EN BANC ARGUMENT SCHEDULED FOR NOVEMBER 30, 2018

No. 18-5227

In the United States Court of Appeals for the District of Columbia Circuit

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LIBERTARIAN NATIONAL COMMITTEE, INC.,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Certification of Constitutional Questions by the
United States District Court for the District of Columbia
The Hon. Beryl A. Howell, Chief District Judge
(Dist. Ct. No. 1:16-cv-121-BAH)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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GLOSSARY

CF	–	Certified Fact, as found by the District Court
FEC	–	Federal Election Commission
FECA	–	Federal Election Campaign Act
JA	–	Joint Appendix, filed September 12, 2018
LNC	–	Libertarian National Committee, Inc.

INTRODUCTION

The District Court correctly rejected the FEC's standing theories. Yet the FEC is right about one thing: this Court *is* being asked to act beyond its jurisdiction—by the FEC. However the FEC styles its motion for the certification order's summary reversal, the motion is statutorily barred.

The FEC's procedural gambit—reformulating its unsuccessful opposition to certification as a "motion to dismiss" the certified case—is novel, but substantively the FEC's document contains nothing new. It seeks to repeat the certification process.

That is impossible. This case arises under 52 U.S.C. § 30110, a jurisdictional statute assigning to *the District Court* the task of finding facts and certifying questions for this Court, sitting en banc, to answer in the first instance.[1] Under Section 30110, it is assuredly *not* this Court's role, acting via a three-judge motions panel or even en banc, to find facts and certify questions to itself.

The statute is also clear about the procedure to be followed upon certification: when questions are certified, they must be given the utmost

[1]Further statutory references are to Title 52, United States Code, unless otherwise noted.

consideration—and quickly. The FEC cannot, as a matter of course, seek de novo review of a certification order under the guise of moving "to dismiss" an allegedly insubstantial or foreclosed question. That would expand this Court's jurisdiction, and defeat the certification process. The complaint might as well have been filed here.

Of course the FEC may continue to argue that the certified questions are insubstantial, but the place for these arguments was within its merits brief's word limits. And while the FEC may move to dismiss a certified Section 30110 case for reasons beyond the District Court's purview, there is no "do over" on the existing record, no "motion to make really sure the District Court got certification right."

Should this Court nonetheless consider the FEC's motion for summary reversal of the District Court's fact-finding and certification, the merits are not so clear as to warrant summary disposition. The FEC's arguments have not improved with age.

With respect to Shaber's bequest, the FEC's alternative arithmetic did not add up below, and it still does not add up here. As the District Court found, the LNC was injured because the FEC forced it to place

money that would have been spent in 2015 into escrow. The injury persists. Once escrowed, that money could not be actively managed, pledged, assigned, or in any way strategically manipulated by the LNC for any purpose, including for the purpose of mooting a portion of this case.

Even were the FEC correct on its Shaber bequest argument, that would still leave the second certified question's facial challenge. Seizing on particular words in the complaint to re-imagine this First Amendment case as one for electoral parity was merely unfair when the District Court rejected the theory at the pleading stage. Now that the matter has been litigated, culminating in a certified question advanced by extensive briefing, the FEC's argument can fairly be termed frivolous. Right or wrong, the LNC's case, including its facial challenge to the segregated purpose spending restrictions, bears *zero* resemblance to the claim imagined by the FEC.

The pleading stage is over. This Court is tasked with answering the questions *as certified* by the District Court and now briefed by both parties, as well as their amici—not the strawman that the FEC conjures

by nitpicking random words from the complaint. The motion should be denied.

STATEMENT OF FACTS

In December 2014, Congress raised tenfold the individual contribution limits to political parties. In addition to the previous limit, Congress now allows triple that amount to be donated for each of three restricted spending purposes: presidential nominating conventions, party headquarters buildings, and "election recounts and contests and other legal proceedings." Section 30116(a)(1)(B), (a)(9).

Joseph Shaber passed away, leaving the Libertarian Party an amount determined in September 2015 to be $235,575.20. CF 117, 121, JA 223-24. Shaber specified that the LNC should take his bequest "outright." CF 123, JA 224. The LNC would use this money for its general expressive purposes. CF 127, JA 224. In 2015, the year in which the LNC could first access the bequest, it accepted the maximum base contribution of $33,400 then-available for unrestricted purposes. CF 119, JA 223.

