UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	)	Civ. No. 16-121 (BAH)
Plaintiff,	)	
v.	)	
FEDERAL ELECTION COMMISSION	)	REPLY IN SUPPORT OF MOTION TO DISMISS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF JURISDICTION

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Plaintiff Libertarian National Committee, Inc. ("LNC") has failed to show that it has standing to challenge the Federal Election Campaign Act's ("FECA") annual limit on contributions from an individual (including an estate) to the General Account of a national party committee. The LNC's claimed injury was self-inflicted because the LNC can actually do what it seeks to do here: As the complaint admits, a 2014 amendment to FECA allows the LNC to immediately accept what remains of its deceased donor's $235,000 bequest. In fact, the trustee of the donor's estate attempted to contribute the entire bequest to the LNC. Instead of accepting it, the LNC filed this lawsuit seeking the invalidation of part of FECA. Even though the trustee stated that the donor's will allows the LNC to accept the bequest "how it wishes," the LNC incorrectly claims that it cannot receive the entire bequest because of the will, which does not constitute government action in any event. A Federal Election Commission ("Commission" or "FEC") advisory opinion that the trustee obtained regarding the bequest also does not prevent the LNC from accepting the entire amount, because the opinion is explicitly premised on the LNC's choice to "decline[] to accept any of the remaining distribution."

The LNC's injury is no less self-inflicted merely because the LNC believes it had good reasons to choose not to accept the entire bequest. The LNC's preference to spend the bequest on advocacy and elections (and not its conventions, headquarters, or election-related legal expenses) also fails to qualify as a cognizable injury here. The LNC does not dispute that it has spent significant sums on its new headquarters and its conventions, including the presidential nominating convention it will hold later this month in Orlando, Florida. Those expenses exceed the Shaber bequest, and money is fungible. The LNC could thus accept the entire bequest into its Segregated Accounts and thereby free an equal amount in its General Account to be used for advocacy and elections. Even though the standing inquiry centers on whether jurisdiction

existed at the time the plaintiff filed suit — in this case 2016 — the LNC improperly analyzes its Segregated Account expenses only for 2015, while avoiding stating anything about its 2016 expenses. Yet the LNC's website is currently soliciting an additional *half-million dollars* in Segregated Account funds to help pay off the mortgage on its headquarters. The LNC has thus failed to carry its burden of proving it had standing when it filed the complaint, and its assertions regarding mootness are beside the point. The self-inflicted nature of the LNC's alleged injuries defeat all of its claims, including its facial challenge.

Finally, the LNC does not dispute the FEC's showing that the competitive disadvantage the LNC claims to suffer and wishes to remedy by spending the bequest does not satisfy standing requirements. Instead, the LNC claims that the complaint's focus is on advocacy and that the LNC's stated desire to spend the bequest to address its competitive disadvantage is irrelevant to its claims of injury. But those assertions are inconsistent with the LNC's simultaneous claim that FECA has injured it by not allowing it to accept the bequest and spend the bequest as it wishes to achieve electoral success. The LNC's contortions cannot change the complaint.

The Court should dismiss the complaint for lack of jurisdiction.

ARGUMENT

A. The LNC Lacks Standing Because Its Injuries Are Self-Inflicted

1. The LNC Cannot Show That FECA Prevents It from Immediately Accepting the Entire Shaber Bequest

The LNC has caused its own alleged injuries by choosing not to immediately accept the Shaber bequest, as FECA allows (*see* FEC's Mem. in Supp. of Its Mot. to Dismiss for Lack of Jurisdiction ("FEC Br.") at 10-14 (Docket No. 9)), and the LNC has failed to show otherwise in its opposition. The LNC does not dispute that "any harm allegedly arising from a political actor's voluntary choice not to accept contributions that FECA allows it to accept is a self-

inflicted injury." (FEC Br. at 10 (citing *McConnell v. FEC*, 540 U.S. 93, 226-28 (2003); *Sykes v. FEC*, 335 F. Supp. 2d 84, 88-94 (D.D.C. 2004)).) And the LNC's complaint acknowledges that FECA allows the LNC to use its General Account and new Segregated Accounts to "'accept the entire balance of the Shaber bequest immediately.'" (*Id.* at 11 (quoting Compl. ¶ 33 (Docket No. 1); *see also* Compl. pp. 1-2 (acknowledging that "the Government would allow the Party to accept as much as $100,200 per year from Shaber's bequest" into each of its three segregated accounts), ¶¶ 19, 29 (stating that the "LNC could even accept any combination of these $100,200 donations" into its three segregated accounts, "in addition to the $33,400 limit for general expressive purposes").)

