UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	Civ. No. 11-562 (RLW)
Plaintiff,	
v.	
FEDERAL ELECTION COMMISSION,	MOTION FOR SUMMARY JUDGMENT
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission ("Commission") respectfully moves the Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of its motion, the Commission is filing today its Memorandum in Opposition to Plaintiff's Motion to Certify Facts and Questions and in Support of Defendant's Motion for Summary Judgment; Responses to Plaintiff's Facts Submitted for Certification; and a Proposed Order. The Commission's Proposed Findings of Fact, filed May 4, 2012 (Docket No. 24) pursuant to 2 U.S.C. § 437h, shall serve as its statement of material facts as to which the moving party contends there is no genuine issue, pursuant to LCvR 7(h)(1).

Respectfully submitted,

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July 6, 2012

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LIBERTARIAN NATIONAL COMMITTEE, INC.,	)	Civ. No. 11-562 (RLW)
Plaintiff,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO CERTIFY FACTS AND QUESTIONS AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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As the Supreme Court has recognized, the "idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible." *McConnell v. FEC*, 540 U.S. 93, 144 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010). Based on a record replete with "examples of national party committees peddling access to federal candidates and officeholders" in exchange for large "soft money" donations, the Court upheld the constitutionality of Congress's effort to end those donations through the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), which amended the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57. *McConnell*, 540 U.S. at 142-89.

Plaintiff Libertarian National Committee, Inc. ("LNC") now seeks to partially reopen the floodgates closed by BCRA, claiming that the application of FECA's contribution limits to bequests to political parties violates the First Amendment. Specifically, the LNC argues that it should be permissible for national political party committees to accept in a single calendar year *unlimited* bequeathed contributions to be spent on federal elections.

The LNC's argument fails. First, it is well-settled that the deceased have no First Amendment rights. Second, and in any event, FECA's contribution limits are closely drawn to support important government interests in deterring corruption. And these important government interests are implicated equally for bequeathed contributions as they are for other contributions because donors could purchase preferential access to a party's federal officeholders with promises of large bequests.

Thus, the LNC has failed to raise a substantial question sufficient to qualify for *en banc* review by the court of appeals pursuant to 2 U.S.C. § 437h, the extraordinary judicial review provision the LNC invokes. The Court should deny the LNC's request for section 437h

certification, and the Federal Election Commission ("Commission" or "FEC") should be granted summary judgment.

I. BACKGROUND

Plaintiff LNC is the national committee of the Libertarian Party. (Def. FEC's Proposed Findings of Fact ("FEC Facts") ¶ 2 (Docket No. 24).) Defendant FEC is an independent agency of the United States with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. (*Id.* ¶ 1.)

FECA instructs that "no person shall make contributions . . . to the political committees established and maintained by a national political party . . . in any calendar year which, in the aggregate, exceed [$30,800]."[1] 2 U.S.C. § 441a(a)(1)(B) ("Contribution Limit"). There are three different types of national political party committees — national committees, House campaign committees, and Senate campaign committees — and political parties often maintain one of each. (FEC Facts ¶ 6.) The Contribution Limit applies independently to each of a political party's national party committees. 11 C.F.R. § 110.1(c)(3).

Construing the language of the Act, the Commission has determined that the Contribution Limit applies to funds contributed through bequests. "[T]he testamentary estate of a decedent is the successor legal entity to the testator and qualifies as a 'person' under the Act that is subject to the same limitations applicable to the decedent in the decedent's lifetime." (FEC Facts, Exh. 8 (FEC Advisory Op. 2004-02) (Docket No. 24-2).) The Commission has also determined,

[1] When 2 U.S.C. § 441a(a)(1)(B) was enacted in 1976, its limit was $20,000. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 487 (1976). In 2003, it was increased to $25,000 and indexed for inflation. *See* BCRA, Pub. L. No. 107-155, §§ 307(a)(2), 307(d), 116 Stat. 81 (2002) (codified as amended at 2 U.S.C. §§ 441a(a)(1)(B), 441a(c)(1)). Today, the inflation-adjusted limit stands at $30,800. *See* Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 Fed. Reg. 8368-70 (Feb. 14, 2011).

however, that an estate is permitted to deposit a bequest that exceeds FECA's applicable contribution limit into a third-party account, and then the estate may make annual FECA-compliant contributions from that account to the recipient committee, so long as the recipient does not exercise any control over the undistributed funds. (*Id.*)

In April 2007, Raymond Groves Burrington died, and his last will and testament contained a residuary bequest of 25% of his estate to the Libertarian Party. (FEC Facts ¶¶ 9-10.) In November 2008, Burrington's estate informed the LNC that the bequest would amount to $217,734. (*Id.* ¶ 11.) The estate made contributions of $28,500 from the bequest to the LNC in December 2007 and March 2008, in compliance with the Contribution Limit as then adjusted for inflation. (*Id.* ¶ 16.) Attempting to comply with the FEC's Advisory Opinions, the estate and the LNC agreed in 2008 to deposit the remaining $160,734 of the bequest into an escrow account, from which an escrow agent has since made annual contributions to the LNC in amounts complying with the Contribution Limit. (*Id.* ¶¶ 17-18.) The estates of other individuals who bequeathed funds to national party committees in excess of the Contribution Limit have similarly deposited the bequeathed funds into escrow accounts or trusts, and these estates have then made annual, FECA-compliant contributions from those accounts to national party committees. (*Id.* ¶ 19.)

In May 2011, the LNC filed its First Amended Complaint ("Complaint") alleging that FECA, as applied to "the contribution, solicitation, acceptance, and spending of decedents' bequests . . . violates the LNC's First Amendment speech and associational rights and those of its supporters." (First Am. Compl. ("Compl.") ¶ 3 (Docket No. 13).) The Complaint also requested that the Court certify this matter to the *en banc* Court of Appeals for the District of Columbia Circuit pursuant to 2 U.S.C. § 437h. (Compl. ¶ 6.) The Commission requested that the parties

first be permitted to "create a factual record that is sufficient for th[e] court to determine which constitutional claims, if any, merit certification to the Court of Appeals." (Def. FEC's Answer and Affirmative Defense to the First Am. Compl. ("Answer") ¶ 6 (Docket No. 15).) The parties completed discovery in February 2012 (Minute Order, Feb. 10, 2012), and on May 4, 2012, each party filed proposed findings of fact (Docket Nos. 24 & 25-3). The LNC also filed a motion requesting section 437h certification of the following question:

> 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?

(Pl.'s Mot. to Certify Facts and Questions ("LNC Mot.") at 1 (Docket No. 25).)[2]

[2] The LNC's Complaint also challenged BCRA's new restrictions on "nonfederal" or "soft" money fundraising to the extent they apply to certain kinds of solicitations by the national parties for bequests. While section 441a(a)(1)(B) caps contributions to national party committees, it applies only to funds contributed "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). These are known as "federal" or "hard" money contributions. *See McConnell*, 540 U.S. at 122. FECA's hard money limits do not restrict donations given for nonfederal purposes, such as to influence state or local elections; those donations are known as "nonfederal" or "soft" money donations. *Id.* at 122-23. To eliminate the possibility that national party committees could, directly or indirectly, use soft-money donations to influence federal elections, BCRA amended FECA to bar national party committees from soliciting, receiving, or spending any funds not raised in accord with section 441a(a)(1)(B), regardless of the stated purpose of the donation. *See* 2 U.S.C. § 441i(a)(1) ("Soft-Money Ban"); *McConnell*, 540 U.S. at 133. The LNC has alleged that the Soft-Money Ban "forbids a political party from soliciting bequests that exceed annual contribution limits, even if that party would not draw funds from such bequests exceeding the contribution limits in any given year." (Compl. ¶ 2; *see also id.* ¶ 25.) The Commission denied this allegation (Answer ¶¶ 2, 25), and thus, the LNC has not requested certification of the issue (Mem. of Points and Authorities in Supp. of Pl.'s Mot. to Certify Facts and Questions ("LNC Mem.") at 9 (Docket No. 25-1)). Because the Soft-Money Ban does not restrict such activity, plaintiff suffers no injury-in-fact that could satisfy its burden of demonstrating standing, so that claim should be dismissed for lack of jurisdiction.

