IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MOTION TO CERTIFY FACTS AND QUESTIONS

Comes now the Plaintiff, Libertarian National Committee, Inc. ("LNC"), by and through undersigned counsel, and pursuant to 2 U.S.C. § 437h, moves this Court to adopt the proposed findings of fact and certify the following question to the Court of Appeals for the District of Columbia Circuit:

Does imposing annual contribution limits against testamentary bequests directed at, or accepted or solicited by political party committees, violate First Amendment speech and associational rights?

This motion is based upon the attached memorandum of points and authorities in support of the motion, attached declarations and exhibits, the Court's file, matters of which the Court may take judicial notice, and any argument the Court may wish to schedule. Plaintiffs reserve the right to submit additional proposed facts as may be warranted in response to any response to this motion, including proposed facts, by the Defendant.

Wherefore, Plaintiff respectfully requests that the motion be granted.

Dated: May 4, 2012

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO CERTIFY FACTS AND QUESTIONS

Comes now the Plaintiff, Libertarian National Committee, Inc. ("LNC"), by and through undersigned counsel, and submits its Memorandum of Points and Authorities in Support of its Motion to Certify Facts and Questions to the Court of Appeals.

Dated: May 4, 2012

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

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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PRELIMINARY STATEMENT

One day in 2007, Libertarian Party officials were surprised with the news that a gentleman in Knox County, Tennessee, Raymond Burrington, had bequeathed the Libertarian Party a portion of his estate. The bequest would eventually be valued at $217,734. Burrington was unknown to party officials and employees. He had neither sought nor received any special favors for his generosity, and the Party is legally entitled to the money regardless of whether it would do Burrington or his heirs any favor today, which it cannot.

The sudden infusion of Burrington's bequest would have materially impacted the Party's ability to advance its ideals. Yet to this day, Plaintiff Libertarian National Committee, Inc. ("LNC") cannot access the bequest's full amount, nor can it operate a fully-effective planned giving program, as Defendant Federal Election Commission ("FEC") subjects testamentary bequests to federal contribution limits. The trust formed by Burrington's estate and LNC to parcel out the money per the government's schedule specifically authorizes this lawsuit, which relates to a significant Article III controversy: to what extent does the First Amendment protect testamentary bequests?

People hold varying beliefs about death and what might follow it. Of these, arguably among the most common is "you can't take it with you." People who hold fast to their possessions throughout life freely leave instructions regarding their assets' dispersal upon death, and those instructions often serve expressive values. Charities, educational institutions, religious organizations, and causes of every description benefit significantly from the generosity of those

who remember them as they pass on. Gifts to individuals may also convey the decedent's love or appreciation. Testamentary bequests plainly constitute core First Amendment expressive activity.

Yet when testamentary gifts take a political dimension, the federal government's imposition of contribution limits severely hampers the expression. The impact on speech is significant: death is the time at which donors are least inhibited in their spending, as they have no personal need to save and spend their money, and testamentary bequests represent the donor's final ability to speak. Limiting such gifts deprives political parties of substantial financial resources, and hinder their ability to engage in political advocacy.

At the same time, the government's interests in regulating testamentary bequests is, at best, unclear. There is no practical way to guarantee that a promised bequest will materialize, or materialize at any point in time, to the benefit of any particular candidate. People are frequently disappointed upon the reading of a loved one's will. It is also impossible for the donor to enforce a *quid-pro-quo* arrangement once a gift has been made. Dead people *voting* may manifest corruption, but dead people leaving behind money to support a political party does not. Neither does it manifest corruption for a political party or its candidates to ingratiate themselves to individuals in the hope that they might donate money, an axiom that is doubly true when the hope is for a donation at some indeterminate time upon the prospective donor's passing.

And even if there were some valid concern regarding the corruption of the political process by testamentary bequests, the government could draft laws specifically addressing such possible corruption far short of applying strict contribution limits to *all* testamentary bequests, regardless of their connection to any particular candidate. For example, the government could

restrict the targeted solicitation of bequests from gravely-ill people, or require the passage of an election cycle between the making of a testamentary bequest and its receipt by a political party.