Congress created the new Segregated Accounts in December 2014, and so they did not yet exist at the time of the LNC's previous lawsuit in 2011 unsuccessfully challenging the $33,400 General Account limit, in which the LNC alleged it wanted to accept a $217,734 bequest in one year. FEC Br. at 4-6; *see LNC v. FEC*, 930 F. Supp. 2d 154, 155-57 (D.D.C. 2013) ("*LNC I*"), *summarily aff'd in part*, No. 13-5094, 2014 WL 590973, at *1 (D.C. Cir. Feb. 7, 2014) (*per curiam*), *and vacating as moot in part*, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (*en banc*) (Doc. No. 1485531).[1] And so contrary to the LNC's assertions, the district court's holding that the LNC had standing in that case has no bearing on this one, in which the LNC can in fact accept the bequest at issue in one year because of the new Segregated Accounts. (*See* LNC's Mem. in Opp'n to FEC's Mot. to Dismiss ("LNC Opp'n") at 1-2 (Docket No. 12).) The LNC therefore lacks standing, since its claimed injuries stem not from the operation of FECA's limits, but from the LNC's voluntary choice not to accept the entire Shaber bequest. *See McConnell*, 540 U.S. at 228; *Sykes*, 335 F. Supp. 2d at 88-94.

[1] http://www.fec.gov/law/litigation/lnc_ac_per_curiam_order_dismissal.pdf (last viewed May 19, 2016).

Even though the LNC admits in its complaint that FECA allows it to immediately accept the Shaber bequest, the LNC now backtracks and asserts that it cannot after all. Both of the reasons the LNC gives for this claim lack merit.

First, the terms of Shaber's will do not preserve the LNC's standing. The LNC contends incorrectly that Shaber's will bars it from taking the entire bequest into its Segregated Accounts. (LNC Opp'n at 3, 5, 9.) But the LNC's reading of Shaber's will conflicts with that of Shaber's own trustee, Alexina Shaber. In her advisory opinion request to the FEC, Ms. Shaber explained that because Mr. Shaber directed that his bequest be made to the LNC "outright," it is therefore "entirely up to the LNC how it wishes to apply the distribution." Letter from Michelle M. Lauer, John C. Lincoln Law Offices, to FEC Office of General Counsel at AOR002 (June 15, 2015) ("Trustee Letter").[2] Ms. Shaber even tried to contribute the entire bequest to the LNC's Segregated Accounts, and the LNC declined. *Id.*; *see also* FEC Br. at 6-7. Nevertheless, the LNC claims that Mr. Shaber "would have wanted" and "would have doubtless wished" for the LNC not to accept his bequest into its Segregated Accounts. (LNC Opp'n at 3, 14.) But Mr. Shaber executed his will in 2010 and died in August 2014. *See* Trustee Letter at AOR001-2. The LNC never explains how he could have intended at those junctures that the LNC not accept his bequest into Segregated Accounts that Congress *did not create until December 2014*. (*See* FEC Br. at 5.) In any case, the LNC's claim about the will terms fails to show an injury that is fairly traceable to FECA, as it must to support standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Second, no FEC advisory opinion prevents the LNC from immediately accepting or otherwise controlling the entire escrowed Shaber bequest, contrary to the LNC's claims. (LNC

[2] *See* http://saos.fec.gov/aodocs/1317218.pdf (last visited May 19, 2016).

