IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	)	Case No. 1:16-CV-0121-BAH
Plaintiff,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO CERTIFY FACTS AND QUESTIONS

Plaintiff Libertarian National Committee, Inc., respectfully submits its Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss and in Reply to Defendant's Opposition to Plaintiff's Motion to Certify Facts and Questions to the Court of Appeals.

Dated: October 19, 2017

Respectfully submitted,

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PRELIMINARY STATEMENT

"Frivolous" or some form thereof appears twenty-six times across the FEC's thirty-five pages of briefing, apparently produced by up to five attorneys and accompanied by thirty-eight exhibits. And hedging its bets, the FEC proposes alternative questions for certification.

The FEC effort's sheer volume belies any notion that the LNC's claims fail the "low" bar of certification. *Shapiro* v. *McManus*, 136 S. Ct. 450, 456 (2015); *Holmes* v. *FEC*, 823 F.3d 69, 71 (D.C. Cir. 2016). This is altogether quite a large body of work to squeeze through a "narrow" exception, *Independence Inst.* v. *FEC*, 816 F.3d 113, 116 (D.C. Cir. 2016), meant to exclude claims of the sort weeded out by the Prison Litigation Reform Act, *Holmes*, 823 F.3d at 72 n.4. Were the LNC's claims "obviously frivolous because they are foreclosed by binding precedent," FEC Br. at 2, perhaps the FEC should have identified that "binding precedent" straight away, or even anywhere in its tome, which should have then been much shorter.

Of course the FEC does not disclose this "binding precedent." Because it does not exist.

This is not to deny the existence of frivolous arguments. The FEC advances several theories that do not merit extended discussion. To the limited extent that the FEC's arguments may not be frivolous, but are merely wrong, the FEC presents its arguments to the wrong court. This is not the forum in which to dispute whether the cromnibus expressive purpose restrictions are, in fact, content-based restrictions on speech.[1] Nor is this the forum in which to argue that the challenged law

[1]The FEC complains that this "shorthand is argumentative and misleading." FEC Br. at 7 n.2. It is neither. The LNC's term describes precisely the scheme's function, and how it came about. The FEC's preferred euphemism only serves to conceal the law's purpose and pedigree.

satisfies, or fails, either strict or intermediate "closely drawn" scrutiny. To be sure, the LNC believes that its certification motion does, in fact, tend to prove the challenged provisions and practices' unconstitutionality. But that is not the point of this exercise.

The only point of this exercise is to pass the very low threshold for certification of this dispute to the D.C. Circuit. That threshold has amply been met—and surpassed. The FEC should be offered the opportunity to present its arguments to the en banc D.C. Circuit, to which the case should be certified.

SUMMARY OF ARGUMENT

The FEC's essential positions are that:

(1) there is nothing novel about the post-cromnibus FECA's limit on contributions to political parties—FECA looks just like it always has before;

(2) 52 U.S.C. § 30116(a)(1)(B) is *only* a contribution limit with no expressive purpose restrictions whatsoever—the LNC must be imagining the three statutory restrictions as to how money is to be "used";

(3) *all* contribution limits are, per se, constitutional, unless perhaps they have a severe impact on a party or candidate's ability to mount a campaign, and in any event, the post-cromnibus FECA satisfies closely-drawn scrutiny;

(4) the LNC should be grateful that FECA imposes content-based restrictions on how the party may speak with up to 90% of the money raised from a particular individual, because allowing a party to speak with restrictions is better than not allowing it to speak at all;

(5) because contribution limits may be applied to testamentary bequests, they may be applied to *all* testamentary bequests; and

(6) enough of the foregoing is contained in uncited mystery precedent such that the LNC's claims are all not just foreclosed, but *frivolous*.

These arguments lack merit. Indeed, the FEC's brief calls into question whether the Commission understands the essential claims, or even the distinction between contribution and expenditure limits. Even one citation to precedent that forecloses this case would have been useful. But LNC's claims plainly include a first-impression challenge to a novel law, and an as-applied claim of the type previously certified. Of course, the LNC need not win its case here. It need only show that the case should be certified to the court having jurisdiction to hear it. That much, the LNC has done. Its motion should be granted, and the FEC's motion should be denied.