In any event, this Court is not called upon to adjudicate the parties' dispute—only to discern that in fact, the constitutional question here is neither frivolous nor settled, and to act as fact-finder for the D.C. Circuit. Both tasks are easy. The Supreme Court has expressly approved of as-applied challenges to federal contribution limits, and the application of such limits to testamentary bequests has not apparently been contemplated by either Congress or, to this point, by the courts. Moreover, the Supreme Court's approach to contribution limits is based largely on factors that cannot apply to the dead—including a donor's ability to associate with and otherwise support the donee party. Even under the "less rigorous" heightened standard of review for contribution limits, the peculiar application of contribution limits to testamentary bequests raises serious questions.

The salient facts are largely undisputed, and otherwise readily capable of resolution (even if the parties might later disagree as to which facts are salient). Respectfully, the matter should be certified for resolution by the Court of Appeals.

PROPOSED FACTS

Plaintiff's proposed facts are listed on Exhibit A. They are recited here, with some discussion.

A. *The Parties to this Litigation*

Plaintiff Libertarian National Committee, Inc. is the national committee of the Libertarian Party of the United States. Redpath Decl., ¶ 2; Answer, ¶ 4. Defendant Federal Election

Commission is the federal government agency charged with administrating and enforcing the federal campaign finance laws, including the laws challenged in this action. Answer, ¶ 5.

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. 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.

Founded in 1971, the party has yet to elect a federal office holder, and no current federal office holder is affiliated with the Libertarian Party. Redpath Decl., ¶ 4. 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. For example, 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. *Id.*; exh. B. Candidate support that year totaled a mere $500. *Id.* Indeed, ballot access typically dwarfs items such as candidate support, media relations, outreach, member communications, and voter registration—combined. *Id.*

The situation is self-perpetuating, as 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. 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. *Id*. Numerous Americans donate money to various organizations and causes which share the Party's libertarian 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.

This Court cannot be expected to pass judgment on the potential popular appeal of any political party, and neither can the FEC. Accordingly, the FEC concedes, as it must, that the Libertarian Party's past performance does not guarantee future results—and that money is tied to the Libertarian Party's potential for success. 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. 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*

Determining this case would require some baseline assessment of the FEC's relevant regulatory behavior. Plaintiff concedes some of these may be as much statements of law as they are statements of fact, but they do describe the circumstances of the parties' relationship and the manner in which FEC conducts itself to generate the present controversy. LNC thus submits these legal facts for certification.

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. 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. 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.

Title 2 U.S.C. § 441a(a)(1) provides, in pertinent part, that "no 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."[1] Pursuant to 2 U.S.C. § 441i, enacted as part of the "Bipartisan Campaign Reform Act of 2002," 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).

Pursuant to Section 441a(c), the contribution limits set forth in Section 441a(a)(1) are indexed for inflation. The current annual limit on contributions to political parties is $30,800. *See* http://www.fec.gov/info/contriblimits1112.pdf (last visited May 4, 2012). Although the term "person," as used in Section 441a(a)(1), is not specifically defined to include an individual's

[1]All further statutory references are to Title 2, United States Code.

testamentary estate, Defendant FEC extends this definition to include testamentary estates. Exh. C, Response to Request for Admission No. 4; Exh. D, FEC Advisory Opinion 2004-02; Exh. E, FEC Advisory Opinion 1999-14.

Accordingly, 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. Exhs. D, E.

It would also appear that Section 441i would prohibit parties from soliciting bequests that exceed contribution limits, even where the bequest would be paid over a period of years so as to comply with those limits. But FEC expressly denies this interpretation of Section 441i. Answer, ¶¶ 2, 25. Apparently, under FEC's view, the term "funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act," refers not to an absolute sum of money—money that is either within or without the limits, and thus can or cannot be solicited—but only to money *received* in compliance with the Act. Under the literal view of Section 441i, no amount exceeding the limits may be solicited. Under the FEC's apparent view, any amount can be solicited so long as its receipt is eventually "subject to . . . this Act."

"In matters of statutory interpretation, the court must give effect to the unambiguously expressed intent of Congress. To determine whether the meaning of a statutory provision is plain, the court's analysis begins with the most traditional tool of statutory construction, reading the text itself." *Wolf Run Mining Co.* v. *Fed. Mine Safety & Health Review Comm'n*, 659 F.3d 1197,

1200 (D.C. Cir. 2011) (citations and internal punctuation omitted). Congress used the language "funds, that *are* not subject" to the Act (emphasis added), not funds that "*would not be* subject" to the Act depending on how they are dispersed. *Cf. City of Tacoma* v. *FERC*, 331 F.3d 106, 114 n.11 (D.C. Cir. 2003).