Opp'n at 3-5, 7, 9-10, 14.) As the LNC acknowledges, the Commission's opinions state that the recipient of a bequest may not exercise control over an amount of a "bequest *exceeding* contribution limits." (*Id.* at 4 (emphasis added).) A contribution is made when the contributor "relinquishes control" over the contribution, 11 C.F.R. § 110.1(b)(6), and so a bequest recipient cannot legally exercise control over the undistributed portions of a bequest when doing so would result in an "*excessive* contribution," FEC Advisory Op. ("AO") 2004-02 (Nat'l Comm. for an Effective Congress), 2004 WL 1402536, at *2 (Feb. 26, 2004); *see also* AO 1999-14 (Council for a Livable World), 1999 WL 521238, at *2 (July 16, 1999) (stating that a committee could control an escrowed bequest it solicited but "only to the extent that the solicitee's bequest is no more than $5,000," the applicable FECA limit).

Because the restrictions above apply only to excessive contributions, no advisory opinion would be violated if the LNC were to immediately accept or otherwise control the entire Shaber bequest remaining in escrow (about $168,775.20) using its Segregated Accounts. (FEC Br. at 7.) FECA's Segregated and General Account Limits combined currently allow any one individual or estate to contribute up to $334,000 in one calendar year to a national party committee like the LNC. (*Id.* at 11.) The LNC refused the Shaber trustee's offer to contribute the entire bequest with portions going to the LNC's Segregated Accounts. *See* Trustee Letter at AOR002. As a result, to avoid further costs to the trust, the Shaber trustee asked the FEC if she could place the bequest in an independent escrow account that would then contribute to the LNC annual amounts that comply with only the Party General Account Limit (currently $33,400 per calendar year). *Id.* The FEC approved the trustee's request in an advisory opinion that is explicitly premised on the LNC's choice to not accept the bequest into its Segregated Accounts. AO 2015-05 (Shaber), 2015 WL 4978865, *1 (Aug. 11, 2015) ("The [LNC] has declined to accept any of the remaining

distribution into a segregated account."). Nevertheless, the LNC now incorrectly asserts that its hands are tied by this advisory opinion — which exists only due to its refusal to take the bequest in the first place. The opinion presents no obstacle to accepting the bequest using Segregated Accounts because it states only that the LNC may not exercise control over the escrowed Shaber bequest *to avoid violating the $33,400 limit* to which the LNC voluntarily subjected itself. *Id.* at *1-3. The opinion does not say that the LNC could no longer decide to use its Segregated Accounts and their much higher limits to accept the bequest, as FECA permits. *See id.*

The LNC alleges that it wants to immediately accept the entire Shaber bequest and it can do so. It therefore lacks standing.

2. The LNC's Motivations for Declining to Accept the Entire, Fungible Shaber Bequest into Permitted Accounts Provide No Grounds for Standing

In addition to incorrectly asserting that it cannot not immediately accept the entire Shaber bequest, the LNC also repeatedly claims that it cannot spend that money as it wishes. (*See, e.g.*, LNC Opp'n at 1.) It is not clear whether these assertions are meant to justify the LNC's choice not to access the entire Shaber bequest or to allege a standalone injury in fact. (*Compare id.* at 19 ("The LNC's 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 that it wishes to access."), *with id.* at 8 ("LNC's injury is that it cannot accept money . . . for spending *as it wishes*.").) Either way, the LNC's preference to accept the Shaber bequest into a particular bank account does not provide it with standing.

In the circumstances presented here, it does not matter why the LNC does not want to accept the Shaber bequest; it only matters that it can legally accept it. (*See* FEC Br. at 11-12.) As the Commission explained in its opening brief, the LNC's claimed injuries stemming from its