ARGUMENT

I. THE FEC MISSTATES THE LNC'S FACIAL CHALLENGE.

The FEC offers that "[t]he LNC . . . limits its current challenge to Congress's recent amendment to FECA that set higher limits for contributions to certain segregated accounts of the national party committees." FEC Br. at 12. This is an odd way to phrase the matter and may not be technically accurate. While the LNC would not have challenged FECA's contribution limit prior to the cromnibus amendment, it challenges the contribution limit as it appears in the U.S. Code—52 U.S.C. §§ 30116(a)(1)(B) and 30125. The LNC does not argue that any portion of Section 30116(a)(1)(B) is severable, a question that goes to the remedy, and not the defect of FECA's current form.

To be sure, excising the provision's reference to segregated accounts, and striking out the segregated account language of subdivision (a)(9), would satisfy the LNC's claim for relief, as it would eliminate the content-based restriction and restore FECA's party limit to the condition of a pure contribution limit. But the LNC doubts that the Court can perform such a legislative task. The

balance Congress would have struck, had it cared to avoid content-based speech restrictions, is unknowable. Obviously, Congress found the old limits insufficient.

The FEC's confusion on this point may not be consequential with respect to any issue in the case, but it seems appropriate to note the matter all the same.

II. THE FEC MAY NOT UNDERSTAND THE DIFFERENCE BETWEEN A CONTRIBUTION LIMIT AND AN EXPENDITURE LIMIT.

Before any substantive discussion of the case's merits, it is critical to establish the basic concepts and terminology. Accordingly, the LNC is constrained to note that the FEC's attempt to distinguish between contribution and expenditure limits is perplexing. The FEC eventually settles on the correct test (even as it would misapply it), but not before offering a confusing and erroneous approach that defies established understanding.

The FEC states that the Supreme Court "defined how to distinguish between a contribution limit and an expenditure limit." FEC Br. at 13. The very next sentence: "The hallmark of a contribution limit is that it 'entails only a marginal restriction upon the contributor's ability to engage in free communication.'" *Id.* (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 20 (1976) (per curiam)). The passage suggest that the extent of the restriction on free speech determines whether a limit is a contribution limit ("marginal restriction") or expenditure limit (significant restriction). Under this view, a complete ban on political contributions would be an "expenditure limit," as it would have a severe effect on speech, while a slight imposition on expenditures would be a "contribution limit."

This is wrong, and it is not at all what *Buckley* held. It should go without saying, but it apparently needs to be said: "contribution limits" limit contributions; "expenditure limits" limit expenditures. To the extent the Supreme Court defined these terms, it referred to an expenditure

limit as "[a] restriction on the amount of money a person or group can spend on political communication during a campaign," *Buckley*, 424 U.S. at 18, and it referred to a contribution limit as "a limitation upon the amount that any one person or group may contribute to a candidate or political committee," *id.* at 20.[2] Now, it may well be that *Buckley* held that contribution limits only have a marginal impact on the contributor's speech, but it is not at all correct to aver that per *Buckley*, the marginal extent of this impact is the "hallmark" that "defined how to distinguish between a contribution limit and an expenditure limit." FEC Br. at 13.

The FEC comes closer to the mark in understanding the difference between contribution and expenditure limits when it discusses *McConnell* v. *FEC*, 540 U.S. 93 (2003). As the FEC aptly notes, in *McConnell*, the Libertarian Party (among others) challenged the "soft money" ban now codified at Section 30125, in part as an expenditure limit. But the Supreme Court found that "in the main," the provision "does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders." *McConnell*, 540 U.S. at 138.

> [I]t is irrelevant that Congress chose . . . to regulate contributions on the demand rather than the supply side. The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, *burdens speech in a way that a direct restriction on the contribution itself would not*.