When bequests exceed FECA's annual contribution limits, the FEC requires that the excess be placed in escrow. Shaber's trust and the LNC agreed to deposit the remaining $202,175.20 into an FEC-compliant escrow account, for spending as Shaber and the LNC wanted—without restriction—subject to this litigation's outcome. CF 128, JA 224-25.

As part of FEC's instructions that parties have no control over escrowed bequest funds, it forbids strategic withdrawals and the pre-commitment of funds. The FEC advises that any selective timing or variation in the amounts withdrawn would be a form of control, and thus, prohibited possession. *See* FEC Advisory Op. 1999-14 (Council for a Liveable World), at 3; FEC Advisory Op. 2004-02 (Nat'l Comm. for an Effective Congress).

Shaber's trust sought an FEC advisory opinion regarding the escrow. The FEC advised that the LNC "may not pledge, assign, or otherwise obligate the anticipated contributions before they are disbursed." FEC Advisory Op. 2015-5 (Shaber), at 4 n.5 (citation omitted). It approved the escrow as the escrow agent would be directed "to disburse annually to the [LNC] the maximum amount," *id.* at 4, meaning that "the trustee[]

would exercise no discretion regarding the amount of the contributions," *id.* at 3 (citation omitted). Disbursements occur "only in increments equal to the [base] Contribution Limit." JA 20, ¶3; JA 19, ¶B.

The FEC correctly states that the LNC could have used the segregated account structure to *accept* the entirety of Shaber's bequest in 2015. But Sections 30116(a)(1)(B) and 30125 forbid the LNC from *spending* segregated funds for its *general expressive purposes*.

Because money is fungible, funds spent from restricted accounts liberate equivalent unrestricted funds that would have otherwise been spent on the restricted purposes. CF 38, JA 192.

In 2015, the LNC spent $80,428.22 in segregated purpose spending: $340.50 on a presidential nominating convention, $72,827.11 on its headquarters, and $7,260.61 on legal proceedings. JA 39, 78. Assuming the LNC could have predicted its total 2015 segregated spending to the penny, and accepted the Shaber bequest in segregated accounts to offset that spending, the "overage" would have totaled $121,746.98 (Shaber's bequest, $235,575.20; less the maximum unrestricted $33,400 base portion; less $80,428.22 of segregated purpose spending).

As the FEC points out for the first time here, Section 30116(a)(9)(B) allows the LNC to use the segregated headquarters building fund to reimburse expenses dating to 2013, totaling $174,031.88. Thus, in 2015, the LNC could have theoretically spent up to $246,858.99 from its segregated building account—if that money were there.

But in 2015, the segregated account contribution limit was $100,200. Transferring $100,200 instead of $72,827.11 from Shaber's bequest to the building account would still have yielded an overage of $94,374.09. Or, as the FEC's Table 1, 2015 column helpfully provides, Motion at 8, the LNC could not have absorbed ***and spent*** more than $141,201.11 of Shaber's bequest.

With respect to the facial challenge, the District Court certified numerous facts relating to the segregated account spending restrictions' impact on other donors and the LNC. *See generally* Plaintiff's Br. 18-24. Here, it suffices to note that these restrictions still reduce the LNC's donations and limit how the LNC may spend money.

PROCEDURAL HISTORY

The LNC raised three counts pursuant to Section 30110. As the FEC admits, Motion at 9, the first and third counts challenge FECA as-applied to Shaber's bequest, while the second facially challenges FECA's party contribution limits as content-based speech restrictions, owing to the segregated purpose spending restrictions.

On January 3, 2017, the District Court rejected the FEC's standing theories. *Libertarian Nat'l Comm.* v. *FEC*, 228 F. Supp. 3d 19 (D.D.C. 2017) ("*LNC III*"); JA 29-42.

Following discovery, the FEC opposed certification and again moved to dismiss. In the context of that effort, it unsuccessfully attempted to have the District Court certify "facts" it now asserts here, to the effect that the LNC declined to fully accept Shaber's bequest "at least in part to maintain standing for this lawsuit." Motion at 5; *see* Response to FEC Proposed Fact 66, Dist. Ct. Dkt. 27-1, at 18.