refusal to accept the bequest are materially the same as those claimed by the third-party candidate found to not have standing in *Sykes v. FEC*. (*Id.* at 12.) In *Sykes*, the plaintiff was a candidate from a minor political party, like the LNC, who refused to accept contributions that FECA allowed him to accept from individuals living in other states during his race for U.S. Senate in Alaska. 335 F. Supp. 2d at 87. The plaintiff claimed he was injured because without the ability to spend such contributions on his campaign, he could not compete with his major party opponents, who were accepting out-of-state contributions. *Id.* at 88. The court held, however, that the plaintiff's claimed injuries were self inflicted, observing that his "'alleged inability to compete stems not from the operation of [the Act], but from [his] own personal 'wish' not to solicit or accept [out-of-state] contributions, i.e., [his] personal choice.'" *Id.* at 92 (quoting *McConnell*, 540 U.S. at 228) (alternations in original). The reasons he made his choice were beside the point. *See id.* Tellingly, the LNC's brief does not address *Sykes* or *McConnell*, even though the FEC discussed those cases extensively in its opening brief. (*See* FEC Br. at 4-5, 10-12, 15, 17-18.)

The LNC's motivations are particularly irrelevant here because the LNC has expenses permitted by the special accounts that would exhaust the Shaber bequest and money is fungible. The LNC could immediately accept the Shaber bequest and effectively spend that same amount on advocacy and elections as it desires. (*See* FEC Br. at 12-14.) As the LNC admits, it could "have accepted the bequest, received it through the segregated purpose accounts and thereby freed an equal amount of money for general purposes," including advocacy and election uses. (LNC Opp'n at 9; *see also id.* at 12 (conceding that there "is something to the [FEC's] logic").)[3]

[3] A party's receipt of a contribution into its Segregated Accounts would *immediately* liberate any funds in its General Account that the party had budgeted to pay for Segregated Account uses — presidential conventions, building headquarters, and election-related legal

The LNC does not dispute that it solicits contributions for its Segregated Accounts and spends significant amounts on Segregated Account uses, as the FEC pointed out. (*See* FEC Br. at 12-13.) The LNC does not contest that during the 2014 election cycle, it spent nearly $1 million on its building headquarters and $120,000 on its national convention. (*See id.*) The LNC also does not dispute that from January 1, 2015 through April 5, 2016 it spent at least $63,000 on its headquarters (*id.* at 13), and the LNC even adds that it actually spent $80,087.72 on Segregated Account uses in 2015 alone (LNC Opp'n at 6-7 (citing Decl. of Robert Kraus ¶¶ 5-6 (Docket No. 12-4))). Although the LNC is notably silent about its 2016 and future expenses — including the cost of its 2016 national convention which it will hold later this month in Orlando — it does not dispute that it has spent in excess of $100,000 on each of its recent conventions, as the FEC stated. (*See* FEC Br. at 13.) Additionally, the front page of the Libertarian Party's website is currently soliciting $500,000 in Segregated Account funds (in addition to the approximately $325,000 already raised) to "Help Us Pay Off The Mortgage On Our New Office!" *See* Libertarian Party, http://www.lp.org (last viewed May 19, 2016) (emphasis omitted) (relevant graphic located halfway down right side of the page and attached here as exhibit A). The LNC protests that the "Government cannot force the LNC to buy a fancy headquarters building [and] spend lavishly on a presidential nominating convention" (LNC Opp'n at 8), but these figures show that the LNC is already engaged in such spending and could easily use the Shaber bequest for it.

The LNC faults the Commission for "suggesting but not proving" that the LNC spent a sufficient amount on Segregated Account uses in 2015 (LNC Opp'n at 6-8, 13), but that is not the only year at issue because this suit was filed in 2016 (*see* Docket No. 1). The standing

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expenses. Thus, the party receiving that contribution would not be deprived of "the present value of unrestricted funds," as the LNC claims. (LNC Opp'n at 12-13.)

inquiry centers "on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (emphasis added). The complaint states that the LNC wants to accept the entire Shaber bequest "immediately," not exclusively in 2015. (Compl. ¶¶ 26, 33.) The LNC has thus failed to carry its burden of proving that it has not spent and will not spend funds in the amount of the Shaber bequest on Segregated Account uses over the course of both last year, when it began receiving distributions from the estate and declined to accept the funds immediately, and this year, 2016, when the LNC continued to receive disbursements and initiated this action.