As a practical matter, the effect of the Soft-Money Ban on the LNC's activities is simply to ensure that the LNC cannot receive any donation above the Contribution Limit in any calendar year and to prohibit the LNC from soliciting any such excessive contribution that would be accepted in a single calendar year. Because the Soft-Money Ban thus reinforces the Contribution Limit and serves the same purposes, unless otherwise indicated, all arguments herein regarding the constitutionality of the Contribution Limit apply equally to the Soft-Money Ban.

II. STANDARD OF REVIEW

A. The Court May Certify Only Substantial Constitutional Questions to the *En Banc* Court of Appeals under 2 U.S.C. § 437h

Section 437h provides that "the national committee of any political party," among others, may bring a suit "to construe the constitutionality of any provision of [FECA]," and the "district court immediately shall certify all questions of constitutionality of [FECA]" to the appropriate court of appeals sitting *en banc*. This certification procedure was enacted in 1974 to provide expedited consideration of anticipated constitutional challenges to the extensive amendments made to FECA that year. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(A), 88 Stat. 1263, 1285-86 (1974).

The Supreme Court has held that use of section 437h is subject to a number of restrictions and should be construed narrowly. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). District courts may certify only questions that are "neither insubstantial nor settled." *Id.*; *see also FEC v. Lance*, 635 F.2d 1132, 1137 (5th Cir. 1981) (*en banc*) ("We agree with the Ninth Circuit that 'delicate questions' such as those raised by section 437h 'are to be decided only when necessary.'" (quoting *Cal. Med. Ass'n v. FEC*, 641 F.2d 619, 632 (9th Cir. 1980) (*en banc*))); *Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (section 437h available "only where a 'serious' constitutional question was presented" (quoting Senator James L. Buckley, the sponsor of the amendment that became section 437h, 120 Cong. Rec. 10562 (1974))); *Buckley v. Valeo*, 387 F. Supp. 135, 138 (D.D.C.) (section 437h certification appropriate where "a *substantial* constitutional question is raised by a complaint" (emphasis added)), *remanded on other grounds*, 519 F.2d 817 (D.C. Cir. 1975).[3]

[3] The standard for section 437h certification is not the "low threshold" the LNC claims. (LNC Mem. at 16.) When the Supreme Court used the term "frivolous" in the section 437h

"[T]he apparent impetus for" for section 437h was to expedite review of *facial* constitutional challenges to FECA, and thus, "questions arising under 'blessed' provisions understandably should meet a higher threshold" for certification. *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990); *see also Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (*en banc*) (same). After a "'core provision of FECA has been reviewed and approved by the courts,'" it is possible that a subsequent as-applied challenge could warrant certification, but "not every sophistic twist that arguably presents a 'new' question should be certified.'" *Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (quoting *Goland*, 903 F.2d at 1257). Moreover, the Court has noted that section 437h should be construed narrowly, in part because it creates "a class of cases that command the immediate attention of . . . the courts of appeals sitting en banc, displacing existing caseloads and calling court of appeals judges away from their normal duties for expedited en banc sittings." *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982).[4]

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context, it cited a case stating that it is "the duty of a district judge . . . to scrutinize the bill of complaint to ascertain whether a *substantial federal question* is presented." *Cal. Water Service Co. v. City of Redding*, 304 U.S. 252, 254 (1938) (*per curiam*) (emphasis added) (cited in *Cal. Med. Ass'n*, 453 U.S. at 192 n.14). Courts have at times used the term "frivolous" to refer to the sort of questions that should not be certified under Section 437h. *See, e.g., Cal. Med. Ass'n*, 453 U.S. at 192 n.14 ("[W]e do not construe § 437h to require certification of constitutional claims that are frivolous." (citations omitted)); *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992) (*en banc*) ("A district court need not certify challenges to the Act that are frivolous or involve settled principles of law."). However, the use of the term "frivolous" in this context is more akin to lacking a substantial federal question and thus differs sharply from the standard for frivolous claims under Federal Rule of Civil Procedure 11, which governs sanctionable filings by attorneys. *See, e.g., Goland*, 903 F.2d at 1257 ("For obvious reasons, the court should have a higher threshold for a 'frivolous' finding in the [Rule 11] context[] than in the case where the issue is certification to an en banc appellate court.").

[4] Under the original statutory scheme, certified constitutional questions could be appealed directly from the *en banc* court of appeals to the Supreme Court, and both courts were required "to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified." 2 U.S.C. § 437h(b), (c) (1974). In 1984, the expedition requirement and similar provisions in other statutes were repealed because "[t]he courts are, in general, in the best

In considering the factual record, the standard for section 437h certification is "somewhere between a motion to dismiss — where no factual review is appropriate — and a motion for summary judgment — where the Court must review for genuine issues of material fact." *Cao v. FEC*, 688 F. Supp. 2d 498, 503 (E.D. La. 2010). A question is insubstantial, and improper, for purposes of section 437h if it fails to state a claim upon which relief may be granted. *Goland*, 903 F.2d at 1257-58; *Cao*, 688 F. Supp. 2d at 501-02 & n.1. But even when a constitutional challenge is not foreclosed as a matter of law, the district court undertaking section 437h review may go beyond the complaint and review the facts, and only if it "concludes that colorable constitutional issues are raised from the facts" should it certify those questions. *Cao*, 688 F. Supp. 2d at 502 (emphasis omitted) (quoting *Khachaturian*, 980 F.2d at 331)).

B. If the LNC's Constitutional Question Fails to Qualify for Certification, Summary Judgment Is Appropriate

This Court may grant summary judgment if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In view of the standard for certification to the court of appeals under section 437h, "it follows that any question that the Court finds [insubstantial] is also appropriate for summary judgment." *Cao*, 688 F. Supp. 2d at 503. Thus, if this Court determines that the LNC has failed to present a question warranting certification, as it should, the Court should grant summary judgment to the Commission.[5]

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position to determine the need for expedition in the circumstances of any particular case, to weigh the relative needs of various cases on their dockets, and to establish an order of hearing that treats all litigants most fairly." H.R. Rep. No. 98-985, at 4 (1984). *See* Pub. L. No. 98-620, § 402, 98 Stat. 3335 (1984) (repealing section 437h(c)). The provision for direct appeal was removed in 1988. Pub. L. No. 100-352, § 6(a), 102 Stat. 662 (1988).

[5] The LNC would retain a right of appeal to a three-judge panel of the D.C. Circuit, but not to mandatory review by the *en banc* court of appeals.

III. THE LNC'S CONSTITUTIONAL QUESTION IS NOT SUBSTANTIAL AND SHOULD NOT BE CERTIFIED TO THE *EN BANC* COURT OF APPEALS

The LNC's challenge to the Contribution Limit as applied to bequests fails to raise a substantial constitutional question sufficient to qualify for *en banc* review. As discussed in Section A, the Contribution Limit does not implicate any cognizable First Amendment rights. Even if it did, however, the Contribution Limit is closely drawn to meet the important government interest of preventing corruption and its appearance, as explained in Section B.

A. The Contribution Limit Does Not Burden Any Cognizable First Amendment Rights

When an estate makes a contribution as a result of a bequest, the person making the bequest is by necessity deceased. It is well-settled that the deceased do not have constitutional rights. Thus, as applied to bequests, FECA's contribution limits cannot burden the First Amendment rights of any contributors.

