Court directly confronted whether parties beyond those enumerated had statutory

standing and did not merely defer to the district court's decision to certify. *Id.*

The LNC's approach would also make district court decisions regarding jurisdiction effectively unreviewable. Any attempt by the Commission to appeal district court orders before certification, including those based on jurisdiction, would appear at best to be limited to narrow exceptions to the final judgment rule such as collateral orders or interlocutory decisions covered under 28 U.S.C. § 1292. *See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). The high standard for obtaining mandamus relief make that "drastic and extraordinary remedy" a poor fit for contested jurisdictional or other disputes leading to certification. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014).

The Article III context of the Commission's motion weighs strongly against the LNC's argument. Article III standing reflects a "fundamental limitation" on the "role of the courts in a democratic society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (internal quotation marks omitted). That doctrine establishes an "irreducible constitutional minimum" plaintiffs must establish to invoke federal court jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Even if the parties fail to raise Article III standing, federal courts must "*satisfy themselves* that the plaintiff" has a sufficient "personal stake" to "warrant *his* invocation of federal-court jurisdiction." *Summers*, 555 U.S. at 493 (internal quotation marks

omitted) (first emphasis added). Every appellate court has a "special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a case under review," especially in constitutional cases. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted).

A statute cannot direct this Court to ignore defects in jurisdiction under the Constitution. Because Article III standing is "an indispensable element of the plaintiff's case," neither this Court "nor the Congress can dispense with the requirement." *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1020 (D.C. Cir. 1998).

The LNC's argument that the Court lacks jurisdiction to consider the Commission's motion appears to be based on a fundamental mischaracterization of the motion. The Commission is not trying to relitigate whether the certified questions are insubstantial or frivolous (*but see* LNC Opp'n at 14), but whether this action meets the "cases" or "controversies" requirement of the Constitution.

The LNC similarly misstates the standard of review. (LNC Opp'n at 16-17.) The *en banc* Court must determine for itself that standing exists before it can answer the district court's certified questions. It cannot merely assume Article III jurisdiction, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), but must ascertain whether it exists based on the Court's own "independent" review. *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994).

Whether the Court makes that determination at a preliminary stage or after argument is ultimately irrelevant.

Likewise, the LNC minimizes its burden at this stage of the litigation. It must do more than invoke "reasonable inferences" that may be drawn in its favor. (LNC Opp'n at 26 (internal quotation marks omitted).) As "the party invoking federal jurisdiction," the LNC "bears the burden of establishing" its own constitutional standing. *Lujan*, 504 U.S. at 561. The "evidence required" increases as the litigation proceeds. *Id.* Now that the "pleading stage is over" and discovery is closed (LNC Opp'n at 3), the LNC's standing must be supported by "evidence," not "mere allegations." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

Discovery adduced evidence about the LNC's standing. The LNC faults the Commission for citing some of this evidence, calling it a "pile of exhibits" not contained within the district court's findings. (LNC Opp'n at 15.) In truth, the vast majority of the Commission's exhibits were either filings in this case or reflected evidence relied on by the district court. Only three documents were not cited in its factual findings (Add. 104-10), presumably because the court did not find those documents relevant to the parties' merits arguments. But the LNC has not contested any of that evidence. And the LNC itself relies on evidence the district court declined to certify in its merits brief. (Opening Br. at 13 & n.6, 14 & n.7, 15 & nn.8-9.)

This motion is proper in its purpose and its timing. It makes no argument on the merits. Nor did the Commission seek to alter the case schedule. Instead, it promptly agreed to maintain the original merits briefing schedule. The default motion briefing schedule would have required the Commission to reply at the same time as it was preparing its own merits brief, and the Commission was prepared to do that. *See* Fed. R. App. P. 27(a)(3)-(4). It was the extension *the LNC* requested that resulted in the Commission's reply being due last.[1]

II. THE LNC'S ASSERTED INJURIES WERE SELF-INFLICTED AND REMEDIED BEFORE THIS CASE WAS FILED

The LNC does not contest that federal law permitted it to accept the entirety of Shaber's testamentary contribution as soon as it was offered. (LNC Opp'n at 17-18.) The LNC also does not dispute that it had substantial expenses which it could have — in 2015 — defrayed using funds raised pursuant to the segregated account provisions. (LNC Opp'n at 19.) And the LNC concedes that the district court erred in failing to consider its headquarters expenses from 2013-2014. (LNC Opp'n at 20.)

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[1] The LNC cites two cases in which this Court disapproved of litigants incorporating an argument in an appellate brief by reference to arguments the litigant made in the district court. (LNC Opp'n at 13-14 n.3.) By contrast, the Commission has not made the challenged arguments "in the most skeletal way," *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166 (2013) (internal quotation marks omitted), but has instead developed them in a permissible dispositive motion.