The LNC admits that it would lack standing if it spent more than the amount of the Shaber bequest on Segregated Account uses in what it contends is the relevant time period. (LNC Opp'n at 9, 12.) Earlier this year, when the LNC filed the complaint, $202,175.20 of the Shaber bequest remained in escrow. (*See* FEC Br. at 7.) As the FEC has highlighted, the LNC's recent spending history and the fact that it is currently soliciting a half-million dollars to pay off its new headquarters building show that it will likely have more than $202,175.20 in Segregated Account expenses this year. In its response, the LNC details its 2015 spending but fails to say anything about its known or anticipated 2016 building and convention expenses. (LNC Opp'n at 10; Kraus Decl. ¶¶ 1-7.) The LNC does apparently believe, however, that its 2016 expenses will at least be significant enough to moot its as-applied claims if combined with its approximately $80,000 in 2015 expenses. (*See* LNC Opp'n at 15 (incorrectly arguing that those claims would be capable of repetition yet evading review).) The LNC's failure to otherwise respond to the Commission's showing regarding the party's upcoming expenses should be treated as a concession; plaintiff has failed to carry its burden of demonstrating standing.[4]

[4] Because the LNC lacks standing, its assertion that its claims are capable of repetition yet evading review is beside the point. (*See* LNC Opp'n at 10, 16-17.) Claims falling into that

3. The Self-Inflicted Nature of the LNC's Alleged Injuries Defeats All of the LNC's Claims Including Its Facial Challenge

The LNC lacks standing to assert its facial challenge (Count II) for the same reasons it lacks standing for all of its claims. Even for its facial claim, the LNC must demonstrate a valid injury in fact. Just last month, the D.C. Circuit dismissed a facial challenge because the plaintiff had failed to allege a cognizable injury, stating that it "know[s] of no case stating that a facial challenge to the constitutionality of a statute itself suffices to establish standing." *Williams v. Lew*, --- F.3d ---, No. 15-5065, 2016 WL 1612804, at *8 (D.C. Cir. Apr. 22, 2016); *see also, e.g.*, *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) ("While the rules for standing are less stringent for a facial challenge to a statute, a plaintiff must still satisfy the injury-in-fact requirement.").

In particular, to establish standing in "a pre-enforcement facial challenge to a statute allegedly infringing on the freedom of speech," the plaintiff must show an "imminent threat[]" of future injury. *A.N.S.W.E.R. v. District of Columbia*, 589 F.3d 433, 435 (D.C. Cir. 2009). To meet this standard, the plaintiff must allege not only (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest" and (2) that "the threat of future enforcement" is "substantial," but also (3) that the plaintiff's "intended future conduct is arguably . . . proscribed by [the] statute." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334,

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category are an exception to mootness, not standing. In any event, the LNC's failure to even allege anything regarding its current and anticipated future Segregated Account expenses also defeats its claim to that mootness exception. To prove that its claims are capable of repetition, it is not enough, as the LNC claims, for it to assert that it could receive a future bequest in excess of the $33,400 limit. (*See id.* at 16.) That scenario itself is uncommon given that Shaber's bequest is apparently only the second bequest the LNC has received in excess of $33,400 in its 45-year history. *See LNC I*, 930 F. Supp. 2d at 175 (Findings of Fact ¶ 34). The LNC must also show, however, that it is unlikely to have Segregated Account expenses on which any future bequest exceeding $33,400 could effectively be spent. Otherwise, that future bequest would fail to provide standing, just as Shaber's bequest does here.

2343-45 (2014) (internal quotation marks omitted; alterations in original); *see also Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1194 (D.C. Cir. 1992) (holding that "a litigant bringing a pre-enforcement facial challenge" must "demonstrate a credible threat of prosecution under a statute that appears to render the litigant's arguably protected speech illegal").