1. The Deceased Have No Constitutional Rights, Let Alone Any Particular First Amendment Right to Make Contributions

FECA cannot infringe a testator's First Amendment rights after death because the deceased have no constitutional rights. *See, e.g.*, *United States v. Maciel-Alcala*, 612 F.3d 1092, 1098 (9th Cir.) ("[O]ne cannot violate a deceased person's civil or constitutional rights."), *cert. denied*, 131 S. Ct. 673 (2010); *Ford v. Moore*, 237 F.3d 156, 165 (2d Cir. 2001) ("Even if there were a viable [constitutional] claim against Moore for conduct after Ford's death, the death would have extinguished any claim of Ford's."); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 745, 749 (10th Cir. 1980) (stating that "the civil rights of a person cannot be violated once that person has died," and rejecting a *Bivens* claim alleging that post-death conduct violated the decedent's First Amendment rights); *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979) ("After death, one is no longer a person within our constitutional and statutory framework, and

has no rights of which he may be deprived."); *Fox v. Leavitt*, 572 F. Supp. 2d 135, 144 (D.D.C. 2008) ("Because Mr. Samp is no longer living, there is no reasonable expectation that the alleged violation of his First Amendment rights could be repeated.").[6]

For living persons, FECA's contribution limits may implicate the ability of contributors to engage in First Amendment-protected speech and association. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the Supreme Court upheld the constitutionality of FECA's contribution limits against a challenge brought by, among others, federal candidates and political parties, including the Libertarian Party. *Id.* at 7-8, 23-38. The Court found the contribution limits imposed only "a marginal restriction upon the contributor's ability to engage in free communication," since a contribution "serves as a general expression of support" for the recipient. *Id.* at 20-21. And contribution limits "impinge on protected associational freedoms" because "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id.* at 22. But as the LNC rightly concedes, "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," and did not "manifest any consideration for the very different circumstances presented by donations by testamentary bequest." (Mem. of Points and

[6] Although constitutional rights do not survive death, a cause of action for a constitutional injury that occurred *before* death does survive where permitted by statute, and may be brought by a decedent's estate. *See, e.g.*, *Estate of Gaither ex rel. Gaither v. District of Columbia*, 655 F. Supp. 2d 69, 73-74 (D.D.C. 2009). But under FECA, any "contribution" from an estate would always take place *after* the donor's death. A contribution is "considered to be made when the contributor relinquishes control over the contribution" by "deliver[ing it] to the candidate, [or] to the political committee." 11 C.F.R. § 110.1(b)(6). In the case of a bequest, a contribution is thus made "at the time the funds [are] distributed by the estate" to the recipient candidate or political committee. *See* FEC Advisory Op. 1999-14, 1999 WL 521238, at *2 (applying 11 C.F.R. § 110.1(b)(6)).

Authorities in Supp. of Pl.'s Mot. to Certify Facts and Questions ("LNC Mem.") at 18-19 (Docket No. 25-1).) [7]

The conclusion that the First Amendment does not protect a person's ability to bequeath a contribution is consistent with long-standing precedent holding that a person's ability to bequeath property is not protected under the Constitution. The ability to dispose of property by will is not a constitutional right, but instead "has always been considered purely a creature of statute, and within legislative control." *United States v. Perkins*, 163 U.S. 625, 627 (1896). As the Supreme Court has explained, "[n]othing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (upholding law allowing surviving spouse to elect to take a pre-determined share of estate, regardless of will's instructions). Congress may also freely regulate testamentary disposition when acting pursuant to one of its enumerated powers. *See, e.g., Knowlton v. Moore*, 178 U.S. 41, 56-61 (1900) (upholding Congress's power to tax legacies using its taxing power).[8] Thus, bequeathed contributions not only lack First Amendment protection, but also, like other distributions of property by will, lack general constitutional protection. In sum, in exercising its power to

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[7] The LNC so characterizes *Buckley* in a strained effort to support its incorrect theory that bequeathed contributions carry no threat of corruption or its appearance that could justify a First Amendment burden (LNC Mem. at 18-19), which we address *infra* pp. 18-35.

[8] *See also* 28 Am. Jur. Estates § 8 ("The power of the legislature over the right of individuals to make a will or exercise testamentary control over property is recognized in practically all jurisdictions."); 79 Am. Jur. 2d Wills § 49 ("A person must devise or bequeath his property in accordance with and subject to the conditions and limitations provided by statute; otherwise he cannot bequeath it at all."); *id.* § 150 ("The right to take and receive property under a will is neither a natural and inalienable right nor one guaranteed by the state or federal constitutions, but is a privilege granted by the state upon such conditions as it may impose, and subject to regulation and control by the state and to the power of taxation." (footnotes omitted)).

regulate federal elections, *see Buckley*, 424 U.S. at 13 & n.16, Congress did not infringe any constitutional rights by subjecting bequests to FECA's contribution limits.

In particular — as the LNC itself concedes — the First Amendment does not protect bequeathed contributions as acts of *association*. (LNC Mem. at 24 ("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 . . . not associational."). This concession is consistent with the LNC's recognition that the deceased cannot engage in association generally. (*Id.* at 3 ("[T]he 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 . . . the donee party."), 21 ("The deceased cannot . . . volunteer on campaigns").

The LNC also recognizes, as it must, that the deceased cannot engage in speech generally. (*Id.* at 12 ("But apart from leaving bequests[] . . . decedents are not in a position to engage in independent political expression.").) Instead, the LNC argues that "the conduct at issue here is expressive," because "[l]eaving a bequest," "remembering a political party in one's will," and a bequest's "instructions" are allegedly expressive. (*Id.* at 1-2, 10-11, 19.)

The LNC's logic is flawed. The act of recording a bequest is temporally distinct from the making of a contribution. Burrington may have engaged in speech when he recorded a bequest instructing that the LNC receive 25% of his residual estate. (*See* LNC Mot., Exh. C (Def. FEC's Resps. to Pl.'s Disc. Reqs.) at 2 (Req. for Admis. ("RFA") 5) (Docket No. 25-5).) Nothing in FECA, of course, prevented him from expressing whatever he wanted in his last will and testament. FECA is concerned only with the *contribution* that takes place later, after his death, when the funds are distributed. Contrary to the LNC's suggestion (*see* LNC Mem. at 10-11), a

post-death contribution does not become First Amendment-protected speech just because a separate act expressing support for a political party might have occurred when the decedent was alive.

In sum, the LNC is correct that "[f]or constitutional purposes, the difference between donations made by living donors, and donations made by estates on behalf of the deceased, [is] quite stark" (LNC Mem. at 16), but that is because, as a matter of well-settled law, FECA's contribution limits cannot infringe deceased contributors' First Amendment rights.

2. The Contribution Limit As Applied to Bequeathed Contributions Does Not Burden National Party Committees' First Amendment Rights

a. There Is No Constitutional Right to Receive a Contribution from the Deceased

Because deceased persons have no constitutional right to make a contribution, it follows as a correlative matter that no one has a First Amendment right to receive such a contribution. Otherwise, the well-established principle that deceased persons have no constitutional rights would be nullified.

Just as any First Amendment right to receive information and ideas requires the existence of a speaker with the right to speak in the first place, *see Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 856 F.2d 1563, 1566 (D.C. Cir. 1988), any claimed right to *receive* a bequest is subject to any limitation that a state may impose on the ability of a person to *make* that bequest in the first place, *United States v. Burnison*, 339 U.S. 87, 91 (1950). In *Burnison*, the United States argued that a California law that barred Californians from bequeathing property to the federal government violated its power to receive bequeathed property under the Supremacy Clause. *Id.* at 89-90. The Court rejected this argument because it "fail[ed] to recognize that the state acts upon the power of its domiciliary to give and not on the United States' power to receive." *Id.* at

91. The state's regulation limiting the power to will was valid, the Court held, as an exercise of the state's plenary power to regulate the ability to bequeath property after death. *Id.* at 91-92 & n.10. Therefore, the right of the United States to receive the bequest was subject to, and not violated by, the limits imposed by the state's valid regulation. *Id.* at 92-93. If a right to receive a bequest were permitted to trump the power to regulate the ability to make a bequest in the first place, the Court explained, no law regulating wills could restrict a bequest to a party claiming a constitutional right to receive it — including laws requiring the competency of the testator, a properly witnessed and attested will, and a portion of an estate to go to a surviving spouse. *Id.* at 92.