The District Court certified three questions based on each of the LNC's counts respectively. *Libertarian Nat'l Comm.* v. *FEC*, 317 F. Supp. 3d 202 (D.D.C. 2018) ("*LNC IV*"); JA 149-235. This Court

scheduled briefing and argument en banc. Two days before the LNC's brief and appendix were due, the FEC filed this motion, reviving its failed dismissal arguments. The LNC immediately moved to stay operation of Circuit Rule 27(g)(3), which would have deferred the scheduled briefing pending this motion's outcome. On September 13, 2018, this Court ordered that the briefing schedule remain in effect.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THE FEC'S MOTION.

Section 30110 "comports with [the] established linguistic norm by which the Congress confers exclusive jurisdiction on specific courts." *Wagner* v. *FEC*, 717 F.3d 1007, 1012-13 (D.C. Cir. 2013). It "vests exclusive jurisdiction in the en banc courts of appeals to resolve constitutional challenges brought by the three parties enumerated in that section." *Id.* at 1014.

But Section 30110 actions are not initiated in the courts of appeals. The statute assigns the district courts exclusive jurisdiction to certify that a challenge is not, inter alia, "wholly insubstantial," *Holmes* v. *FEC*, 823 F.3d 69, 71 (D.C. Cir. 2016) (internal quotation marks

omitted), and to "develop a record and make findings of fact sufficient to allow the en banc court to decide the constitutional issues," *Khachaturian* v. *FEC*, 980 F.2d 330, 331 (5th Cir. 1992). Section 30110's certification procedure "enable[s] a district court to prevent . . . abuses of [the statute]," including by screening cases for lack of standing or frivolity. *Cal. Medical Ass'n* v. *FEC*, 453 U.S. 182, 192 n.14 (1981).

The FEC miscomprehends the jurisdictional framework. It argues that "[i]f the LNC possesses standing," by which the FEC apparently means Article III standing, "the district court otherwise had jurisdiction to find facts and certify constitutional questions to this Court under [Section] § 30110." Defendant's Br. 1. This formulation reverses the proverbial cart and horse. The District Court had exclusive original subject-matter jurisdiction to find facts and certify constitutional questions, regardless of whether it ruled correctly. In the absence of a legitimate case or controversy, it would have denied certification.

Upon certification, the courts of appeal "*shall hear* the matter sitting enbanc." Section 30110 (emphasis added). The statute does not specify the precise manner of such hearing, but certification "command[s] the

immediate attention of . . . the courts of appeals sitting en banc, displacing existing caseloads and calling court of appeals judges away from their normal duties for expedited en banc sittings." *Bread PAC* v. *FEC*, 455 U.S. 577, 580 (1982).

This Court has rejected the "claim that the Congress could not have intended to make such an onerous procedure mandatory." *Wagner*, 717 F.3d at 1017.

Section 30110 thus necessarily limits the range of dispositive motions that may be brought under Fed. R. App. P. 27, promulgated per the Rules Enabling Act, 28 U.S.C. § 2072 ("REA"). "While the Federal Rules are of course presumptively valid, they must be interpreted consistently . . . with the limited mandate of the Rules Enabling Act, which authorizes only Federal Rules that relate to 'practice and procedure.'" *Answering Service, Inc*. v. *Egan*, 728 F.2d 1500, 1506 (D.C. Cir. 1984) (citations omitted).[2]

[2]Courts avoid applying rules in ways that are inconsistent with the REA's procedural mandate. *See*, *e.g.*, *Tyson Foods, Inc*. v. *Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016); *N.C. Shellfish Growers Ass'n* v. *Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 667-68 (E.D.N.C. 2003).

The REA authorizes "general rules of practice and procedure," 28 U.S.C. § 2072(a); it does not authorize the Supreme Court "to enlarge or diminish the jurisdiction of federal courts." *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941) (predecessor statute). That the Federal Rules of Appellate Procedure do not generally reach jurisdictional matters is confirmed by the fact that two specific exceptions to that understanding required congressional authorization. *See* Fed. R. App. P. 1, Notes of Advisory Committee on 2002 amendments (explaining abrogation of express limitation on jurisdictional rules). Congress has authorized no such exceptions to Section 30110.