The LNC cannot demonstrate that its intended future conduct is proscribed by the FECA provisions it challenges. As explained above, the LNC's alleged future injury is self-inflicted; FECA allows any one estate or contributor to give the LNC up to $334,000 in a calendar year. *See supra* p. 5. And the LNC could effectively gain the amount of such future contributions for advocacy and electoral spending by accepting them into its Segregated Accounts, for which it has substantial periodic expenses, thus freeing up General Account funds. *Id.* at 7-9. Because FECA does not bar that conduct, the LNC does not face any credible threat of future prosecution for it. *See, e.g.*, *PETA*, 298 F.3d at 1203 (finding no standing for plaintiffs' pre-enforcement facial challenge against a law barring interference with the peaceful conduct of a school because the government admitted that the law did not bar plaintiffs' planned protest); *Schirmer v. Nagode*, 621 F.3d 581, 587 (7th Cir. 2010) (holding that plaintiffs lacked standing for a pre-enforcement facial attack on a law barring disorderly conduct when "[o]ur reading of the provision's language . . . indicates that [the law] cannot fairly be read to prohibit peaceful protests of the sort engaged in by the plaintiffs").[5]

[5] The LNC cannot claim standing to assert its facial challenge on the theory that in the future it might receive a bequest or contribution in an amount in excess of the combined General Account and Segregated Account limits (currently $334,000), since the LNC's complaint limits its alleged prospective injury to "sums in amounts that are otherwise within the limits it could accept and spend for the segregated account purposes of 52 U.S.C. § 30116(a)(9)." (Compl. ¶ 14.)

B. The LNC Does Not Even Try to Show That Its Claimed Competitive Disadvantage Is an Injury in Fact That Is Fairly Traceable to FECA and Can Be Redressed Here

The LNC does not even attempt to counter the FEC's showing that the competitive disadvantage the LNC claims to suffer does not satisfy all three standing requirements. (*See* LNC Opp'n at 18-20.) Thus, even if that claimed injury was not caused by the LNC's refusal to accept the Shaber bequest, it would still fail to support standing. (*See* FEC Br. at 15-19.)

The complaint alleges that the LNC has "comparatively little" to spend on campaigning relative to "its two major competitors" (Compl. ¶ 12); that it has "comparatively less use" for the Segregated Accounts, which it points out were enacted by the "two major political parties" (*id.* ¶ 13); and that it wants to immediately accept the Shaber bequest to "substantially improve its ability to advocate and achieve electoral success" (*id.* ¶ 26). The FEC explained that there is no legal right to compete equally against electoral opponents with more money (FEC Br. at 15), and the LNC has not disputed this in response. Nor does the LNC dispute that its claimed competitive injury results from the decisions of private actors in the political marketplace, not FECA. (*Id.* at 15-16.)

The LNC has also failed to refute the FEC's showing that a favorable decision of this Court would worsen, not redress, its claimed competitive disadvantage. (*See* FEC Br. at 17-19.) As the Supreme Court has said, FECA contribution limits "'would appear to *benefit* minor-party and independent candidates relative to their major-party opponents because major-party candidates receive far more money in large contributions.'" (*Id.* at 17-18 (quoting *Buckley v. Valeo*, 424 U.S. 1, 33 (1976) (*per curiam*)).) In response, the LNC calls this Supreme Court precedent "mere speculation" (LNC Opp'n at 20), even though the LNC's own complaint states

that its fundraising lags behind that of the major parties (Compl. ¶ 12), as current fundraising statistics and the record in *LNC I* show (FEC Br. at 18-19).

Instead of attempting to demonstrate its alleged competitive injury, the LNC spends several pages trying to show that the focus of its complaint was really more on advocacy rather than competition. (*See* LNC Opp'n at 18-20.) In this section of its brief, the LNC urges the court to disregard its "explanations for *why* it needs money, and what it would like to do with that money" (*id.* at 19), even though in the rest of its brief the LNC strenuously argues that its "injury is that it cannot accept money . . . for spending *as it wishes*" (*id.* at 8). The LNC's contortions cannot change its complaint, however, since a plaintiff's alleged injury "[a]s pled" determines whether standing exists, not a later "shifting characterization" of that injury in briefing or argument. *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014). The complaint plainly alleged comparative disadvantage relative to the two major political parties (Compl. ¶¶ 12-13, 26), and those allegations do not provide the LNC standing.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion to dismiss under Rule 12(b)(1) because the LNC lacks standing.

Respectfully submitted,

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