Thus, because the Contribution Limit as applied to bequests burdens no First Amendment right of the deceased, it likewise burdens no First Amendment right of anyone who might receive a contribution through a bequest.

b. A First Amendment Analysis of the Contribution Limit Would Focus on the Burden on the Contributor and the Democratic Process, Not on the Recipient

When analyzing contribution limits through a First Amendment lens, the Supreme Court has considered the burdens such limits may place on the rights of contributors, *not* recipients, as LNC contends. In *Buckley*, the Court discussed the associational burdens that contribution limits place on the ability of *contributors* to associate, not on the rights of recipients. *See, e.g.*, 424 U.S. at 24 ("[T]he primary First Amendment problem raised by [FECA's] contribution limitations is their restriction of one aspect of *the contributor's* freedom of political association." (emphasis added)). But even if contribution limits, on their face, could be construed to burden recipients' associational rights, no such burden could exist when those limits are applied to bequeathed contributions, since the contributor is deceased. The freedom of association protects

the ability to "associate *with others*" and to engage in a "*group* effort" in pursuit of ends otherwise protected by the First Amendment, such as speech and worship. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphases added). Consistent with this protection, *Buckley*'s discussion of FECA's contribution limits assumes there is a living contributor who can associate with the recipient. *See* 424 U.S. at 22 (a contribution "serves to affiliate *a person* with a candidate" (emphasis added)); LNC Mem. at 18-19 (*Buckley* assumes a living contributor). In the case of a bequeathed contribution, however, there is no longer anyone for the party to associate with at the time of the contribution. (*See* LNC Mem. at 3 (the deceased have no ability to associate with a "donee party").) Indeed, "[w]hen LNC learns that a member has passed away, the deceased is removed from the Party's membership rolls." (*Id.* at 10.)

Moreover, to the extent contribution limits impose burdens on the ability to speak (rather than to associate), the Supreme Court has likewise focused on the contributor, not the recipient. The Court in *Buckley* explained that a contribution limit "entails only a marginal restriction upon the *contributor's* ability to engage in free communication." 424 U.S. at 20 (emphasis added). Indeed, we are not aware of any decision holding that the passive act of *receiving* a contribution, bequeathed or otherwise, is a form of protected speech. *See Dean v. Blumenthal*, 577 F.3d 60, 68-69 (2d Cir. 2009) (noting the absence of "any decision . . . in which either this Court or the Supreme Court specifically held that a candidate has a First Amendment right to receive campaign contributions").[9]

[9] Although *Buckley* noted the potential for contribution restrictions to "have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing resources necessary for effective advocacy," this analysis did not create specific rights for individual candidates or political committees to receive particular contributions. 424 U.S. at 21. As the Court later elaborated in *Randall v. Sorrell*, its concern was potential harm to the democratic process itself, not to the interests of individual candidates or other recipients of contributions. 548 U.S. 230, 248-49 (2006) (plurality) ("[C]ontribution limits that are too low

Because the deceased have no First Amendment right to make contributions, and because there is no constitutional right to receive a contribution from the deceased, the Contribution Limit does not burden any First Amendment rights when applied to bequests.

B. The Contribution Limit as Applied to Bequeathed Contributions Is Closely Drawn to Match the Important Government Interest of Preventing Corruption and Its Appearance

Even if the Contribution Limit as applied to bequeathed contributions implicates First Amendment rights, the LNC would still fail to present a substantial constitutional question meriting *en banc* review pursuant to section 437h. Contribution limits need satisfy only intermediate scrutiny, and limits on bequeathed contributions easily pass muster — they are closely drawn to match the important government interest of preventing corruption and its appearance.

1. Intermediate Scrutiny Applies to Contribution Limits

"Under the Supreme Court's precedents, limits on campaign *expenditures* are subject to strict scrutiny. But limits on *contributions* to candidates and political parties are subject to 'less rigorous scrutiny' and are valid if they are 'closely drawn' to meet a 'sufficiently important' governmental interest." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C.) ("*RNC*") (three-judge court) (quoting *McConnell*, 540 U.S. at 134-38 & n.40), *aff'd*, 130 S. Ct. 3544 (2010); *see also In re Cao*, 619 F.3d 410, 427 (5th Cir. 2010) (describing the "closely drawn" standard as "intermediate scrutiny"), *cert. denied*, 131 S. Ct. 1718 (2011). As *Buckley* explained, while expenditure limits "impose direct and substantial restraints" on speech, contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in

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can . . . *harm the electoral process* by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby *reducing democratic accountability*." (emphases added)).

free communication." 424 U.S. at 20, 39.[10] For more than 35 years, the Court has strictly adhered to *Buckley*'s fundamental distinction between contributions and expenditures by applying only intermediate scrutiny to contribution limits. *See Randall*, 548 U.S. at 241-42; *McConnell*, 540 U.S. at 135-42; *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437-38, 456 (2001) ("*Colorado II*"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-88 (2000); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-11 (1982); *Cal. Med. Ass'n*, 453 U.S. at 195-97; *Buckley*, 424 U.S. at 23-36, 38.

The LNC incorrectly claims that strict scrutiny applies here because, unlike regular contributions, bequeathed contributions are allegedly "purely expressive, not associational." (LNC Mem. at 19-21, 24; *see also* Compl ¶ 21.) But, if true, that would mean that FECA's contribution limits place *lesser*, not greater, burdens on First Amendment rights when applied to bequeathed contributions. *Buckley* held "that contribution limits burden both protected speech *and* association, though they generally have more significant impacts on the *latter*." *McConnell*, 540 U.S. at 142 n.42 (emphases added). In the absence of the latter associational burden, all that would remain is the "marginal restriction" contribution limits impose on speech, which *Buckley* found did not justify strict scrutiny even when *combined* with the more significant associational burden. *See* 424 U.S. at 20-23.

The LNC claims that recording a bequest in a will constitutes "core First Amendment expressive activity" because a bequest's "instructions often serve expressive values" and can

[10] *McConnell* held that the Soft-Money Ban is also subject only to intermediate scrutiny. 540 U.S. at 138-42. The Court explained that the Soft-Money Ban places identical burdens on contributors' speech and association rights as the contribution limits in *Buckley*, since it "simply effect[ed] a return to the scheme that was approved in *Buckley*." *Id*. Although section 441i(a)(1) prohibits, *inter alia*, the spending and solicitation of soft money, those restrictions simply "implement" and "prevent circumvention" of the Contribution Limit, and thus do not place any burdens on speech in addition to those already imposed by the Contribution Limit. *Id.* at 138-39.

convey "the decedent's love or appreciation." (LNC Mem. at 1-2.) But as explained *supra* pp. 11-12, *writing* a bequest, which FECA does not regulate, is not the same thing as making a contribution, which FECA does impose limits upon. And, more fundamentally, the LNC's contention fails to distinguish bequeathed contributions from contributions generally.

Buckley recognized that the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." 424 U.S. at 21. Thus, even very large bequests contain little communicative expression above and beyond a modest contribution, and any additional "instructions" expressing the "decedent's love or appreciation" (LNC Mem. at 1-2) that a will may contain would exist apart from the dollar value of the bequest. The LNC repeatedly states that bequests are "expressive," as if that alone called for strict scrutiny (LNC Mem. at 1-2, 10-11, 19, 24), but *Buckley* instructed that contributions are not subject to strict scrutiny even though they "serve[] as a general *expression* of support," 424 U.S. at 21 (emphasis added); *see also McConnell*, 540 U.S. at 140 n.42 (*Buckley* found that "contribution limits burden both protected speech and association," and thus, it "is thus simply untrue in the campaign finance context that all burdens on speech necessitate strict scrutiny review" (internal quotation marks omitted)). Nor does the LNC explain, and it cannot, how a bequest is any less "expressive" simply because it is accepted by the recipient in annual installments, in compliance with the Contribution Limit, rather than in a lump sum as the LNC demands.

Finally, the LNC argues that the Contribution Limit imposes a "severe" burden on speech because "once people pass away, they have no ability to engage in any alternative forms of 'direct political expression'" besides bequests. (LNC Mem. at 17, 20-21.) To be sure, *Buckley* found that contribution limits impose only marginal restrictions on expression in part because

they leave contributors free to engage in direct political expression. 424 U.S. at 20-21. But here it is *death*, not FECA's contribution limits, that renders decedents unable to engage in direct political expression — just as the LNC recognizes that death has eliminated decedents' ability to engage in association. (*See* LNC Mem. at 3.) Moreover, if the deceased are capable of First Amendment speech as the LNC claims they are through bequests, then the dead might also be deemed to engage in other forms of posthumous "speech" and "association" as alternatives to bequeathing contributions. A person could "arrang[e] for the posthumous publication or other dissemination of his or her political views," as the LNC concedes (LNC Mem. at 12) — options which would seem to be far more "expressive" than the "undifferentiated, symbolic act of contributing," *Buckley*, 424 U.S. at 21. FECA does not affect these alternative options for expression.