Id. at 138-39 (citation omitted) (emphasis added).

[2] "The major contribution and expenditure limitations in the Act prohibit individuals from contributing more than $ 25,000 in a single year or more than $ 1,000 to any single candidate for an election campaign and from spending more than $ 1,000 a year 'relative to a clearly identified candidate.'" *Buckley*, 424 U.S. at 13 (footnotes omitted).

III. FECA IMPOSES CONTENT-BASED EXPENDITURE LIMITS, WHICH ARE SUBJECT TO STRICT SCRUTINY, ON NINETY PERCENT (90%) OF THE MONEY POLITICAL PARTIES MAY RAISE.

Without any citation, the FEC blithely declares that "[b]inding First Amendment precedent forecloses the LNC's claim that strict scrutiny applies to the segregated account limits." *Id.* at 12 (citing nothing). But this is only true if, in fact, the "segregated account limits" are pure contribution limits bereft of any content-based speech restrictions. *See, e.g., Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015) (content-based speech restrictions trigger strict scrutiny). That, itself, is at least a question of first impression—if not a particularly difficult one.

Oblivious to the difference between a generic contribution limit, and the new content-based mechanism spawned by the 2014 cromnibus, the FEC adds that "[t]he Supreme Court clearly rejected this argument," to wit, that the FECA party limit is subject to strict scrutiny because it contains content-based restrictions on speech, "when the Libertarian Party made it previously . . . ." FEC Br. at 13.

The LNC is unaware of the Supreme Court having ever considered its challenge to the 2014 cromnibus version of FECA, with its expressive purpose restrictions.

As per *McConnell* and until the cromnibus, FECA's contribution limits on political party contributions were once just that—contribution limits. But that's no longer so. FECA still limits contributions to political parties, but the amounts that may be accepted depend on how the money is "used." 52 U.S.C. §§ 30116(a)(9)(A), (B), and (C). The provision at issue is *both* a contribution limit *and* an expenditure limit. There is simply no precedent that deals with such a provision. And even the FEC concedes that expenditure limits trigger strict scrutiny. FEC Br. at 12.

As a matter of common sense, and under *McConnell*'s "relevant inquiry," the cromnibus FECA is plainly an expenditure limit, because it "burdens speech in a way that a direct restriction on

the contribution itself would not." *McConnell*, 540 U.S. at 138-39. A "direct restriction on the contribution itself" would simply limit the LNC to annual contributions of $X, as before, but it would not burden the LNC's speech in any way thereafter. The current restrictions make a contribution legal or illegal depending on the content of the speech that it would fund. Indeed, in *McConnell*, the lack of any content-based restrictions on contributed funds was the decisive factor in upholding the soft-money ban. Right or wrong, the entire theory of banning soft money is that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id.* at 155.

Respectfully—the notion that "there is no credible argument that the segregated account limits at issue here restrict expenditures," FEC Br. at 15, is risible. To what end are the accounts "segregated," if not to restrict how the funds are "used"? *See* 52 U.S.C. §§ 30116(a)(9)(A), (B), and (C). Can money from a segregated account be expended for a purpose inconsistent with the statutory restriction? The accounting here is not recreational. The expenditure restrictions are *spelled out* in the *text* of the statute *and form the entire basis for the provision's existence*.

The FEC is not wrong in asserting that this case is replete with frivolous arguments, but it has misidentified their source. Even if the FEC were correct, and the limits at issue today are purely contribution limits that have no impact on how money is spent, that idiosyncratic view is hardly mandated by precedent. Provided the text of Section 30116(a)(1)(B) and (a)(9), a not-insubstantial number of judges, lawyers, and other people not employed by the FEC would immediately recognize that the provision limits the amount of money a party may raise *depending on how it speaks with that money*. That this is even in dispute is startling.

At the very least, this is something for the D.C. Circuit to consider en banc—something no court has ever considered before. Yes, the application of strict scrutiny to *pure contribution* limits

"has been squarely rejected through more than forty years of Supreme Court cases." FEC Br. at 17. But the FEC is simply in denial about the nature of the challenged provision.

