

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

LIBERTARIAN NATIONAL)	
COMMITTEE, INC.,)	
)	
Plaintiff,)	No. 13-5088
)	
v.)	
)	
FEDERAL ELECTION)	SUGGESTION OF MOOTNESS
COMMISSION,)	
)	
Defendant.)	
)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S
SUGGESTION OF MOOTNESS**

Defendant Federal Election Commission (“FEC” or “Commission”) respectfully informs the Court that as of January 1, 2014, the claim of plaintiff Libertarian National Committee, Inc. (“LNC”) in this matter is moot. In this as-applied challenge, the LNC claims that a contribution limit of the Federal Election Campaign Act (“FECA”), 2 U.S.C. §§ 431-57, is unconstitutional because it prevented the LNC from immediately accepting a \$217,734 bequest that a supporter left for the LNC in 2007. FECA has required instead that the decedent’s estate contribute the bequest to the LNC in annual amounts of no more than about \$30,000. As of January 1, 2014, however, the LNC has either already received, or can immediately accept, the entire bequest. Thus, the LNC has already obtained

everything it seeks to recover with a judgment in its favor, and therefore it can no longer be granted effective relief in this case. As a result, this case is moot and this Court no longer has jurisdiction.

BACKGROUND

In April 2007, LNC-supporter Raymond Groves Burrington bequeathed \$217,734 to the LNC upon his death. *LNC v. FEC*, 930 F. Supp. 2d 154, 175 (D.D.C. 2013) (Appendix (“App.”) ¶¶ 27-29). However, FECA has long limited contributions to national political party committees such as the LNC, *see* 2 U.S.C. § 441a(a)(1)(B) (“Contribution Limit”), and in 2007 and intervening years the limit was approximately \$30,000 per calendar year, *see infra* pp. 4-5. Burrington’s estate therefore deposited the bequest into an escrow account, from which the estate has since made annual contributions to the LNC in amounts that comply with the Contribution Limit. *See LNC*, 930 F. Supp. 2d at 176 (App. ¶¶ 36-37).

Nearly four years later, in March 2011, the LNC filed suit claiming that the Contribution Limit violates the First Amendment as applied to Burrington’s bequest and potential future bequests to the LNC and other political parties. (*See* Complaint, No. 11-562 (D.D.C. Mar. 17, 2011) (Docket No. 1).) The LNC seeks a declaration and a permanent injunction that would allow it to take “immediate control over the balance of the Burrington Estate funds.” (First Amended

Complaint (“Compl.”) at 7, ¶ 24, No. 11-562 (D.D.C. May 27, 2011) (Docket No. 13); *see also id.* at 8, ¶¶ 1-2.)

Before the district court, the LNC moved under a special judicial-review provision in FECA, 2 U.S.C. § 437h, to have its suit certified to this Court sitting *en banc*. *LNC*, 930 F. Supp. 2d at 156. The district court granted the LNC’s motion only to the extent the LNC’s claim challenges the Contribution Limit’s application to the Burrington bequest. *Id.* at 169-71. Only that narrow claim is at issue in this matter (No. 13-5088).¹ (*See* Order (Docket No. 1426598).)

ANALYSIS

A. This Case Is Moot Because the LNC Can Now Accept the Remainder of the Burrington Bequest

This case is moot because as of January 1, 2014, the LNC has obtained the relief that it seeks: the ability to accept the entire Burrington bequest.

¹ To the extent the LNC’s suit challenges the Contribution Limit as applied to potential future bequests to the LNC and to other political parties, the district court denied the LNC’s section 437h motion and granted the FEC summary judgment. *LNC*, 930 F. Supp. 2d at 165-67, 171. The LNC’s appeal of that ruling is now pending before this Court under ordinary review procedures in a separate matter, number 13-5094. On September 23, 2013, this Court denied the LNC’s motion to consolidate the two matters, and, at the LNC’s request, ordered that this matter be held in abeyance pending resolution of matter number 13-5094. (*See Per Curiam* Order (*en banc*) at 2 (Doc. No. 1457785).) The FEC respectfully submits this suggestion of mootness despite the abeyance to inform the Court of the recent events creating a defect in its jurisdiction. *See JB Pictures, Inc. v. Dep’t of Def.*, 86 F.3d 236, 238 (D.C. Cir. 1996) (“Because th[e mootness] defense is jurisdictional, it may be raised at any time.”).