2. Unlimited Bequeathed Contributions to National Party Committees Would Pose a Threat of Corruption and Its Appearance

The Supreme Court has recognized important government interests "in preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell*, 540 U.S. at 136 (internal quotation marks omitted). These interests "have been sufficient to justify not only contribution limits themselves, but laws preventing circumvention of such limits." *Id.* at 144. As a result, the Court has held that FECA's contribution limits and Soft-Money Ban facially serve these important interests. *See Buckley*, 424 U.S. at 23-38; *McConnell*, 540 U.S. at 143-61. When applied to bequeathed contributions, those FECA limits likewise deter corruption and its appearance.

In *Buckley*, the Court upheld FECA's limit on individual contributions to candidates in light of the "deeply disturbing examples" of corruption relating to contributions found in the

record, and concluded that FECA's purpose of "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions" was a "constitutionally sufficient justification" for that contribution limit. 424 U.S. at 26-29. The Court also upheld FECA's annual $25,000 aggregate contribution limit, explaining that it prevents individuals from circumventing the limit on contributions to candidates with "huge contributions to the candidate's political party." *Id.* at 38.

Subsequently, in *McConnell*, the Court upheld the constitutionality of the Soft-Money Ban, finding that "there [was] substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." 540 U.S. at 150. As the Supreme Court observed in upholding the ban, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised," and the "idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible." *McConnell*, 540 U.S. at 144 (internal quotation marks omitted).

Of course, FECA has limited contributions, including those resulting from bequests, for more than 35 years. "Since there is no recent experience with unlimited [bequeathed contributions], the question is whether experience under the present law confirms a serious threat of abuse from the unlimited [bequeathed contributions]." *Colorado II*, 533 U.S. at 457 (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes)).

Recent experience with unlimited soft-money contributions, prior to the enactment of the Soft-Money Ban in BCRA, confirms a serious threat of abuse from equivalent unlimited

bequeathed contributions. *McConnell* and its record amply demonstrate that national party committees sold preferential access to their federal candidates and officeholders in exchange for unlimited contributions of soft money. Here, the record shows that national parties could similarly sell preferential access to federal candidates and officeholders in exchange for promises of large bequests, and that parties could also grant such access to the family, friends, and associates of a decedent who bequeathed the party a large amount.

a. McConnell *Found that Unlimited Contributions to National Party Committees Pose a Threat of Corruption and Its Appearance*

The record in *McConnell* — which is "replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations," 540 U.S. at 150 — illustrates the danger of corruption and its appearance that would be posed if national parties were again permitted to accept unlimited contributions through bequests.[11] Based on that extensive record, *McConnell* held that "soft-money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption." *Id.* at 145 (emphasis omitted); *see also* FEC Facts ¶¶ 33-35.

The *McConnell* record demonstrates that the national parties are "inextricably intertwined" with their federal candidates and officeholders, with whom they "enjoy a special relationship and unity of interest." (FEC Facts ¶ 20.) The national party committees of the two major parties are primarily concerned with electing their candidates to office, and are "both run by, and largely composed of, federal officeholders and candidates." (*Id.* ¶¶ 21, 23.) The "close connection and alignment of interests" between parties and candidates put the parties in a

[11] The *McConnell* record is discussed in further detail in section III of the FEC's Proposed Findings of Fact. (FEC Facts ¶¶ 20-75.) With its Proposed Findings of Fact, the Commission submitted to the Court a DVD containing the *McConnell* Defendants' Exhibit Volumes, upon which the three-judge district court and the Supreme Court relied heavily.

position to "sell access to federal officeholders in exchange for soft-money contributions that the party [could] then use for its own purposes." (*Id.* ¶ 73.) Federal candidates and donors also willingly "exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." (*Id.* ¶ 41.) Because soft money was unlimited, the national parties put a premium on raising and spending soft-money donations, which tended to be "dramatically larger than the contributions of hard money permitted by FECA." (*Id.* ¶¶ 29-30.) Some of these soft-money donations consisted of bequeathed donations, which were also unlimited and which also were much larger than hard-money bequeathed contributions. (*Id.* ¶¶ 89-92.)

Federal candidates and officeholders solicited soft-money donations for their national party committees. (FEC Facts ¶¶ 36-37.) Often at their parties' urging, candidates would target donors who had already given them the maximum amount of hard money allowed by FECA, and ask for additional soft-money donations to their parties. (*Id.* ¶ 37.) In return, the national party committees often used soft-money to benefit their federal candidates' campaigns, and donors gave soft money with at least an implicit understanding that their donation would benefit specific candidates. (*Id.* ¶¶ 69-72.) Donors were often made aware that their soft-money donation could be "credited" to their favored candidate. (*Id.* ¶ 71.) Even when candidates did not directly solicit soft money, they were nevertheless made aware of who the large soft money donors were by the parties and the donors themselves. (*Id.* ¶¶ 38-40.)

Based on the record before the Court, *McConnell* stressed that "[g]iven th[e] close connection and alignment of interests[]" the parties and their candidates share, "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*." 540 U.S. at 155

(emphasis added); *see* FEC Facts ¶ 74. The fact that candidates and officeholders donated their valuable time to granting access to large soft-money donors thus "indicate[d] either that officeholders place substantial value on the soft-money contribution themselves, without regard to their end use, or that national committees are able to exert considerable control over federal officeholders." *McConnell*, 540 U.S. at 155-56; *see* FEC Facts ¶¶ 74-75.

Many individuals donated large amounts of soft money to national parties in order to gain access to federal candidates and officeholders "for the express purpose of securing influence over federal officials." (FEC Facts ¶¶ 41-51.) Soft money was particularly effective for obtaining access because it was unlimited, and soft-money donors were able to purchase access to Members of Congress and the President, who made time to listen to their views. (*Id.* ¶¶ 42, 46-48.) Such access resulted in actual influence over officeholders and legislation. (*Id.* ¶ 45.)

The national party committees took advantage of donors' desire for access by creating major-donor programs that offered menus of increasing levels of access to federal candidates and officeholders in exchange for increasingly large donations of soft money. (FEC Facts ¶¶ 49-51.) For instance, the Democratic Congressional Campaign Committee offered "a range of donor options, starting with the $10,000-per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program." (*Id.* ¶ 50.) National Finance Board members were entitled to conference calls, private dinners, and retreats with Democratic Members of Congress and other party leaders. (*Id.* ¶ 50.) Similarly, the Republican National Committee ("RNC") offered its donors membership in major-donor groups, which promised, for example, "special access to high-ranking Republican elected officials, including governors, senators, and representatives." (*Id.* ¶ 51.)

The national party committees and their candidates and officeholders granted their largest soft-money donors access not only to reward past contributions, but also to encourage future ones. (FEC Facts ¶¶ 63-68.) As Senator John McCain noted, "legislators have been in situations where they would rather fit in an appointment with a soft money contributor than risk losing his or her donation to the party." (*Id.* ¶ 64.) Indeed, "most federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support." (*Id.*)

On the basis of this record, the Supreme Court concluded that "there [was] substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *McConnell*, 540 U.S. at 154.[12]

b. Unlimited Bequeathed Contributions to National Party Committees Would Be Functionally Equivalent to Unlimited Soft-Money Contributions

Unlimited bequeathed contributions to national party committees would partially reopen the soft-money loophole and thus renew the threat of corruption and its appearance. The national parties, including the LNC, remain closely linked to their federal candidates and officeholders, and those parties continue to sell access to major donors. If bequeathed contributions were unlimited, individuals looking to purchase preferential access could plan their estates to circumvent the limits applicable to living donors. The parties could also provide such purchased access to the family, friends, and associates of deceased donors. The bequeathed nature of the

[12] Contrary to the LNC's suggestion (LNC Mem. at 22), *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010), which involved corporate *independent expenditures*, did not disturb *McConnell*'s determination that the selling of preferential access to federal officeholders and candidates by national party committees in exchange for unlimited soft-money donations led to corruption and its appearance. *See RNC*, 698 F. Supp. 2d at 158, *aff'd*, 130 S. Ct. 3544 (2010).

contributions may increase the risk of corruption and its appearance, both because bequests are often larger than *inter vivos* donations and because of the risk that the testator could revoke the bequest before death if not satisfied.

i. Unlimited Bequeathed Contributions Would Allow Donors to Circumvent FECA's Limits on Contributions to National Party Committees

If bequeathed contributions were no longer limited by FECA, individuals looking to buy preferential access could exploit this new loophole and contribute vast amounts of money to national party committees through their wills, unhindered by FECA's $30,800 limit on contributions to parties.