FEC's more elastic view of "funds" is plausible, although it must be remembered that a testamentary estate is just another "person" under Section 441a(a)(1). Were FEC's construction of Section 441i correct, there would be no reason to suppose that political parties could not also solicit unlimited donations to be irrevocably-dispersed during the donors' lifetime, so long as the donations would be paid over a period of years within annual contribution limits. In other words, so long as the party can legally solicit donations that would take a particular form—irrevocable, but dispersed within annual limits—it should not matter, and under the text of the Act, it does not matter, that the donations are solicited from dead or living "persons."[2] But FEC refused to admit this application of its view of Section 441i, suggesting it would apply the provision differently to different "persons." Exh. C, Response to Admission Request 13. FEC's response added further ambiguity, in that it would apply the statute differently to different types of political committees covered by the provision. *Id.* And asked directly what effect Section 441i's prohibition on solicitation has that the section's prohibition on receipt of over-limit funds already accomplishes, FEC objected. Exh. C, Response to Interrogatory 3.

[2]Congress might determine that donations by testamentary estates are different in kind from donations by living individuals, but then, it is not apparent that Congress ever considered issues relating to donations by testamentary estates, and the statutory text reflects no such distinction.

Alas, while FEC's shifting, multiple-choice application of Section 441i's solicitation ban is troubling in other contexts, that is a matter for another day. This case is narrowed by FEC's concession that the ban does not extend to testamentary bequests exceeding contribution limits in toto but collected pursuant to FECA limits. LNC thus does not require certification of the second question raised in its complaint, whether it may solicit testamentary bequests in any amount whose receipt is spread out over time to comply with FECA limits. However, it remains clear that FEC enforces Section 441i to prohibit the solicitation of testamentary bequests that would be accepted without limits completely upon the donor's death, and this much, LNC contests as a First Amendment violation.

C. *The Burrington Bequest*

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. Burrington's bequest to the Libertarian Party totaled $217,734.00. Exh. G. The Libertarian Party had no knowledge of this bequest prior to Mr. Burrington's passing. Kraus Decl., ¶ 2. 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.

Owing to Defendant FEC's application of federal contribution limits, Plaintiff 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.

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.

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. 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; Redpath Decl., ¶ 8.

D. *Decedents' Estates and Political Parties*

Notwithstanding the fact that living individuals and testamentary estates are both considered "persons" under FECA (and notwithstanding that the FEC might at times wish to treat these "persons" differently), very substantial differences exist between donors who donate in the course of their life, and donors planning to disperse their assets at life's end, with respect to their relationship to donee political parties.

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. FEC concedes that "the 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, but argues the mechanistic "transfer, distribution, donation, or

contribution of funds" by the estate is not expressive. *Id.* This is akin to claiming that writing a check to charity is expressive, but the act of donating to charity may not be expressive because the bank clerk's function in processing the check is ministerial. In any event, FEC's argument is foreclosed by its longstanding approach to testamentary estates: "The Commission 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.

Beyond conceding that remembering a political party in one's will is expressive activity, FEC further concedes that 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. 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, so the evidence on this point is unchallenged. Redpath Decl., ¶ 8; Kraus Decl., ¶ 4. At the very least, the Libertarian Party does not associate with the dead and does not maintain deceased members. *Id.*

Nor can the FEC deny that individuals who leave testamentary bequests for political parties often have no idea which candidates might benefit from the contribution. Exh. C, Response to Request for Admission No. 8. This much is self-evident. 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. Burrington could not have predicted which candidates would run for office in 2007, let alone the

topical issues in the campaign.[3] 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.

In part for the same reasons, 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. Of course, 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. And the Libertarian Party, for its part, offers no benefits in exchange for being remembered in an individual's will. Redpath Decl., ¶ 10.

Additionally, living individuals can engage in many forms of political activity to help their favorite party, other than donating money. But 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.

Testamentary bequests are also likely to be more generous than donations made in one's lifetime. Redpath Decl., ¶ 8; see also discussion of FEC records survey, infra. Again, the

[3]Burrington could not have foreseen that his gift would be made available just ahead of an election in which Barack Obama, then an Illinois legislator who had just lost his primary bid for a House candidacy, would be elected President.

Burrington bequest proves as much. 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.