To have Article III standing, a plaintiff “must have suffered, or be threatened with, an actual injury traceable to the defendant” that is likely to be redressed by a favorable judicial decision. *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990). Even if a plaintiff initially had standing, when intervening events “make it impossible to grant the prevailing party effective relief,” the case becomes moot and the court no longer has jurisdiction. *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1996). A court can no longer grant effective relief where the plaintiff has “obtained everything that [it] could recover by a judgment of th[e] court in [its] favor.” *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 91 (D.C. Cir. 1986) (internal quotation marks omitted).

The district court concluded on March 18, 2013, that the LNC had standing in this matter “because it alleges an injury connected to the FEC’s conduct — the prevention of obtaining immediate control of the entire Burrington bequest — that would be redressed by a favorable decision.” *LNC*, 930 F. Supp. 2d at 163. But today, the Contribution Limit no longer prevents the LNC from obtaining immediate control of the entire Burrington bequest. The Contribution Limit for 2014 is \$32,400,² while only \$7,534 of the Burrington bequest remains. As

² See *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530-02, 8532 (Feb. 6, 2013). The Contribution Limit is indexed for inflation in odd-numbered years. *Id.*

detailed below, the LNC has already received the rest of the \$217,734 bequest in contributions made by the estate to the LNC since 2007.³

Year	Amount of Burrington Bequest Remaining	Calendar Year Contribution Limit	Contributions Made from Bequest to LNC
2007	\$217,734	\$28,500	\$28,500
2008	\$189,234	\$28,500	\$28,500
2009	\$160,734	\$30,400	\$30,400
2010	\$130,334	\$30,400	\$30,400
2011	\$99,934	\$30,800	\$30,800
2012	\$69,134	\$30,800	\$30,800
2013	\$38,334	\$32,400	\$30,800
2014	\$7,534	\$32,400	

Because the LNC can now accept all that remains of the Burrington bequest, it has obtained everything that it could recover by a favorable judgment in this matter. The permanent injunction the LNC seeks against the FEC's enforcement of the Contribution Limit (*see* Compl. at 8, ¶ 1) is no longer necessary to allow the LNC to take control of the balance of the Burrington bequest. And in the absence of any ongoing alleged injury, the declaration the LNC seeks (*see* Compl. at 8, ¶ 2) “would be an advisory opinion which federal courts may not provide,” *Better Gov't Ass'n*, 780 F.2d at 91. It is therefore no longer possible for a court to grant effective relief to the LNC in this matter and so the case is moot.

³ The LNC's disclosure reports reflecting the Burrington estate's contributions from the bequest to the LNC can be found on the Commission's website by searching for the last name “Burrington” and first name “Raymond” at the following link: <http://www.fec.gov/finance/disclosure/norindsea.shtml>.

In its previous briefing, the LNC has essentially conceded that this matter would become moot on January 1, 2014. Last year, the Commission informed the district court that the LNC would be able to receive the entirety of the Burrington bequest in 2014. (*See* FEC Mot. to Alter or Amend the J. at 4, No. 11-562 (D.D.C. Apr. 15, 2013) (Docket No. 48).) In response, the LNC did not deny this fact (nor could it have); instead, the LNC has twice wrongly asserted that its case would be saved by the capable-of-repetition-yet-evading-review mootness exception. (*See* LNC's Opp'n to FEC's Mot. to Alter or Amend at 3 n.2, No. 11-562 (D.D.C. Apr. 29, 2013) (Docket No. 51); LNC Opp'n to FEC's Mot. to Extend Time for Filing Dispositive Mots. Due to the Fed. Gov't Shutdown at 1-2, No. 13-5094 (D.C. Cir. Oct. 18, 2013) (Docket No. 1461972).)