When permitted, individuals have historically exploited the ability to make unlimited contributions to influence federal elections. (FEC Facts ¶¶ 76-79.) In the current election cycle, individuals may for the first time contribute unlimited sums to political committees that only make independent expenditures supporting federal candidates (commonly known as "super PACs"). (*Id.* ¶ 76.) Older donors with vast resources have donated tens of millions of dollars to super PACs to influence the outcome of the 2012 presidential election. For instance, Harold Clark Simmons, an 80-year-old businessman with a net worth of $10 billion, had donated more than $18 million to super PACs as of March 2012 to prevent President Obama's reelection, and stated that he was planning to double that amount by the November election. (*Id.* ¶ 76.) Simmons explained: "I have lots of money, and can give it legally now." (*Id.*)

As the soft-money era illustrates, the ability to bequeath unlimited sums to parties would be an attractive vehicle for donors looking to purchase preferential access, because a single, large contribution to a political party is "more effective for obtaining access to federal officials than several small . . . contributions" adding up to the same amount of money. (FEC Facts ¶¶ 80-82.)

The fact that a contribution would be bequeathed would increase the chance that it could be very large, and thus capable of purchasing greater preferential access and influence. (*Id.* ¶¶ 83-86.) As the LNC points out, "bequests are . . . likely to be more generous than donations made in one's lifetime" because "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." (LNC Mem. at 2, 12.) In fact, the three bequests the LNC has received, including the Burrington bequest, were each significantly larger than the LNC's median donation and any amount those donors had contributed to the LNC during their lifetimes. (*Id.* at 12-13; FEC Facts ¶ 84.)

Similarly, before BCRA, the two major political parties were permitted to accept the full amount of soft-money bequests and thus received donations much greater than the Contribution Limit. (FEC Facts ¶ 90.) For example, the Democratic National Committee ("DNC") accepted a $390,000 bequeathed soft-money donation in 2002, and the RNC accepted a bequeathed soft-money donation in excess of $141,000 in 1999. (*Id.*) Once the Soft-Money Ban went into effect, large bequeathed contributions to the national party committees continued, but they were capped by the Contribution Limit. (*Id.* ¶¶ 93-101.) For example, one individual bequeathed more than $574,000 to the RNC in 2008, but to comply with FECA, the estate and the RNC created an irrevocable trust to hold the bequest and contribute FECA-compliant amounts to the RNC annually. (*Id.* ¶ 95; *see also id.* ¶¶ 96-98 (showing that in 2008, decedents left bequests of $200,000, $267,595.41, and more than $216,000 for the DNC, which were all limited by FECA).) Due to the Contribution Limit, the average bequeathed hard-money contribution to the

national party committees is far less than the average bequeathed soft-money donation had been.[13] (*Id.* ¶¶ 91-92.)

Against this backdrop, it is unsurprising that the LNC intends to direct more effort into soliciting bequests if they are no longer subject to the Contribution Limit. (FEC Facts ¶ 104.) This plan is reminiscent of the extra effort made by the national party committees when soft-money donations were unlimited, given the potential for raising large sums. (*See id.* ¶ 82.) The LNC candidly admits that it would implement a planned-giving program that would target "people that [the LNC] ha[s] reason to believe are well-to-do or reasonably so" and that it would do so at events involving federal candidates. (*Id.* ¶ 104.) Moreover, the LNC would accept a bequest of any size, and the party believes it "would be wonderful" if it received a million dollar bequest — which would be nearly the size of the LNC's entire 2010 operating budget. (*Id.* ¶ 103.) If a $500,000 donation to the DNC could purchase time with the President of the United States (*id.* ¶ 47), a $1 million party donation seems likely to buy even more preferential access and influence. *Cf. McConnell*, 540 U.S. at 149 (quoting a former U.S. Senator: "Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about — and quite possibly votes on — an issue?" (internal quotation marks omitted)).

ii. Unlimited Bequeathed Contributions to National Party Committees Could Directly Benefit Federal Candidates, but Need Not in Order to Pose a Threat of Corruption and Its Appearance

Unlimited bequeathed contributions to national party committees could directly benefit particular federal officeholders, but the threat of corruption and its appearance would likely arise

[13] Individuals have bequeathed many *millions* of dollars to organizations they support, and organizations looking to raise funds, including politically active groups, have instituted sophisticated planned-giving programs aimed at soliciting bequests and other forms of planned giving. (FEC Facts ¶¶ 85-86.) Moreover, an industry of consultants focuses on advising organizations about how to more effectively solicit bequests. (*Id.* ¶ 86.)

even without such direct candidate benefits. As explained *supra* pp. 21-22, *McConnell* held 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*." 540 U.S. at 155 (emphasis added); *see* FEC Facts ¶¶ 73-75. Donors cared more about responding favorably to the solicitations of officeholders and party officials than about how the parties actually spent the donations. (FEC Facts ¶ 43.)

Thus, the federal candidates of the LNC and other national party committees would value a large bequest regardless of whether it ever benefited them personally, given their unity of interest with the party (*see, e.g.*, FEC Facts ¶¶ 22, 24-27 (detailing close relationship between the LNC and its federal candidates)) and the considerable control parties have over their candidates and officeholders (*see, e.g., id.* ¶ 27 (indicating that the LNC can rescind the party's presidential nomination from a candidate that fails to follow the party's platform)). It is therefore beside the point that, as the LNC stresses, a donor recording a bequest might not be able to determine which federal candidates would eventually benefit from the bequest. (*See* LNC Mem. at 2, 11-12, 17, 23.) Nor does it matter that candidates might not know for certain that they would benefit directly from a recorded bequest. (*See id.* at 2, 12, 22.) As explained in *RNC*, 698 F. Supp. 2d at 158-60, the threat of corruption from unlimited donations to political parties would persist even if a party did not use *any* of the donations it received to benefit its federal officeholders.

Nevertheless, national party committees and donors could informally steer bequeathed contributions to benefit particular federal officeholders and candidates.[14] *See Colorado II*, 533

[14] Even the LNC appears to recognize this. (*See* LNC Mem. at 11 ("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." (emphasis added)); at 12 ("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*." (emphasis added)); at 22 ("[N]or is there any lawful

U.S. at 459. The parties could, as some have in the past, keep informal tallies of how many recorded bequests a candidate or officeholder solicited, and bestow a financial benefit on that candidate either immediately with other funds, or later upon receipt of the testator's bequest. (*See* FEC Facts ¶¶ 69-72 (discussing the former soft-money fundraising tally system).) Indeed, a testator could indicate in the bequest itself which candidate or officeholder should benefit, and some testators have already done so (*see id.* ¶ 128 (reflecting wills with bequests for the "Hillary Clinton Election Committee" and "Barack Obama's campaign fund")). Since many Members of Congress have "safe" seats which they may keep for a very long time, donors could often be reasonably certain that a bequest would end up benefiting a particular officeholder, and an officeholder would have the same kind of incentive to please such potential donors that Members had when large soft-money donations could be lawfully solicited.