Helpfully, the FEC subpoenaed thousands of pages of Democratic, Republican, and Green Party records relating as much. At least at this time, it does not appear necessary to burden the Court with excessive documentation, as the FEC's excerpted review of these records, as well as its internal records review, prove that other parties have also received substantial support from their deceased donors, and have likewise been hampered by the contribution limits at issue here.

FEC does not track political contributions received from testamentary bequests. Clark Decl., ¶ 2. Attempts to search FEC's database for such records 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.

The imposition of contribution limits to political parties—BCRA's prohibition of so-called soft-money—makes it difficult for FEC to identify oversized bequests 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. FEC submits

> the average hard-money contribution made by estates to national political party committees from bequeathed funds was approximately $9,041.09. In contrast, the average soft-money donation made by estates to national political party committees from bequeathed funds was $62,117.23.

Clark Decl., ¶ 11. But surely the disparity is even greater than that, since 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.

FEC does not reveal which portion of pre-BCRA "soft money" contributions exceeding FECA's limits came from living as opposed to dead people. Nor does FEC reveal the average size of bequests to political parties, relative to the average size of donations from living people. A rough approximation of average size of bequests to political parties, however, 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.

But LNC's average contribution is only $45.98, Kraus Decl., ¶ 9, and 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

At least in terms of average bequest size, per the FEC's survey, Libertarian donors lie comfortably in the middle between Republicans and Greens.

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

As noted supra, application of the contribution limits to the Burrington bequest prevented LNC from having the entire amount of the bequest available for use during the 2008 election cycle. An additional $160,734.00 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.*

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. 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. *Id.* ¶ 13. 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. *Id.* ¶ 14.

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. *Id.*, ¶ 15. The LNC has placed advertisements in its newsletter, LP News, seeking testamentary bequests. Representative copies are attached as Exhibit K. 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.

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. *Id.* ¶ 17.

SUMMARY OF ARGUMENT

LNC's complaint plainly passes the low threshold for certification under Section 437h. The claim is neither frivolous, nor has it been previously adjudicated.

Although the Supreme Court has previously upheld contribution limits to political parties against a facial challenge, the Court has expressly authorized the pursuit of as-applied challenges. For constitutional purposes, the difference between donations made by living donors, and donations made by estates on behalf of the deceased, are quite stark. None of the arguments advanced to sustain contribution limits to political parties are applicable to the situation presented by testamentary bequests.

The imposition on speech here is severe, as the deceased have few options to speak other than through testamentary bequests. Because such bequests are likely to be unusually generous relative to normal contributions, and owing to their size in proportion to the budget of nascent and struggling political parties, the limitation's impact on recipient parties is also relatively high.

On the other side of the equation, the regulatory rationales for such limitations on speech are non-existent. The anti-corruption rationale for limiting contributions is, at best, theoretical, where a decedent would rarely suspect the identity of candidates he or she might be supporting. Many years often pass between the time that a bequest is recorded in an estate document, and the time that the party would actually receive the money. For that and other obvious reasons, the deceased are also unable to engage in a *quid pro quo* transaction with a party or its candidates and elected officials.

If the regulation is still to be viewed as an associational restriction, it still fails constitutional scrutiny for much the same reasons that it fails scrutiny as a regulation of speech.

ARGUMENT

I. SECTION 437H CERTIFICATION STANDARDS.

Title 2 United States Code § 437h provides:

> [T]he national committee of any political party . . . may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting enbanc.

Pursuant to Section 437h, the District Court should (1) identify the constitutional issues raised by the complaint; (2) take evidence; (3) make factual findings; and (4) certify

constitutional questions to the D.C. Circuit. *Buckley* v. *Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc). As Section 437h does not require certification of questions that are frivolous or purely hypothetical, *Ca. Med. Ass'n* v. *FEC*, 453 U.S. 182, 192 n. 14 (1981), this Court need only make a threshold determination that Plaintiff's question for certification is neither frivolous nor already settled by precedent. *See, e.g., Khachaturian* v. *FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (en banc); *Goland* v. *United States*, 903 F.2d 1247, 1257-58 (9th Cir. 1990); *see also Int'l Ass'n of Machinists and Aerospace Workers* v. *FEC*, 678 F.2d 1092, 1096 (D.C. Cir. 1982) (district court certified questions under Section 437h after finding the claims "neither frivolous nor so insubstantial as to warrant dismissal for failure to state a claim.").

II. THIS CASE IS NEITHER FRIVOLOUS, NOR DOES IT RAISE SETTLED QUESTIONS.

LNC's case plainly bears further briefing and consideration by the Court of Appeals.