B. This Case is Not Capable of Repetition Yet Evading Review

The “capable of repetition, yet evading review” mootness exception 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, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (internal quotation marks omitted; alteration in original). The LNC's claim meets neither requirement.

First, the challenged action in this case — the application of the Contribution Limit to the Burrington bequest — was not too short to be fully litigated prior to its

expiration. The Contribution Limit prevented the LNC from accepting the entire Burrington bequest for *seven* years — from 2007 to 2013. *See supra* pp. 2, 5.

Instead of filing this suit in 2007, however, the LNC waited nearly four years until March 2011. *See supra* p. 2. By that time, the LNC had already received more than two-thirds of the Burrington bequest. *See supra* p. 5. The LNC thus ran out of time to fully litigate this case due to its own delay, and a “litigant cannot credibly claim his case ‘evades review’ when he himself has delayed its disposition.” *Armstrong v. FAA*, 515 F.3d 1294, 1296 (D.C. Cir. 2008).

Second, there is no reasonable expectation that the Contribution Limit will restrict a bequest to the LNC again. Burrington’s bequest is the *only* bequest that the LNC has ever received in its 43-year history in an amount in excess of the Contribution Limit. *LNC*, 930 F. Supp. 2d at 172 (App. ¶ 5), 175 (App. ¶ 34). Besides the Burrington bequest, the record reflects that the LNC has received just two bequests in 43 years. *Id.* at 182 (App. ¶ 69). As a “minor” political party that has never had a federal officeholder, the LNC typically receives donations with a median-size of only “approximately \$25.” *Id.* at 172, 182 (App. ¶¶ 5-6, 69). It would therefore be unreasonable to expect the unique circumstances of this case to occur again. *See, e.g., Spivey v. Barry*, 665 F.2d 1222, 1234-35 (D.C. Cir. 1981) (holding moot a claim that “sharply focused on a unique factual context” unlikely to recur).

Finally, even in the highly unlikely event that the LNC were to receive a bequest in the future in an amount in excess of the Contribution Limit, that bequest would not evade review: In matter number 13-5094, this Court is currently reviewing the LNC's broader claim that the Contribution Limit is unconstitutional as applied to future bequests to political parties generally (including the LNC). That ruling would govern any future bequests to the LNC.⁴

CONCLUSION

For the foregoing reasons, the LNC's claim in this matter is moot and this Court therefore lacks jurisdiction. When a civil case is mooted pending appellate review, it is the "established practice" of the federal courts to "reverse or vacate the

⁴ In its previous briefing, the LNC has incorrectly claimed that cases that bear no relation to this case support its claim to the capable-of-repetition-yet-evading-review exception. (*See* LNC's Opp'n to FEC's Mot. to Alter or Amend at 3 n.2, *supra* p. 6; LNC Opp'n to FEC Mot. to Extend Time for Filing Dispositive Mot. Due to the Fed. Gov't Shutdown at 1-2, *supra* p. 6.) In each of those cases, a plaintiff sought to make then-regulated expenditures in advance of a particular election that had passed during the course of the litigation. The cases were found to be capable of repetition because the plaintiffs stated that they intended to make similar expenditures before future elections. The cases were found to evade review, however, due to the difficulty of fully litigating an action over such expenditures in the short amount of time before an election. *See Citizens United v. FEC*, 558 U.S. 310, 334 (2010); *Davis v. FEC*, 554 U.S. 724, 735-36 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462-63 (2007); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75 (1978). In contrast here, it is not up to the LNC whether it receives another bequest exceeding the Contribution Limit, and the facts indicate that it is highly unlikely that the LNC will. Also, this case was not mooted by any election; instead, the LNC had seven years to litigate this matter before it became moot, and yet failed to do so due to its own delay.

[ruling] below and remand with a direction to dismiss.” *Humane Soc. of United States v. Kempthorne*, 527 F.3d 181, 184 (D.C. Cir. 2008) (internal quotation marks omitted).

Respectfully submitted,

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February 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, I electronically filed defendant Federal Election Commission’s 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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