Consider this sentence: "There is, therefore, simply no basis for the LNC's argument that whether the *segregated* account limit is an expenditure limit subject to strict scrutiny is a substantial issue worthy of certification." *Id.* at 18 (emphasis added). What, exactly, is the function of this segregation, if not to limit the content of expenditures? In one sense, the FEC is correct: if the question of whether strict scrutiny applies is insubstantial, that's because the FEC's position with respect to the nature and function of the challenged provision is utterly frivolous. The current state of First Amendment precedent, and for some time now, makes it exceedingly clear that expenditure limits and all forms of content-based restrictions on speech are subject to strict scrutiny. Pretending that post-2014 cromnibus, FECA's restriction remains an unadulterated contribution limit, is detached from the reality of the plain statutory text and the provision's essential function.

IV. THE FEC DOES NOT ARGUE THAT FECA'S LIMITS ON CONTRIBUTIONS TO POLITICAL PARTIES WOULD SURVIVE STRICT SCRUTINY.

The FEC has placed all its eggs in the "contribution limit" basket. The government does not lose every strict scrutiny case, but here, it does not even bother making an effort to justify the law under strict scrutiny. Perhaps the FEC recognizes that the fit between FECA's expenditure limits, which are plainly content-based restrictions on speech, and any legitimate anti-corruption interest, is not as strong as that which sustains other laws against constitutional challenge. The FEC is unprepared for, or perhaps resigned to, the inevitable outcome flowing from a recognition of the FECA party limit's new, post-cromnibus character.

V. EVEN IF THE CHALLENGED PROVISION IS A PURE CONTRIBUTION LIMIT, THE GOVERNMENT BEARS THE BURDEN OF ESTABLISHING THAT IT PASSES CLOSELY-DRAWN SCRUTINY.

The FEC suggests that the LNC's facial challenge is foreclosed, because the Supreme Court has "repeatedly" upheld "restrictions on political contributions . . . so long as the limits are set at levels that allow candidates and political parties to amass the resources necessary to engage in effective campaign advocacy." FEC Br. at 1 (citation omitted). "[Contribution] limits would only be invalid if they prevent candidates from amassing the resources necessary for effective campaign advocacy." FEC Br. at 24 (internal quotation marks omitted).

Putting aside for the moment whether the challenged provision is truly a pure contribution limit (it is not, as discussed above), these are not correct statements of law. Neither is the FEC's related claim that "[a]s the LNC acknowledges and as explained above, the Supreme Court has squarely held that limits on contributions to political party groups are subject to closely drawn scrutiny *and are* constitutional." FEC Br. at 12 (emphasis added).

The LNC has never acknowledged, and the Supreme Court has never held, "squarely" or otherwise, "that limits on contributions to political party groups . . . are constitutional," in the sense that they are *all* constitutional. Some are, and some are not.

The "closely drawn" scrutiny to which pure contribution limits are held is still a form of heightened scrutiny. The fact that *some* contribution limits have been upheld does not mean that *all* contribution limits are per se constitutional. Contrary to the FEC's sweeping claim of per se constitutionality of contribution limits, the Supreme Court "has recognized . . . that contribution limits might *sometimes* work more harm to protected First Amendment interests than their anti-corruption objectives could justify." *Randall* v. *Sorrell*, 548 U.S. 230, 247-48 (2006) (plurality) (citations omitted) (striking down contribution limits).

Whether the post-2014 cromnibus FECA limit passes "closely drawn" scrutiny—if that level of scrutiny even applies—is plainly a matter of first impression. Nothing like the *current* version of FECA has ever been litigated. The LNC is well within its rights to ask whether this version of a contribution limitation is "so different in kind as to raise essentially a new issue about the adequacy of [post-cromnibus FECA's] tailoring to serve its purposes." *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 395 (2000). After all, the Supreme Court has always "understood contribution limits . . . to 'focus precisely on the problem of large campaign contributions -- the narrow aspect of political association where the actuality and potential for corruption have been identified . . . .'" *Id.* n.7 (quoting *Buckley*, 424 U.S. at 28). FECA's contribution limit, if it is just that, has abandoned this focus. A $33,901 contribution may be illegal where a $339,000 contribution is just fine. Whether the mechanisms of this scheme are "closely drawn" to an anti-corruption interest, and considering the scheme's particular harms, is a matter of first impression.