Accordingly, a Rule 27 motion to dismiss a certified Section 30110 case might well raise matters outside the district court's purview, *e.g.*, post-certification developments that have mooted the controversy, or the failure to follow this Court's rules. But the FEC's Rule 27 motion, based on nothing more than arguments the District Court rejected in certifying the case, trenches on the District Court's exclusive Section 30110 jurisdiction to find facts and determine the weight of questions.

Such a motion also defeats the purpose for which Congress created Section 30110. "The Congress is understood to have enacted section [30110] to further the public's interest in having questions of FECA's constitutionality speedily resolved." *Wagner*, 717 F.3d at 1013 (footnote and citations omitted). "The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal." *Id.* at 1014 (quoting *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 593 (1980)).

"A second review on appeal" of the District Court's certification order is precisely what the FEC seeks. And it has already been disruptive. This motion would have upended the briefing schedule and a scheduled en banc argument, on the eve of Plaintiff LNC's brief, but for the LNC's scrambling to seek a stay of Circuit Rule 27(g)(3). By this motion, the FEC also gave itself an additional 7,800 words, including the last word on the merits, to which it was not entitled under the briefing schedule.[3]

[3]Word-limit circumvention might be at play here. The FEC's brief clocks in at 12,918 words, just 82 words shy of the limit. Fed. R. App. P. 32(a)(7)(B)(i). Its motion, containing argument that belonged (if anywhere) in that brief, runs a near-maximum 5,162 words, and the reply is yet to come. And the FEC's brief incorporates its motion arguments by reference in contesting jurisdiction. Defendant's Br. 1.

The FEC's attacks on this Court's handling of Section 30110 cases are becoming a part of the process itself, as the FEC repeatedly multiplies the litigation seeking additional words and the last word. This Court has twice rejected such attempts. Order, *Holmes* v. *FEC*, No. 16-5194 (Jul. 15, 2016); Order, *Speechnow* v. *FEC*, No. 08-5223 (Nov. 5, 2009).

If it succeeds in having its motion considered here, the FEC will attack *every* Section 30110 certification with a "motion to dismiss." The FEC's institutional mission is to defend these cases, and it always looks to argue that proposed questions are too insubstantial to trigger this Court's jurisdiction. Any failed FEC defense to certification can be repackaged as a "motion to dismiss for lack of jurisdiction," throwing the schedule into disarray and expanding the FEC's word limit by 7,800 words, Fed. R. App. 27(d)(2)(A) and (D). Plaintiffs and their amici would be forced to brief these cases under the shadow of a last-minute dispositive motion, and this Court would either have to deal with

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That is impermissible. *Davis* v. *Pension Ben. Guar. Corp.*, 734 F.3d 1161, 1167 (D.C. Cir. 2013) (disapproving of incorporation by reference to evade word limits); *Gerlich* v. *United States DOJ*, 711 F.3d 161, 173 (D.C. Cir. 2013) (same). This Court should "presume that the [FEC's] counsel have briefed the claims determined to be most important and with the greatest chance of success on appeal." *Davis*, 734 F.3d at 1167.

repeated motions to stay Circuit Rule 27(g)(3) and preserve its schedules, or modify its practices by not scheduling anything until it has resolved the inevitable FEC "second review on appeal" of the District Court's certification opinion, thus subverting Section 30110.

Of course, even in Section 30110 cases, this Court is obligated per Article III to confirm its own jurisdiction. But certification is not nothing. This case is not here because the LNC filed a timely piece of paper and submitted the correct fee. The case's docketing reflects the Chief District Judge's considered judgment in twice rejecting the FEC's motions to dismiss, the second time following a lengthy period of discovery and litigation. If the FEC wished to renew its "jurisdictional" challenges, it should have briefed them per the regular schedule, within the word limits, and hopefully with reference not to a pile of exhibits but to the facts adjudicated by the District Court.

The FEC also had other options to avert or contest certification. As it has done in the parties' previous litigation, *Libertarian Nat'l Comm.* v. *FEC*, 950 F. Supp. 2d 58 (D.D.C. 2013) ("*LNC II*"), the FEC could have asked the District Court to correct its alleged errors by moving for

reconsideration. And considering that the District Court first rejected the FEC's arguments on January 3, 2017, the FEC could have petitioned for mandamus relief from the denial of that first motion to dismiss, to save itself, the courts, witnesses, the LNC and other discovery targets from the ensuing litigation.

