

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,) Case No. 11-CV-562-RLW
)
Plaintiff,)
)
v.)
)
FEDERAL ELECTION COMMISSION,)
)
Defendant.)
)

PLAINTIFF’S FACTS SUBMITTED FOR CERTIFICATION

Comes now the Plaintiff, Libertarian National Committee, Inc. (“LNC”), by and through undersigned counsel, and submits the following facts for certification pursuant to 2 U.S.C. § 437h:

A. *The Parties to this Litigation*

1. Plaintiff Libertarian National Committee, Inc. is the national committee of the Libertarian Party of the United States. Redpath Decl., ¶ 2; Answer, ¶ 4.
2. Defendant Federal Election Commission is the federal government agency charged with administering and enforcing the federal campaign finance laws, including the laws challenged in this action. Answer, ¶ 5.
3. LNC is a not-for-profit organization incorporated under the laws of the District of Columbia, which maintains its headquarters in Washington, D.C. LNC has approximately 14,500 current dues paying members, in all 50 states and the District of Columbia. Approximately 278,446 registered voters identify with the

Libertarian Party in the 25 states in which voters can register as Libertarians.

Throughout the Nation, 154 officeholders (including holders of non-partisan offices), are affiliated with the Libertarian Party. Redpath Decl., ¶ 2.

4. LNC's purpose is to field national Presidential tickets, to support its state party affiliates in running candidates for public office, and to conduct other political activities in furtherance of a libertarian public policy agenda in the United States. Redpath Decl., ¶ 3.
5. Founded in 1971, the Libertarian Party has yet to elect a federal office holder, and no current federal office holder is affiliated with the Libertarian Party. Redpath Decl., ¶ 4.
6. Unlike its two major competitors, the Libertarian Party's national committee is forced to spend the bulk of its resources securing access to the ballot, leaving comparatively little for actual campaigning—an expensive activity in and of itself. Redpath Decl., ¶ 5.
7. In the last presidential election year, “ballot access” was LNC's largest budgetary item, at \$510,257, drawn against available resources of \$1,280,103. Redpath Decl., ¶ 5; exh. B. Candidate support that year totaled a mere \$500. *Id.*
8. The Libertarian Party's ballot access costs typically dwarf items such as candidate support, media relations, outreach, member communications, and voter registration—combined. Exh. B
9. A party's ability to solicit donations depends in part on having adequate financial resources on hand. Donors, voters, and prospective political candidates who might

be attracted to the party's ideology are nonetheless dissuaded from supporting the party by its lack of resources. Redpath Decl., ¶ 6.

10. Approximately 265,000 voters registered as Libertarians do not donate to the Party, and the Party reasonably believes that its ideology is attractive to many more than those Americans who are actual members. Redpath Decl., ¶ 6.
11. Numerous Americans donate money to various organizations and causes which share the Libertarian Party's ideology, but do not find it effective to donate to the Party. It is common to encounter people who are sympathetic to the Party's ideology but do not believe the Party has the resources to be viable and make an impact. Redpath Decl., ¶ 7.
12. The Libertarian Party might achieve greater electoral success than it has historically achieved if it were to obtain greater financial resources. Exh. C, Response to Request for Admission No. 14.
13. The Libertarian Party's ability to influence elections is in some measure related to its ability to raise and expend money. Exh. C, Response to Request for Admission No. 15.

B. *The Regulatory Framework*

14. National committees of political parties, candidates for federal office, and federal office holders, may grant preferential treatment and access to certain individuals. Exh. C, Response to Request for Admission No. 1.
15. National committees of political parties, candidates for federal office, and federal office holders, may grant preferential treatment and access to potential donors in

- the unilateral hope that such preferential treatment and access would be remembered with a donation. Exh. C, Response to Request for Admission No. 2.
16. Individuals may donate money to political parties, candidates for federal office, and federal office holders, because they appreciate the treatment and access they are afforded by federal office holders. Exh. C, Response to Request for Admission No. 3.
 17. “[N]o person shall make contributions— (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed \$ 25,000.” 2 U.S.C. § 441a(a)(1).
 18. No political committee can “solicit, receive or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements” of 2 U.S.C. § 441a(a)(1). 2 U.S.C. § 441i.
 19. The contribution limits set forth in Section 441a(a)(1) are indexed for inflation. 2 U.S.C. § 441a(c).
 20. The current annual limit on contributions to political parties is \$30,800.
<http://www.fec.gov/info/contriblimits1112.pdf>.
 21. Although the term “person,” as used in 2 U.S.C. § 441a(a)(1), is not specifically defined to include an individual’s testamentary estate, Defendant FEC extends this definition to include testamentary estates. Exh. C, Admission No. 4; Exh. D, FEC Advisory Opinion 2004-02; Exh. E, FEC Advisory Opinion 1999-14.

22. The national committees of political parties may not receive bequests exceeding the federal contribution limits applicable to individuals. In the event such bequests are nonetheless made, defendant FEC does not permit national party committees to receive such bequests into escrow funds over which they exercise control, including control by the direction of the funds' investment strategies or choice as to whether or in what amount withdrawals might be made in any particular year. 2 U.S.C. § 441i; Exhs. D, E.