The anti-corruption purposes of a generic contribution limits are understood. The anti-corruption purposes of a contribution limit that contains expressive purpose, content-based expressive limitations, has yet to be revealed. The most that the FEC offers here is that Congress might have thought this and could have found that, all the while admitting that political parties may or may not value smaller or larger contributions for general or restricted purposes. This is "*closely* drawn *scrutiny*?" The FEC also argues that the cromnibus expressive purpose limits are intended to allow the political parties to raise more money, which is at once a circular argument (Congress allowed additional money to come in so parties could raise more money), and ignores the fungible aspect of money that allows the sort of widespread circumvention by the incumbent parties that the FEC elsewhere complains the LNC should have engaged in as well.

But while the cromnibus amendment's legitimate purposes are, to be charitable, elusive, the harm it visits is obvious: censorship offends First Amendment values. Period, full stop. And where the rules favor fundraising for purposes needed most by incumbent parties, the playing field is tilted. These harms are separate and distinct from the potential evil of a *generic* contribution limit, whereby "candidates and political committees [are prevented] from amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, and they were not at issue in *Buckley* (or any other case) because they are so novel. *Buckley* did not foreclose what it could not foresee, let alone consider. The fact that contribution limits can impose multiple harms does not let Congress off the hook because it has inflicted only one or some of these harms utilizing a new species of contribution limit that incorporates expressive purpose limitations.

The LNC will not fully preview its D.C. Circuit brief here and burden this Court with argument as to why the FEC is wrong in asserting that the post-cromnibus FECA limits pass closely drawn scrutiny. Suffice it to say, there is absolutely nothing in the record—*nothing*—that reveals any connection or rationale between the expressive purpose limitations and anti-corruption interests. "Congress might have thought this and could have thought that" doesn't cut it, especially as there is *nothing* offered on the connection between corruption and expression for a particular purpose, and the FEC has admitted that parties might well favor larger donations for restricted purposes.

Why should they not? Money is fungible. And with no sense of irony, the FEC's loudest complaint throughout this litigation is that the LNC *shoud have preferred a larger, restricted donation*. Of course, the FEC plays fast and loose with the terminology, casually slipping back and forth between "funds" and "contributions." *See* FEC Br. at 22 ("the LNC admitted that it values unrestricted *funds* more than those that may only be used for particular categories of expenses. If the

LNC is correct that unrestricted *contributions* are more valuable . . . .") (citation omitted) (emphasis added). These are not the same thing. Unrestricted *funds* are always better than restricted funds. But a large, restricted *contribution* may be preferable to a smaller, unrestricted *contribution*, if the restricted contribution merely offsets fungible general account money that would have been spent on the restricted purpose anyway. For example, the LNC may prefer an unrestricted $10,000 gift to a $100,000 gift that can only be used on recounts and legal proceedings. Given *their* legal expenses, the RNC and DNC would choose differently.

"[T]he plain text of section [30110] grants exclusive merits jurisdiction to the en banc court of appeals." *Wagner* v. *FEC*, 717 F.3d 1007, 1011 (D.C. Cir. 2013). That is where this case belongs, and that is where the FEC should make its "closely-drawn scrutiny" argument in the unlikely event of that being the correct standard of review.