But Section 30110 precludes post-certification challenges to certification.

II. THE FEC'S MOTION IS SUBJECT TO THE HIGH BAR RESERVED FOR SUMMARY DISPOSITION.

The FEC's statement that its standing arguments are adjudicated on a de novo basis elides the fact that it seeks extraordinary relief: summary reversal of a decision the District Court did not reach lightly.

Neither of the cases the FEC's cites for its "de novo" standard were summarily decided. This Court generated two opinions following argument in *Elec. Privacy Info. Ctr.* v. *Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017). The FEC's citation to *In re Cao*, 619 F.3d 410 (5th Cir. 2010) (en banc), omits notation that the case was decided en banc. Indeed, *Cao* was argued orally. The majority

opinion—one of four—was co-authored by two judges, and it found that the plaintiffs had standing. *Id.* at 421.

Incredibly, the FEC cites *Cao*'s fractured en banc disposition while claiming that this case's certified "posture" is irrelevant. Motion at 11. But *Cao* demonstrates that post certification, "the circumstances of the case" are indeed relevant in contemplating summary disposition. *Ambach* v. *Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982). The FEC "bears the heavy burden of establishing that the merits of [its] case are so clear that expedited action is justified," *Taxpayers Watchdog, Inc.* v. *Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam) (citations omitted), that "plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect our decision," *Sills* v. *Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985).

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FEC CAUSED THE SHABER INJURY.

The FEC first asserts that the LNC's inability to spend Shaber's bequest without restriction "is entirely the product of its own choice not to accept all of the Shaber funds," Motion at 12, because it could have accepted the entire bequest in *restricted* accounts, *id.* at 13-14. "It is

undisputed here that FECA permitted the LNC to accept its entire share of the Shaber estate at the time it became available," *id.* at 14, meaning 2015.

The District Court correctly determined that "[t]he FEC's argument papers over the nuance in the LNC's claims. The LNC does not argue that the amended statutory scheme . . . prohibits [it] from accepting the entire Shaber bequest in one lump sum. Rather, the LNC alleges that the harm is due to the restriction on [its] inability to accept the entire bequest for *general expressive purposes* when the bequest became available in 2015." *LNC III*, 228 F.3d at 25; JA 37.

The LNC did not choose to spend money and then claim injury for the money's disappearance. Motion at 16. Rather, the government limited the LNC's spending in expressing itself—an obvious "concrete injury." *Republican Party of La.* v. *FEC*, 219 F. Supp. 3d 86, 93 (D.D.C. 2016) (three-judge panel), *affirmed*, 137 S. Ct. 2178 (2017) ("party's inability to use corporate funds in its possession for additional [federal election activity] in which it would like to engage qualifies as a concrete injury").[4]

[4]The FEC also made it unnecessary for the LNC to "solicit" restricted contributions from Shaber's trust. *See* Motion Addendum at

The FEC claims that the LNC should have spent Shaber's money in 2015 on its headquarters, especially as it seeks to make large mortgage payments in off-election years. But "LNC was overall short of funds in 2015, owing largely to ballot access efforts in Oklahoma, and it had stopped most deliberate building-targeted fundraising to focus on general fundraising." JA 73, ¶37. It "was still retiring a significant portion of its mortgage principal ahead of schedule, and did not know how much building-earmarked revenue would come in by year's end." *Id.* It also wanted to honor Shaber's wishes that the funds not be restricted. *Id.*

Regardless, it is not the FEC's place to tell the LNC how to run its party. The FEC barred the LNC from spending Shaber's bequest as it saw fit. That is an injury.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE LNC'S SEGREGATED ACCOUNT EXPENSES COULD NOT HAVE ABSORBED SHABER'S ENTIRE GIFT.