A. As-Applied Challenges to Federal Contribution Limits Are Available.

Although limits on contributions to political parties have been upheld against facial challenge, *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that does not mean such laws are immune from as-applied challenges. Indeed, the Supreme Court specifically offered that "a nascent or struggling minor party can bring an as-applied challenge if [Section 441i(a)] prevents it from 'amassing the resources necessary for effective advocacy.'" *McConnell* v. *FEC*, 540 U.S. 93, 159 (2003) (citing *Buckley*, 424 U.S. at 21).

That is precisely the sort of case at issue before the Court. And even if the Libertarian Party were not "struggling" owing, in part, to federal contribution limits, the various considerations offered by the Supreme Court to generally uphold contribution limits are inapplicable on the peculiar facts of this case. Right or wrong, the Supreme Court's analysis in

Buckley and its progeny was based entirely upon the assumption that the donors whose contributions were being limited are alive. Like FECA's text itself, *Buckley*'s words do not manifest any consideration for the very different circumstances presented by donations by testamentary bequest.

B. The Challenged Regulation Implicates Important Constitutional Concerns.

"[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2827 (2011) (quotation and internal punctuation omitted). The First Amendment guarantees freedom of political speech to "ensure the unfettered interchange of ideas for the bringing about of political and social change desired by the people." *Buckley*, 424 U.S. at 14. Moreover, the First Amendment guarantees the right of association, as "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). Associating with others "enables individuals [to] make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control,* 454 U.S. 290, 294 (1981); *Buckley*, 424 U.S. at 22. Contributions to political parties ordinarily implicate both speech and associational rights. *Buckley*, 424 U.S. at 14-15.

C. Limiting Testamentary Bequests to Political Parties Violates the First Amendment Right of Free Speech.

FEC concedes that the conduct at issue here is expressive. Because limiting testamentary bequests to political parties "burdens political speech, it is subject to strict scrutiny." *FEC* v.

Wisc. Right to Life, Inc., 551 U.S. 449, 464 (2007); *Arizona*, 131 S.Ct. at 2817; *Citizens United* v. *FEC*, 130 S.Ct. 876, 882 (2010).

Contribution limitations have been upheld under a "'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest,'" *McConnell*, 540 U.S. at 136 (citations omitted), but this standard of review is based on findings that contribution limits only have a minimal burden upon expressive conduct, and are primarily viewed as restrictions on "associational rights." *Id.* "[W]e have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny." *Arizona*, 131 S.Ct. at 2817. Contribution limits to political parties were previously upheld, facially, on the theory that such limits "entai[l] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20; *McConnell*, 540 U.S. at 134-35.

To determine the standard of review, if not the case, it is necessary to examine some of the Supreme Court's observations about political speech, and consider whether these observations hold equally true of political speech by testamentary bequest as by living, breathing individuals. They do not.

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution *but does not in any way infringe the contributor's freedom to discuss candidates and issues*.

Buckley, 424 U.S. at 21 (emphasis added); *McConnell*, 540 U.S. at 135.

> The overall effect of the Act's contribution ceilings is merely . . . to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on *direct political expression*, rather than to reduce the total amount of money potentially available to promote political expression.

Buckley, 424 U.S. at 21-22 (emphasis added); *see also Preston* v. *Leake*, 660 F.3d 726, 734 (4th

Cir. 2011) (upholding a ban on campaign contributions by lobbyists as "less onerous because of the numerous other ways in which would-be contributors can associate with particular candidates and express their political viewpoints.").

Even so, contribution limits impose serious burdens on free speech only if they are so low as to "preven[t] candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; *McConnell*, 540 U.S. at 135.

But once people pass away, they have no ability to engage in any alternative forms of "direct political expression." The limitation on an estate's contribution absolutely "reduce[s] the total amount of money potentially available to promote political expression" in a given period of time. The deceased cannot give to other organizations, select individual candidates to support, volunteer on campaigns, or write letters to the editor. And the impact extends beyond depriving a party of support for a particular year in which the limitation is in effect. The difference between collecting $30,800, and collecting $217,734 or $574,332.33 in a given year, plainly constricts a party's options for strategic spending. Moreover, the ineffectiveness of bequeathing money to political parties, owing to annual contribution limits, may reduce the overall money donated to parties. An individual wishing to have a million dollars' worth of ideological, expressive impact may seek alternative recipients for that money if the putative party donee could only accept that sum over the course of 33 years.