VI. THE CROMNIBUS EXPRESSIVE PURPOSE LIMITATIONS HAVE NOT DONE THE LNC MANY FAVORS.

Permeating the FEC's defense of this case is the Orwellian notion that the LNC is somehow ungrateful for having its speech restricted. How could the LNC possibly complain after Congress "*relaxed* the burden of an annual contribution limit," and the new law "obviously *increases* the pool of funds that are potentially available"? FEC Br. at 1. "If anything, the segregated account limits permit *increased* spending by parties by providing additional sources of funds they may use to finance certain operations." *Id.* at 15. "Far from *reducing* the resources available to national parties to engage in campaign advocacy, the segregated account limits instead *expand* the parties' ability to amass resources by enlarging the potential pool of funds available to them." *Id.* at 24.

This is an upside-down view of the First Amendment. The ability to express oneself on political matters is not a privilege that Congress deigns to bestow upon political parties. Free speech

is a pre-existing, natural right whose protection happens to be codified in our Constitution. Congress does *not* create the "pool of funds that are potentially available." But for the regulations—which the government must bear the burden in defending—the LNC could raise and spend all the money it wants in whatever way it wants. Until 2014, Congress had imposed a neutral contribution limit on this right that courts had upheld, if not without controversy. The record is fairly obvious that Congress, comprised of the two incumbent parties, has now created a scheme allowing its constituent parties to raise vast sums of money that their smaller competitors cannot raise, leaving the LNC (and others) in the constitutional dust.

Two unassailable facts, admitted by the FEC, tower above all others. First, "the maximum amount of money that the government allows an individual to give the Libertarian National Committee in a calendar year is $339,000." LNC Exh. A, Dkt. 24-3, ¶ 10 (citing 52 U.S.C. §§ 30116(a)(1), 30125; Exh. C, FEC's Response to Request for Admission 26). Second, how the LNC would use that money is subject to content-based restrictions. No, the LNC is *not* grateful that it suffers content-based restrictions on 90% of the money that it might raise from an individual. That is not a gift from Congress. It is a severe violation of the LNC's First Amendment rights.

The baseline is freedom, not the previous regulation. What FECA used to provide is irrelevant. Imagine if a city were to amend its noise ordinance to allow an additional two hours of sound amplification, provided that those two hours of amplified sound were used exclusively to discuss the city council. Would concert promoters be ungrateful for challenging the content-based restriction on two hours of their speech? Or should they just be happy that they can express themselves for an additional two hours, even if the content-based restrictions do not obviously advance any noise-control interest?

Nobody knows how Congress will react if the D.C. Circuit were to agree with the LNC's position. At a minimum, the playing field will at least be more level if Congress couldn't favor the incumbent parties' spending priorities. For its part, the LNC suspects that Congress would raise the contribution limit, if not to $339,000, then to something higher than the existing base limit of $33,900 that the Republicans and Democrats found so constraining. The LNC might be proven wrong as to how this plays out in the end, but, the FEC cannot establish that the cromnibus law is the best that the LNC could hope to obtain. As the cromnibus regime is unconstitutional, it is not irrational for the LNC to ask that it be rid of the scheme, and that Congress try again (if it wishes).

VII. AS THIS COURT CONFIRMED IN *LNC I*, THE LNC MAY CHALLENGE THE CONSTITUTIONALITY OF FECA'S APPLICATION TO PARTICULAR BEQUESTS.

The FEC offers that "[i]f it is constitutional to apply contribution limits to bequeathed contributions, as the Court of Appeals confirmed in 2014, then there is no plausible argument that it is unconstitutional to apply that limit to the bequest at issue here." FEC Br. at 25.

The argument is unserious. In *Libertarian Nat'l Comm., Inc*. v. *FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013) ("*LNC I*"), this Court certified a challenge to a particular bequest even as it held that FECA may be applied to bequests as a general proposition. The FEC unsuccessfully complained in a motion for reconsideration, and to this day it complains that this Court "[m]isperceiv[ed] the import of broader arguments the Commission had made . . . ." FEC Br. at 8. The LNC respects the fact that the FEC would rather not be sued, especially where it would be called upon to defend its more aggressive and creative applications of federal election law, *e.g.*, for fear of corruption from the hereafter. The LNC could play this game, too, as certification of its broader categorical attack was denied under a pre-*Shapiro*, pre-*Holmes* certification standard. But the LNC acknowledges the reality of what has already been won and lost. It's well-past time for the FEC to do likewise.