The FEC claims the District Court erred in determining that the LNC's segregated account expenses could not have absorbed Shaber's entire bequest in 2015, because the building account could be used to

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104 ("General Counsel for the FEC called me" to suggest restricted contributions).

repay expenses dating to 2013. The FEC should have raised this argument below (it only made oblique references to past "election cycles"), but no matter. Conceding that the building account can reach back to 2013, the FEC's math still doesn't add up, because the most that the building account might have received from Shaber's trust in 2015 was $100,200. Perfect prescience and calculation (*but see* JA 73, ¶37) would have still left an overage of $94,374.09. *Supra* at 7. The FEC itself concedes that in 2015, the LNC's total expenses could have absorbed only $141,201.11 of Shaber's bequest. Motion at 8, Table 1.

Had the LNC accepted the entirety of Shaber's bequest in restricted accounts, the FEC would claim that the LNC voluntarily forewent spending the money without restriction. But the LNC might have received segregated purpose donations later in 2015, wiping out some or all of the Shaber bequest's offsetting potential as a restricted contribution. The LNC could not ensure that "[b]y accepting Shaber's contribution through segregated accounts, [it] would have been able to defray more of its expenses and would have freed an equal amount in its general account." Motion at 18.

Of course the LNC would have no standing to assert its Shaber claims had it just given up and gone away in 2015. But faced with a $235,575.20 bequest, the LNC had no legal avenue to spend that entire amount as it desperately wished that year for general purposes.

The LNC thus did the only thing it legally *could* do to preserve its rights—it placed Shaber's bequest in an FEC-authorized escrow whose terms track the base contribution limit, and brought suit.

The LNC lost control over Shaber's bequest once it was placed in escrow. The FEC forbids the strategic manipulation of escrowed funds. It has advised against making below-limit withdrawals from escrowed bequests "in a particular year as part of an investment strategy," *Livable World*, Advisory Op. 1999-14 at 3. Indeed—the FEC approved Shaber's escrow because the trustee "would exercise no discretion regarding the amount of the contributions." *Shaber*, Advisory Op. 2015-05 at 3. The FEC's advisory opinion did not suggest that the FECA amendments allowed varying the amount of annual escrow withdrawals. The FEC presented the LNC a choice in 2015: accept restrictions on most of

Shaber's bequest, or leave the money in escrow for up to six years. The LNC took the latter path, and challenged the restriction.

Only *after* the lawsuit's filing did the FEC change its tune, and wonder why the LNC was not violating its guidance, and the escrow agreement's terms, based on the Commission's convenient litigating position. The FEC's new theory might account for 2016 (and later) expenses, but it was unknown—and contrary to guidance—"as of the time [this] suit commence[d]." *Chamber of Commerce of the U.S.* v. *EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011).

V. THE LNC'S SHABER INJURY REMAINS REDRESSABLE.

Much of Shaber's bequest remains in escrow, unspendable by the LNC for years. The FEC apparently concedes the injury's continuing nature: "a court could allow the LNC access to the remaining Shaber funds being held in escrow . . . ." Motion at 19. That sounds like redress. *See Libertarian Nat'l Comm*. v. *FEC*, 930 F. Supp. 2d 154, 163 (D.D.C. 2013) ("*LNC I*").

To the extent the FEC responded to the Complaint by suggesting the LNC was or is free to access the entirety of Shaber's bequest, it cannot

"deprive a court of jurisdiction with a wave of its hand." *Kifafi* v. *Hilton Hotels Ret. Plan*, 701 F.3d 718, 724 (D.C. Cir. 2012) (footnote omitted). The FEC has not cited to any bulletin or advisory opinion amending its strategic withdrawal policies respecting escrowed bequest funds. At best, the FEC presents an unpersuasive argument for mootness. Moreover,

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

Honeywell Int'l v. *NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (quotation omitted).

A controversy is "capable of repetition" where there exists a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (quotations omitted). "[T]he test is not whether there is in fact a 'future relation' that will be affected, but rather whether 'resolution of an otherwise moot case . . . h[as] a reasonable chance of affecting the parties' future relations.'" *Honeywell*, 628 F.3d at 577 (quotation omitted) (alteration in original).

Both *Honeywell* factors are met. First, the FEC finally concedes that Shaber's bequest could not be fully absorbed in 2015, but it belatedly asserted the problem disappeared (notwithstanding the escrow's structure) in 2016. Second, the FEC routinely subjects the LNC's bequests to FECA. The record describes not only Shaber's escrow, but also Frank Clinard's. Plaintiff's Br. at 23-24.