Even were strict scrutiny inapplicable, limiting testamentary bequests to political parties fails the "less rigorous" yet still heightened review applicable to some restrictions on campaign contributions. "The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech:

preventing corruption or the appearance of corruption." *Speechnow.org* v. *FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (en banc).

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.

FEC v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("*NCPAC*"). In *Citizens United*, the Supreme Court confirmed that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." 130 S.Ct. at 910. "The Court returned to its older definition of corruption that focused on *quid pro quo*, saying that '[i]ngratiation and access . . . are not corruption.'" *Speechnow*, 599 F.3d at 694 (quoting *Citizens United*, 130 S.Ct. at 910).

Thus, it does not matter that political parties and their candidates might "be nice to old people" in the hopes of someday being remembered with a bequest. Probate courts routinely disappoint putative heirs. There is simply no way for political parties to ensure that a promised or hoped-for bequest comes through, nor is there any lawful way for political candidates to ensure that memorialized gifts to their parties are reaped in time for election day. Indeed, on the evidence before the Court, there is even less than "'scant evidence' that [testamentary bequests] even ingratiate," *id.*, as LNC had no knowledge of Burrington, Kelleher, or Reitano, nor does LNC offer anything of value to individuals in exchange for mere *promises* to *someday* leave behind money for the party upon their death. And once a donee has passed away, nothing but a party's conscience obligates it to honor any promise to the deceased, whose money the party already has, and who can neither donate more nor retaliate.

Indeed, a testator to a political party has no way of knowing which candidate might benefit from the bequest. "The candidate-funding circuit is broken." *Arizona ,*131 S.Ct. at 2826. And speech unconnected to candidates cannot raise corruption concerns. *NCPAC*, 470 U.S. at 496-97; *Buckley*, 424 U.S. at 47. The regulatory rationale for upholding FECA's restrictions on contributions to political parties, presumptively by *living* individuals, thus fails.

> [T]his quite modest restraint upon protected political activity serves to prevent evasion of [the campaign contribution] limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.

Buckley, 424 U.S. at 38. But if the testator can assume nothing about the identity of candidates upon the bequest's dispersal, there is obviously no limit to circumvent.

Perhaps, under some circumstances, a party could heighten the odds of effectuating a testamentary *quid pro quo* by soliciting a bequest from a terminally-ill individual. But there is no evidence that this has ever occurred, nor is it necessary to effectuate sweeping limitations on all testamentary bequests to deal with this far-fetched hypothetical. The government could easily remedy this circumvention scenario by applying contribution limits to testamentary bequests received within a short time of being made, perhaps within one election cycle (to eliminate the prospect that the donee knows the identity of the candidates who might benefit from the bequest). Or the government could restrict the ability to solicit donations from gravely-ill people, perhaps imposing contribution limits where the party reasonably should have known that the donor's bequest would be effectuated in the immediate future. Such rules would clearly alleviate much of the burden currently imposed by blanket application of contribution limits to testamentary bequests, while targeting the hypothetical evil of a *quid pro* bequest. The government may have

other narrow tailoring options. As currently applied against *all* testamentary bequests, however, the restrictions reach too much conduct that cannot raise legitimate regulatory anti-corruption interests.

D. Limiting Testamentary Bequests to Political Parties Violates First Amendment Associational Rights.

The parties apparently agree that associational rights are not implicated when individuals remember political parties in their wills. The act of leaving a testamentary bequest to a political party is purely expressive, not associational.

However, should the Court discern some associational relationship in the transaction, application of contribution limits to such "associational" activity would be unconstitutional for many of the same reasons noted with respect to the application of contribution limits upon the expressive aspects of testamentary bequests. "[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of *one aspect* of the contributor's freedom of political association." *Buckley*, 424 U.S. at 24 (emphasis added). But donors remain "free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id*. at 28 (footnote omitted).

If a testamentary bequest to a political party is a manifestation of associational freedom, it is not merely "one aspect" of that freedom—it is likely the only possible manifestation. The other options for political association are, obviously at best, quite limited. Moreover, the lack of an anti-corruption rationale, and the availability of less restrictive regulatory measures, is no different than as considered in the speech context.

CONCLUSION

LNC's claim raises non-frivolous issues of first impression. It warrants certification to the Court of Appeals.

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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