The argument would ordinarily end here, but the LNC is constrained to respond to one of the FEC's more objectionable claims on this point. Yes, the LNC conceded, as it should have, that were it to someday lose a substantially similar case, that loss would preclude similar cases. But that hasn't happened. And the LNC most certainly did not argue in *LNC I* that Judge Wilkins erred in certifying the as-applied challenge concerning the Burrington bequest, and that he should have certified nothing because he declined to certify a broader challenge. Here is the complete language from the page cited by the FEC:

> Indeed, were LNC to lose this case before the D.C. Circuit, and a subsequent suit were brought involving a different bequest that is nonetheless similarly situated to the LNC here, that case would likely be frivolous within the meaning of §437h. *But LNC has not lost this case, nor has any remotely similar case involving any bequest been decided by the Court of Appeals.* And were LNC to prevail before the D.C. Circuit, presumably no materially similar cases would arise, as the Commission would conform its conduct to the Court's decision and implement rules for similar, non-corrupting bequests.

LNC v. *FEC*, D.D.C. No. 11-562, Dkt. 51 at 6 (citation omitted) (emphasis added).

This language remains true today. The LNC *did not lose* the challenge Judge Wilkins certified with respect to the Burrington bequest. The case was declared moot before it could be decided. It remains true that the Court of Appeals has never decided any "remotely similar case involving any bequest." It remains quite plausible, and not at all foreclosed, for a political party to advance an argument as to why the FEC lacks a constitutionally-adequate basis (valid anti-corruption concerns) to limit the money that may be accepted from a particular bequest.

To the extent that the FEC argues that the LNC has not sufficiently distinguished Shaber's bequest from one where anti-corruption concerns might apply, the arguments are at best premature. This goes to the merits of the LNC's claims, which are within the exclusive jurisdiction of the en banc D.C. Circuit. Whether and to what degree Shaber's bequest should be differentiated from ordinary bequests, which questions necessarily include considerations of how and under what

circumstances a bequest raises valid anti-corruption concerns, is precisely the sort of question that the Act leaves to the en banc Court of Appeals. To the extent the *LNC I* opinion serves as a guide, it indicates that Shaber's bequest is not too different from Burrington's. Burrington donated only a small amount in his life to the LNC, $25.00. *LNC I*, 930 F. Supp. 2d at 170. Shaber donated more consistently, but in nominal amounts. His $3,315 over the course of 24 years—average annual donation, $138.13, LNC Exh. E—did not mark him as a big fish. Not surprisingly, as with Burrington, *LNC I*, 930 F. Supp. 2d at 170, nobody at the LNC knew that Shaber would leave a bequest to the party. LNC Exh. A, Dkt. 24-3, ¶ 70. Indeed, neither Shaber nor anyone related to him or acting on his behalf has had any relationship with the LNC, its officers, board members, or candidates, apart from Shaber's contribution history. *Id.* ¶ 84. And aside from pursuing its ideological and political mission, LNC has provided nothing of value to Joseph Shaber, or to anyone else, in exchange for his bequest to the LNC. *Id.* ¶ 85.[3]

Furthermore, as with Burrington, "there are no facts to indicate that the LNC solicited a large bequest from" Shaber, "provided any benefit or special access to [Shaber] while he was alive, or provides any special benefit or access to [Shaber]'s heirs or representatives now." *LNC I*, 930 F. Supp. 2d at 171. To say, as does the FEC, that the campaign finance laws should be afforded a prophylactic effect, and may bar many contributions that are not, in fact, tainted by corruption, is all well and good. It is also perfectly compatible with the acknowledgment that the dead are different, and thus raise different indicia of potential corruption and a different level of concern from that raised by the living. With a bequest, the corruption inquiry is wholly retrospective, and barring

[3]Had Shaber been a more generous and active donor to the LNC during his life, he would have left the FEC with a greater opportunity to conduct discovery into his relationship with the party.

supernatural intervention, the potential for quid pro quo activity is rather more limited, as is its enforcement. Judge Wilkins's opinion inherently recognizes that a bequest poses a rather different situation than that of a living person who foreswears corruption attached to a large gift. The FEC fails to acknowledge the distinction.