The LNC argues that an "obvious" injury results when a party is unable to use "'funds in its possession'" on the activity "'in which it would like to engage.'" (LNC Opp'n at 18 (quoting *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 93 (D.D.C. 2016) (three-judge panel), *aff'd*, 137 S. Ct. 2178 (2017)).) But the Shaber funds the LNC seeks to spend are in independent escrow (JA 224-25) only because of the LNC's choice to receive the money only into its general account, not segregated accounts. The LNC asserts that it "wanted to honor Shaber's wishes that the funds not be restricted" (LNC Opp'n at 19), but the record reveals no such wish. Shaber instructed that the LNC's share be distributed "outright" (JA 224), which means going to the LNC without restriction and not in trust, *see* Lawrence P. Keller, Wills § 3:2 (West 2017). The effects of choices the LNC made were caused by the party, not the Federal Election Campaign Act ("FECA").

The LNC disputes that it could have defrayed the full amount of Shaber's contribution in 2015, but ignores the fact that this case was filed in 2016. (LNC Opp'n at 19-23.) The LNC does not contest that its 2016 expenses were sufficient to exhaust the amount Shaber left to it. (*See* JA 188 (finding that "the LNC spent roughly $467,251.58 on 52 U.S.C. § 30116(a)(9)-sanctioned expenses in 2016").) And no court order in 2016 or after could have remedied its asserted 2015 injuries. (FEC Mot. at 18-20.)

The only form of redress the LNC identifies is from the "continuing"

consequences of part of Shaber's contribution being placed in escrow. (LNC Opp'n at 22.) But again, the LNC caused those consequences. Indeed, Shaber's estate representatives were "happy to learn" that the LNC could lawfully receive the full share at once in segregated accounts, and they asked how to effectuate such a distribution. (FEC Add. at 104-05.) The LNC declined. The LNC admits that it could have accepted the full Shaber contribution into segregated accounts. (*See* LNC Opp'n at 21-22.) If the LNC had done so, then a suit filed in 2015 may have presented a better case that the segregation provisions prevented the party from spending money in its possession in the way that it desired. *See Republican Party of La.*, 219 F. Supp. 3d at 93. But once the calendar turned to 2016, the LNC's asserted injury would have been entirely resolved, because a new set of annual limits applied, the LNC undisputedly had sufficient 2016 expenses meeting the segregated-account criteria to exhaust the Shaber contribution, and money is fungible.

The LNC is free to budget resources as it wishes, and on the facts presented here FECA did not prevent the LNC from accessing and spending the full amount of Shaber's contribution before it filed suit. This Court has even held that bona fide organizational budgetary choices in response to statutes are insufficient to constitute cognizable harm. *See Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994). Here, where the LNC

simply declined to accept Shaber's funds into bank accounts that could have financed spending the party actually undertook, even though FECA permitted it to do so, the asserted harms are even more obviously self-inflicted.

Nor would accepting the full amount into segregated accounts have required the LNC to violate Commission guidance regarding strategic withdrawals, which affects only testamentary contributions that *exceed* the contribution limit. *See* FEC Advisory Op. 1999-14 (Council for a Livable World), 1999 WL 521238, at *1 (July 16, 1999) (explaining that the Commission's guidance "addressed a lump sum bequest in excess of" the contribution limit). It does not restrict the LNC from structuring its receipt of a testamentary contribution to maximize what it may accept *within* the limits into segregated accounts, as other national parties have done. (*See* JA 219-20.)

Rather than directly address the Commission's redressability argument, the LNC responds to mootness arguments the Commission did not make. (*See* LNC Opp'n at 22-25.) The Commission has not argued that the LNC's as-applied claims became moot after the complaint was filed, but that the LNC lacked standing when this suit commenced. (FEC Mot. at 19-20.) It is therefore of no moment that the record describes other testamentary contributions the LNC might receive. (LNC Opp'n at 24.) The LNC's certified questions related to

testamentary contributions are as-applied to Shaber's contribution only. (JA 147-48.)

III. THE LNC CONTINUES TO RELY ON ITS COMPETITIVE DISADVANTAGE THEORY

The LNC argues that its facial challenge to FECA's segregated account limits does not rely on a theory of competitive disadvantage, but the LNC continues to rely on its argument that those limits place it at a fundraising disadvantage relative to other political parties. (Opening Br. at 8-9, 55.) Its remedy argument invokes the idea that other parties in Congress selected particular categories in order to harm the LNC's electoral efforts. (*See* FEC Br. at 50-52.) And its *amicus* argues that the segregated account provisions affect "the ability" of the LNC "to convince" voters "to vote for a third-party candidate." (Goldwater Inst. Br. at 4.) However, no such effect is caused by FECA. And any inability to raise additional funds depends on the individual decisions of potential LNC donors. (*See* FEC Mot. at 21.) The LNC lacks standing for this challenge.

CONCLUSION

This Court should decline to answer the certified questions for lack of subject-matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(B) because it contains 2,581 words, excluding the parts of the motion exempted by Fed. R. App. P. 27 (d)(2)(B) and 32(f).

The motion also complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it was prepared using Microsoft Word 2013 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2018, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF System.

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