And then there is *LNC I*, where Judge Wilkins certified LNC's as-applied challenge to the FEC's limitation of Raymond Burrington's bequest, but the FEC suggested mootness when the escrow was exhausted. Notwithstanding factual findings that the LNC solicits bequests, *LNC I*, 930 F. Supp. 2d at 174 (facts 22 and 23); that the LNC regularly receives bequests, *id.* at 182 (fact 69); that political parties generally receive bequests, *id.* at 183 (facts 72 and 73); and that "many bequests of amounts far exceeding FECA's annual contribution limit . . . have been left for national party committees in recent years," *id.* at 184 (fact 78); *see generally* facts 76-86, the FEC confidently predicted that "there is no reasonable expectation that the Contribution Limit will restrict a bequest to the LNC again." Suggestion of Mootness,

Libertarian Nat'l Comm. v. *FEC*, D.C. Cir. No. 13-5088, at 7 (Feb. 3, 2014).

But here we are.

VI. THE DISTRICT COURT CORRECTLY REJECTED THE FEC'S MISREADING OF THE LNC'S COMPLAINT.

The FEC asserts that "[t]he LNC . . . lacks standing to the extent its claims are dependent on its allegations that [FECA] place[s] the Libertarian Party at a competitive disadvantage vis-à-vis other political parties." Motion at 20.

As the District Court correctly found, that extent is zero. "[T]he Commission does not afford the Complaint a fair reading." *LNC III*, 228 F. Supp. 3d at 27 (internal quotation marks omitted), JA 41. "[T]he FEC cherry-picks certain phrases from the LNC's complaint referencing the party's interest in competing with other parties." *Id.*, JA 40-41. Its competitive-disadvantage arguments "are premised on a mischaracterization of the alleged injury and therefore fail." *Id.* (footnote omitted), JA 41. Notably, the complaint here is similar to that in *LNC I*, which also survived a motion to dismiss.

On motions to dismiss, courts "draw all reasonable inferences in favor of the plaintiffs." *Owens* v. *BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir. 2018) (citation omitted). The LNC certainly does not argue that the First Amendment requires a level electoral playing field, free of the advantages that speakers may have owing to their resources. Its complaint contains no such allegation.

Indeed, the FEC's competitive-disadvantage theory is belied by its *fair* description of the LNC's claims. *See* Motion at 9, Subheading D, first paragraph. It also filed a brief addressing (albeit unpersuasively) the LNC's claims.

The LNC's rhetorical explanations for *why* it needs money, and what it would like to do with that money, do not alter the fact that it complains of specific injuries in being unable to access money. For example, the LNC claims that the segregated account structure "discriminates against LNC based on the content of LNC's speech," JA 15, ¶29; that FECA provisions are unconstitutional "[b]ecause they favor, on their face, the acceptance of funds based on the content of a political party's speech," JA 16, ¶31; and that its First Amendment rights are

violated "[b]ecause LNC prefers to spend [the Shaber] money to express itself generally" and "it can access only a small portion of the Shaber bequest every year," *id.* ¶ 33.

Especially at this late stage—following certification of questions and merits briefing bereft of even a molecule of competitive disadvantage theory—it is absurd for the FEC to insist that the LNC seeks particular outcomes. Even if the LNC's message is hopeless in the marketplace of ideas, the LNC is entitled to raise and spend money without unconstitutional restrictions. That is all the LNC seeks here.

The FEC's competitive disadvantage theory also serves no practical purpose. Should this Court find that the LNC secretly argues for electoral success rather than for the freedom to spend without restriction whatever money it is allowed to raise, the latter argument would not be foreclosed. The LNC could simply re-file the complaint without explaining *why* it might benefit from speaking freely, and the parties would return here on essentially the same record.

Beyond the desire to defend constitutional principles, every Section 30110 case brought by a political party is backed by the hope and belief

that the challenge will inure to the party's electoral success. But if accusing political parties of desiring victory could defeat a First Amendment challenge, FECA would be unreviewable.

CONCLUSION

The FEC's motion should be denied.

Dated: October 15, 2018

Respectfully submitted,

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Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that on October 15, 2018, I electronically filed the foregoing motion with the Clerk of this Court 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.

/s/ Alan Gura
Alan Gura