Along these lines, the FEC simply errs in asserting that "any First Amendment interest the LNC has in receiving contributions is already reflected in the constitutional test the Supreme Court has applied to uphold FECA's contribution limits." FEC Br. at 32. The Supreme Court never held that political parties lack a First Amendment interest in receiving contributions. It only held that the challenged versions of FECA did not infringe the rights of parties. Certainly the Supreme Court never considered how it might apply that balance in the context of a particular bequest, let alone, in combination with a content-based expenditure limit.

And of course, as the Supreme Court has explained to the FEC, "[i]n upholding [a BCRA provision] against a facial challenge, we did not purport to resolve future as-applied challenges." *Wis. Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 411-12 (2006) (per curiam).

VIII. THE FEC'S SUGGESTED EDITS TO THE PROPOSED QUESTIONS ARE IRRATIONAL.

Sensing that this case may not be "frivolous" after all, the FEC takes aim at two of the LNC's questions. But in seeking to re-write these questions, the FEC is re-writing the complaint, and altering the LNC's theory of the case. There is no valid reason to do so.

The second question asks:

> Do 52 U.S.C. §§ 30116(a)(1)(B) and 30125, on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its money?

This question merely tracks the Complaint, which posits a facial challenge against 52 U.S.C. §§ 30116(a)(1)(B) and 30125. *See* Complaint, Dkt. 1, ¶ 31 ("Because they favor, on their face, the

acceptance of funds based on the content of a political party's speech, 52 U.S.C. §§ 30116(a)(1)(B) and 30125 violate the First Amendment speech and associational rights of the LNC and its supporters"). Ever-resistant to the LNC's essential theory of the case, the FEC wants to re-frame this challenge as one that asks whether the LNC's rights are violated "by permitting it to accept 300% of the otherwise applicable contribution limit." FEC Br. at 34.

The LNC's third question asks whether "restricting the purposes for which the Libertarian National Committee may spend the bequest of Joseph Shaber violate the Committee's First Amendment rights," tracking its challenge to the "CONTENT-BASED RESTRICTIONS," Complaint, Dkt. 1, at 10 (Count Three), based on the LNC's desire not "to spend the bulk of the [Shaber bequest] on attorney fees, a convention, or a building," *id*. ¶¶ 33, 34. The FEC would alter this request, too, by asking whether the LNC's rights are violated "by permitting it to accept 300% of the otherwise applicable contribution limit from the bequest of Joseph Shaber"for segregated purposes. FEC Br. at 35.

The FEC's proposed edits are irrational and argumentative. Obviously, when someone is being "permitted" to do something that he or she otherwise cannot ordinarily do, no rights are violated. The FEC's construction assumes that the default, background condition is a complete lack of freedom. That may not be a surprising position for the FEC to hold, but it is a position that stands completely outside the broad spectrum of how the First Amendment is understood in this country. Stated simply, Americans presume that they may speak freely within the scope of a right that secures political expression.

The FEC's alternative construction is thus offensive to the LNC's values, as well as to the LNC's right as a plaintiff to describe and define its conception of its rights and how they are being violated. As discussed above, at 12-13, the LNC strongly rejects the notion that it is being

"permitted" to do anything by a law that *restricts* the amount of money it can accept and what it may do with the money. The government does not "permit" the LNC to enjoy First Amendment rights. FECA is only, at best, an imposition on First Amendment rights. The questions here are whether aspects of that imposition are constitutional. The LNC has framed these questions in an accurate, direct, and neutral fashion.

CONCLUSION

FEC's motion to dismiss should be denied. Plaintiff's certification motion should be granted.

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Respectfully submitted,

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