C. *The Burrington Bequest*

23. On April 26, 2007, Raymond Groves Burrington of Knox County, Tennessee, passed away, leaving a Last Will and Testament in which the Libertarian Party was named as a legatee. Exh. F.

24. Burrington's bequest to the Libertarian Party totaled \$217,734.00. Exh. G.

25. The Libertarian Party had no knowledge of Burrington's bequest prior to Mr. Burrington's passing. Kraus Decl., ¶ 2.

26. Apart from the bequest, Burrington had only once donated to the Libertarian Party, in the amount of \$25, on May 19, 1998. Kraus Decl. ¶ 3.

27. Owing to Defendant FEC's application of federal contribution limits, LNC could not accept Burrington's entire bequest at once, as it would use at least some if not all of the money on federal election efforts. Rather, the LNC accepted annual distributions from the Burrington Estate in the amounts of \$28,500.00 in 2007 and 2008, with the balance of \$160,734.00 being deposited in an escrow account that complies with Defendant FEC's restrictions. Kraus Decl., ¶ 5.

28. The escrow account is established pursuant to an agreement among the Estate, the LNC, and the escrow agent, the Mercantile Bank of Michigan. The agreement provides, inter alia, that the Estate remains an escrowee, that the deposited funds may be invested only in the Bank's money market or certificate of deposit products, and that the LNC must annually withdraw the maximum amount permitted by the individual contribution limits. The agreement explicitly provides, however, that the LNC may challenge the legal validity of the contribution limit in federal court, and demand payment of the full amount remaining in the account should its challenge succeed. Exh. G.
29. LNC does not knowingly associate with dead people. When LNC learns that a member has passed away, the deceased is removed from the Party's membership rolls. Kraus Decl., ¶ 4; Redpath Decl., ¶ 8.
30. Upon learning of the bequest, LNC removed Burrington from the membership rolls on which he had appeared owing to his 1998 \$25 donation. Kraus Decl., ¶ 4.

D. *Decedents' Estates and Political Parties*

31. Leaving a bequest to a political party is a form of political expression. Redpath Decl., ¶ 8; Exh. C, Response to Request for Admission No. 5.
32. "[T]he act of a living person causing his or her will to contain a provision that provides for a bequest to a political party upon his or her death" is expressive. Exh. C, Response to Request for Admission No. 5.

33. FEC “views the testamentary estate of a decedent as the successor legal entity to the testator and thus will apply the Act and its limits to that entity as the *alter ego* of the living testator.” Exh. H, FEC Advisory Opinion 1983-13.
34. Leaving a bequest to a political party is not necessarily a means of maintaining affiliation with the party after the donor’s passing. Exh. C, Response to Request for Admission No. 6.
35. FEC can neither admit nor deny that political parties do not generally count the deceased among their membership, Exh. C, Response to Request for Admission No. 7.
36. The Libertarian Party does not associate with the dead and does not maintain deceased members. Redpath Decl., ¶ 8; Kraus Decl., ¶ 4.
37. Individuals who leave testamentary bequests for political parties often have no idea which candidates might benefit from the contribution. People cannot always predict their death, they cannot predict who will run in future political campaigns, and bequests are often disbursed many years after they are first recorded. For example, the bequest at issue in this case was made October 13, 2000, Exh. F, nearly seven years before the donor’s death. Sometimes, multiple contingencies must occur before a bequest is received by a political party. For example, the Libertarian Party received a \$19,331.40 bequest from a donor’s trust only after the trust’s initial beneficiary passed away. Exh. I. At least one individual who presently intends to bequeath LNC significant assets cannot predict when that gift

might come to pass, or which candidates would benefit from it. Redpath Decl., ¶ 9; see also Exh. C, Response to Request for Admission No. 8.

38. A political party's federal office candidates cannot reliably count on receiving money from particular bequests in many cases. A prospective donor might defy the odds and outlast actuarial or medical predictions—or change his or her mind. Redpath Decl., ¶ 10.
39. The Libertarian Party does not offer any benefits in exchange for being remembered in an individual's will, apart from perhaps a simple expression of gratitude.
40. Once a political party receives a testamentary bequest, neither it, nor its candidates, risk offending the deceased donors. Exh. C, Response to Request for Admission No. 10.
41. Apart from leaving bequests, and perhaps arranging for the posthumous publication or other dissemination of his or her political views, decedents are not in a position to engage in independent political expression, to associate actively through volunteering their services to political campaigns, or to support candidates and committees with financial resources. Exh. C, Response to Request for Admission No. 12.
42. Testamentary bequests are likely to be more generous than donations made in one's lifetime. Redpath Decl., ¶ 8; see also discussion of FEC records survey, *infra*. For example, Burrington gave the Libertarian Party only \$25 throughout his life—but \$217,734 upon his death, a staggering 870,936% increase. Kraus Decl.,