Finally, after a testator dies, the testator's family, friends, or associates could inform the national party committee which federal candidates the decedent would have wanted to benefit from the bequest. For example, in 2010, a trustee in charge of a $200,000 bequest left for the DNC asked the DNC's then-chair to use a portion of those funds to defeat a particular Senate candidate because it would have reflected the decedent's wishes. (FEC Facts ¶ 124.)

iii. National Party Committees Could Sell Preferential Access to Their Federal Candidates and Officeholders in Exchange for Recorded Bequests

National party committees could exploit a bequeathed-contribution loophole by selling preferential access to their federal candidates and officeholders in exchange for donors recording or otherwise promising large bequests — just as the parties sold access for soft money. For example, a national party committee or its candidates could approach wealthy individuals known

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way for political candidates to *ensure* that memorialized gifts to their parties are reaped in time for election day." (emphasis added)).)

to be interested in influencing federal elections (*see, e.g.*, FEC Facts ¶¶ 76-79) and inform them that while *inter vivos* contributions are limited, a bequeathed contribution could be for any amount and could have an enormous impact on future federal elections (*cf. id.* ¶¶ 36-37 (explaining how parties and candidates solicited soft-money donations from donors who had already contributed the maximum allowed by FECA)). In exchange for some reasonable assurance that the donor had recorded the bequest, such as receiving a copy of the will, the party could then arrange high-level access to candidates and officeholders for the donor so that he or she could make a personal pitch regarding an important policy issue. (*Cf. id.* ¶¶ 46-48 (describing how six-figure donations got donors meetings with high level officials, including the President, to talk about legislation and other policy issues)). Because the donor could revoke the recorded bequest at any time before death, the candidates and lawmakers would be under pressure to comply with the donor's policy preferences and perhaps offer further preferential access in the future. (*Cf. id.* ¶ 45 (describing how soft-money donations influenced legislative decisions).)

This process could easily be integrated into national party committees' major-donor programs. As discussed *supra* p. 22, the national party committees "furnish[ed] their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access." *McConnell*, 540 U.S. at 151; *see* FEC Facts ¶¶ 49-51. The practice of selling increasing levels of access has continued even after BRCA was enacted (FEC Facts ¶ 52), including by the LNC (*id.* ¶¶ 54-62). For example, an LNC contributor can become a member of the "Chairman's Circle" major-donor group for $25,000 annually or $2,500 monthly, and in return, receive "[d]irect contact with [the] National Chair, POTUS [(President of the United States)] nominee, or significant L[ibertarian]P[arty] candidate during [the] campaign

season." (*Id.* ¶ 54.) The parties could offer membership in such major-donor programs — and programs with far higher admission prices — in exchange for recording a bequest of a sufficient size or simply for not revoking an already recorded bequest. (*See id.* ¶ 109.) Indeed, the LNC could not rule out that it would grant membership into its Chairman's Circle on this basis. (*Id.*)

It is not uncommon for organizations that accept bequests to reward their future donors in exchange for some assurance that the bequest was recorded. (FEC Facts ¶¶ 111-14.) For example, the National Rifle Association ("NRA") recognizes people who plan to leave it bequests through a recognition society. (*Id.* ¶ 112.) The NRA encourages future donors to notify the NRA of their bequest, and those who provide the NRA with a copy of their will demonstrating their future gift to the NRA are "awarded Ambassador Membership in the Heritage Society and receive a special gift and invitations to members only events." (*Id.*) National party committees could easily adopt a similar program involving "members only events" with federal officeholders.

The LNC concedes that a national party committee could solicit individuals to leave bequests of unlimited amounts in exchange for preferential access to one or more of its federal officeholders or candidates. (FEC Facts ¶¶ 106-07.) The LNC nevertheless argues that it does not "manifest corruption for a political party or its candidates to ingratiate themselves to individuals in the hope that they might donate money." (LNC Mem. at 2; *see also id.* at 22). But parties have been willing to *sell* preferential access on the basis of a *promise* of a future contribution. For example, during the soft-money era, donors could join the RNC's Team 100 major-donor group and enjoy special benefits on the basis of an immediate $100,000 donation and a commitment to donate $25,000 annually for three years in the future. (FEC Facts ¶ 66.) Today, the RNC continues to permit major-donor group membership on the basis of pledges to

donate in the future (*id.* ¶¶ 66-67), as does the LNC (*id.* ¶ 68). As *McConnell* illustrates, national parties and federal candidates do not grant preferential access to major donors only in exchange for past contributions; they also seek to encourage future contributions. (*Id.* ¶¶ 63-64.) Indeed, even the LNC acknowledges that corruption based on the promise of a future bequest is possible if the bequest is sufficiently imminent. (*See* LNC Mem. at 23-24 (suggesting corruption could arise from "soliciting a bequest from a terminally-ill individual").)

Of course, a testator could revoke a recorded bequest before death, as the LNC notes (LNC Mem. at 2, 22), but this uncertainty could in fact *increase* a national party's incentive to cater to the wishes of the potential donor in exchange for a recorded bequest, particularly if a large amount of money were at stake. Otherwise, the party might lose the bequest. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.D.C. 2003) (Kollar-Kotelly, J.) (quoting former Senator Alan Simpson: "When you don't pay the piper that finances your campaigns, you will never get any more money from that piper."), 489-90 (quoting lobbyist Wright H. Andrews: "[M]ost federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.").

iv. National Party Committees Could Sell Preferential Access to Their Federal Candidates and Officeholders for the Family, Friends, or Associates of a Decedent Who Left a Large Bequest for the Party

After death, a donor can no longer receive access to federal candidates and officeholders, but the donor could be survived by like-minded associates and family members who could receive preferential access in the decedent's place. Indeed, wealthy individuals who donate substantial sums to influence federal election often have family, friends, and associates with similar political interests. (FEC Facts ¶¶ 115-16.) For example, George Soros, 81, stated in

2003 that if he could have traded his entire $7 billion fortune to defeat then-President George W. Bush, he would have if someone had "guaranteed" it would work. (*Id.* ¶¶ 115.) In 2012, Soros's son Alexander donated $200,000 to a super PAC supporting President Obama. (*Id.*)

The like-minded friends, family, and associates of a decedent can take a strong interest in the decedent's bequest — sometimes to the point where they act as a living representative of the decedent's preferences. (*See id.* ¶¶ 117-18.) For example, in 2010, the trustee of a trust holding a $200,000 bequest from her deceased friend to the DNC wrote to the DNC's then-chair:

> Due to the fact that mid-term elections are upon us, I [am] working to get this [contribution from the decedent's bequest] out to you as quickly as possible. I know it would be important to my friend, Michael Buckley, who we called "Buckley." Of course I cannot speak with him, as he is deceased, but both of us were kindred spirits with regard to our political views and had many, many discussions on politics. As you can see by the fact that he left the [DNC] 25% of his estate, it was a very important thing to him. While I believe he would want you to use the money in the way you think best, it is my heartfelt belief that he would want this year's money going towards defeating Carly Fiorina and Meg Whitman in California.

(*Id.* ¶ 117.) The trustee then asked the DNC to let her know if the money would in fact be used to help defeat Fiorina and Whitman, because the decedent's "friends would be pleased to know." (*Id.*) Thus, the LNC is incorrect that "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." (LNC Mem. at 22.) To the contrary, the donee could have family or friends, like Buckley's friend, who would be very interested in whether the party honored promises made to the deceased and, if those promises were not honored, might decline to donate to the party themselves, or might be in a position to retaliate, particularly if they had a role in effecting the bequest to the party. A national party committee

would clearly have an incentive to please such people, and could grant them the preferential access the decedent would have been entitled to were he or she still alive.[15]

v. The LNC's Status as a Minor Party Does Not Alter the Potential for Corruption and Its Appearance If the LNC Could Accept Unlimited Bequests

The threat of corruption and its appearance that could arise from unlimited bequeathed contributions is no less real in the case of a minor party like the LNC. As the Supreme Court recognized, "the relevance of the interest in avoiding actual or apparent corruption is not a function of the number of legislators a given party manages to elect," and thus it is "reasonable to require that *all parties* and all candidates follow the same set of rules designed to protect the integrity of the electoral process." *McConnell*, 540 U.S. at 159 (emphasis added).