- ¶ 3; Exhs. F, G. James Kelleher bequeathed the Libertarian Party \$10,000, Exh. J, although during his life he had given the party only \$100. Kraus Decl., ¶ 6. And Joseph Reitano bequeathed the Libertarian Party \$19,331.40, Exh. I, although there is no record that he ever donated to the Party while alive. Kraus Decl., ¶ 7.
43. FEC does not track political contributions received from testamentary bequests. Clark Decl., ¶ 2.
44. Attempts to search FEC's database for records of testamentary bequests produce underinclusive results. Clark Decl., ¶¶ 3, 4. For example, the FEC's largest bequeathed political party donation, Martha Huges' \$250,000 gift to the Democratic Party, Clark Decl., Table 2, is eclipsed by Eleanor Schwartz's \$574,332.33 bequest to the Republican Party, discovered in this case. Clark Decl., ¶ 3. The Burrington bequest, which would be second on the FEC's table of all-time highest bequests to political parties, does not appear in FEC's search-generated top five list.
45. BCRA's prohibition of so-called soft-money makes it difficult for FEC to identify oversized bequests made since 2002. Clark Decl., ¶ 9. Nonetheless, FEC identified \$2,260,799.70 in funds bequeathed to national political party committees since the inception of its database in 1978. Clark Decl., Table 3.
46. FEC estimates that "the average hard-money contribution made by estates to national political party committees from bequeathed funds was approximately \$9,041.09, [and] the average soft-money donation made by estates to national political party committees from bequeathed funds was \$62,117.23," Clark Decl., ¶

11, understate the true disparity between the two variables, as some of the donations classified as “hard money” are maximum annual withdrawals against what would otherwise be “soft money” donations. For example, averaged in to the \$9,041.09 “hard money” figure are annual withdrawals from the Burrington trust in amounts of \$28,500 and \$30,800 dollars, while the “soft money” average should include, but does not, the total of Burrington’s \$217,734 gift.

47. A rough approximation of average size of bequests to political parties can be determined by dividing FEC’s “Total Amount of Bequeathed Funds Contributed or Donated,” \$2,260,799.70, by the “Total Number of Contributions or Donations Made From Bequeathed Funds,” 162: **\$13,955.55**. Of course this number is too low, as post-BCRA bequests that exceed contribution limits are broken down into smaller “hard money” donations.
48. LNC’s average contribution is \$45.98. Kraus Decl., ¶ 9.
49. There is no reason to suppose that LNC’s donors are poorer or less generous with their party than are supporters of other political parties. Dividing amounts contributed or donated, by the number of bequeathed contributions and donations by party as supplied by FEC’s survey, Clark Decl., Table 4, yields the following average bequest per party:

Libertarian:	\$16,255.39
Republican:	\$10,531.93
Democratic:	\$18,824.06
Green:	\$20,303.84

E. *The Impact on LNC of Applying Contribution Limits Against Testamentary Bequests.*

50. An additional \$160,734.00 in 2008 would have had a material impact on LNC's ability to advocate for and elect its candidates, covering nearly the entirety of LNC's operating deficit that year. Exh. B; Redpath Decl., ¶ 11. That same amount of money in 2010 would have more than sufficed to cover the Party's ballot access costs. *Id.*
51. The Libertarian Party's ability to advocate for and elect its candidates would still be improved if today the Party could take possession of the remainder of the Burrington bequest. Redpath Decl., ¶ 12.
52. LNC's inability to raise large sums from bequests has contributed to the LNC being unable to amass the resources necessary for effective advocacy in every election impacted by the application of contribution limits to bequests to political parties. Redpath Decl., ¶ 13.
53. LNC's ability to raise and accept at once and without limitations, bequests the size of that left by Burrington to the Libertarian Party, would have a profoundly positive impact on the Libertarian Party's ability to compete. Redpath Decl., ¶ 14.
54. The LNC refrains from taking immediate possession of the entirety of the Burrington bequest, and refrains from actively soliciting and accepting testamentary bequests without limitation, owing to the FEC's application of federal contribution limits against testamentary bequests. Redpath Decl., ¶ 15.

55. The LNC has placed advertisements in its newsletter, LP News, seeking testamentary bequests. Exhibit K.
56. The option of remembering the LNC in one's will has also been conveyed to delegates at the Party's conventions, and indeed, the LNC intends on soliciting bequests from time to time. Redpath Decl., ¶ 16.
57. Were the Court to enjoin enforcement of federal contribution limits against testamentary bequests to LNC, LNC would immediately launch a comprehensive planned giving program. LNC would establish a planned giving page for its website, address planned giving through direct mail solicitations, emails, personal solicitations, stories in the LNC's newspaper for members, LP News, and through announcements at its National Conventions by the National Chair. The LNC would also solicit bequests at its presidential nominating convention banquets. Redpath Decl., ¶ 17.

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Respectfully submitted,

Alan Gura (D.C. Bar No. 453449)
Gura & Possessky, PLLC
101 N. Columbus Street, Suite 405
Alexandria, VA 22314
703.835.9085/Fax 703.997.7665

By: /s/ Alan Gura
Alan Gura

Attorney for Plaintiff