In *Buckley*, the Supreme Court rejected a claim by the Libertarian Party, among others, that FECA's contribution limits invidiously discriminate against minor-party candidates. 424 U.S. at 33-35 & n.40. The Court explained that "any attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election." *Id.* at 34-35. In *McConnell*, the Court addressed a similar argument by the LNC and others who claimed that the Soft-Money Ban was overbroad because it applied to minor parties, "which, owing to their slim prospects for electoral success and the fact that they receive few large soft-money contributions from corporate sources, pose no threat of corruption comparable

[15] For example, in February 2010, the LNC learned that it was to receive a bequest from Joseph A. Reitano that eventually amounted to more than $19,000. (FEC Facts ¶¶ 121-22.) LNC officials later discovered that Reitano's son was a former LNC donor. (*Id.*) If Reitano had contributed $19,000 to the LNC while alive, he would have qualified for membership in the Chairman's Circle major-donor group, which today offers preferential access to the LNC's presidential candidate, among others. (*Id.*) Had Reitano's son asked, the LNC could have allowed him to become a member of the Chairman's Circle in his father's place; the LNC has no rules that would bar such a substitution. (*Id.*)

to that posed by the RNC and DNC." 540 U.S. at 158-59. Rejecting that claim, *McConnell* reiterated *Buckley*'s observation that minor-party candidates may win or substantially affect elections and held that the corruption rationale applies fully to minor parties. *Id.* at 159.

In this case, the LNC similarly argues that because it "has never seen one of its candidates elected to federal office," it is "not in any position to deliver political favors in exchange for promises of future bequests." (Compl. ¶ 20; *see also* LNC Mem. at 4.) But *Buckley* and *McConnell* preclude the LNC's attempt to relitigate this issue.[16] And the record shows that the LNC exemplifies the very factors upon which *Buckley* and *McConnell* relied in upholding the application to minor parties of the same contributions limits that apply to major parties.

First, the LNC's candidates have won many elections for state and local office, and they may well win an election for federal office. (*See* FEC Facts ¶¶ 130-35; LNC Mot., Redpath Decl. ¶ 2 (Docket No. 25-15).) The LNC considers itself the "number one . . . minor party in the United States," and it aspires to be a major party, as well as to "have a Libertarian president and a Libertarian Congress." (FEC Facts ¶¶ 130-31.) In any one election cycle, the LNC typically fields "[n]orth of 200" candidates for federal office, and in five of the last six federal elections, its candidates for the House of Representatives collectively earned more than one million votes, which no minor party has done since 1912. (*Id.* ¶ 132-33.)

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[16] *See RNC*, 698 F. Supp. 2d at 157 ("[A] plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision."). As the LNC notes, *McConnell* left the door open for a minor party to bring an as-applied challenge against the Soft-Money Ban, but only if "[section 441i(a)] prevents it from 'amassing the resources necessary for effective advocacy.'" 540 U.S. at 159 (quoting *Buckley*, 424 U.S. at 21). We address this argument *infra* pp. 37-40. *McConnell* closed the door, however, on an as-applied challenge based on the claim that a minor party lacking federal officeholders cannot raise corruption concerns.

Second, the LNC's candidates have had a substantial impact on the outcome of federal elections, which the party values, since it results in attention from the media, voters, and other candidates. (FEC Facts ¶¶ 137-39.) As the LNC wrote in a solicitation in 2006: "One of the most significant achievements of the year was our candidates being identified as the deciding factor in control of the U.S. Senate." (*Id.* ¶ 139.) The letter continued, "Our impact in these important elections even led to an article in *The Economist* titled 'Libertarians Emerge as a Force.'" (*Id.*)

3. The Contribution Limit as Applied to Bequeathed Contributions to National Party Committees Is Closely Drawn

Finally, the Contribution Limit as applied to bequeathed contributions is closely drawn to address the important government interests of preventing corruption and its appearance. First, *Buckley* and *McConnell* have already held that the limit at issue here is closely drawn to match the anti-corruption interest, and it need not be narrowly tailored as the LNC suggests. Second, the Contribution Limit as applied to bequeathed contributions has not prevented the LNC or any other national party committee from amassing the resources necessary for effective advocacy.

a. The Contribution Limit Is Closely Drawn to Serve an Anti-Corruption Interest

To be constitutional, a contribution limit must be closely drawn to match a sufficiently important interest. *McConnell*, 540 U.S. at 136. Unlike strict scrutiny, which requires narrow tailoring, the "lesser demand" of intermediate scrutiny, *id.*, does not require that a contribution limit be the least restrictive means of preventing corruption and its appearance, *see, e.g.*, *Buckley*, 424 U.S. at 27-28 (rejecting argument that contribution limits are invalid because bribery laws and disclosure requirements are "less restrictive means" of addressing corruption). Accordingly, *Buckley* rejected the argument that FECA's contribution limits are overbroad even though most

large contributors do not seek improper influence. *Id.* at 29-30. The Court explained that it is "difficult to isolate suspect contributions," and "the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30; *see also McConnell*, 540 U.S. at 156 ("The Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA."); *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 500 (1985) (noting the Court's "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized").

The LNC similarly argues that the Contribution Limit, as applied to bequeathed contributions, is not sufficiently tailored because "the government could draft laws specifically addressing . . . possible corruption" involving bequests "far short of applying strict contribution limits to *all* testamentary bequests." (LNC Mem. at 2-3; *see also id.* 23-24.) The LNC suggests, for example, that "the government could restrict the ability to solicit donations from gravely-ill people." (*Id.* at 23.) It is far from clear how such a test would be administered, but, in any event, the LNC is attempting to apply a narrow-tailoring standard that the Contribution Limit need not meet. Under "closely drawn" scrutiny, "Congress' failure to engage in such fine tuning does not invalidate the legislation," and Congress was entitled to conclude that stopping corruption and its appearance required preventive limits that eliminate the "opportunity for abuse inherent" in large campaign contributions. *Buckley*, 424 U.S. at 30.

b. The LNC Cannot Demonstrate that the Contribution Limit as Applied to Bequeathed Contributions Has Prevented It from Amassing the Resources Necessary for Effective Advocacy

The Contribution Limit has not prevented the LNC from amassing the resources it needs for effective advocacy.

In determining whether contribution limits are closely drawn, the Supreme Court has recognized that "'contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.'" *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 21). The Court has "asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397. *McConnell* noted that "a nascent or struggling minor party" could bring an as-applied challenge against section 441i(a) on this basis. 540 U.S. at 159. But the Court has also emphasized that it has "no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000" — "distinctions in degree become significant only when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30 (internal quotation marks omitted). And *Buckley* concluded that there was "no indication" that FECA's then-$1,000 contribution limit would have "any dramatic adverse effect on the funding of campaigns" generally, *id.* at 21; and more specifically, found no evidence that the limit "will have a serious effect on the initiation and scope of minor-party and independent candidacies," *id.* at 34; *see also Shrink Mo.*, 528 U.S. at 395 (upholding state contribution limits alleged to prevent effective advocacy, noting "their striking resemblance to the limitations sustained in *Buckley*"). Indeed, in *Randall*, the only case in which the Court

actually struck down contribution limits on this basis, the Court reviewed "suspiciously low" limits of $200-400 for candidates in state races. 548 U.S. at 238, 261.

In this case, the LNC claims that FECA's current $30,800 annual contribution limit, as applied to bequeathed contributions, prevents the party from amassing the resources necessary for effective advocacy. (LNC Mem. at 15-16.) But that limit is a far cry from the limits struck down in *Randall*, and the record shows no causal relationship between the effectiveness of the LNC's advocacy and the bequests it has or has not received. Moreover, the LNC is not a "nascent or struggling minor party." *McConnell*, 540 U.S. at 159. Founded more than 40 years ago (*see* LNC Mem. at 4), the LNC considers itself the "number one . . . minor party in the United States" (FEC Facts ¶ 131). It is on the ballot in more states, runs more candidates, and raises more funds than the other minor parties. (*Id.*) Overall, it is the third largest political party, and it is active in all 50 states with more than 250,000 registered voters. (*Id*.) In November 2010, the party fielded over 800 Libertarian candidates for federal, state, and local offices. (*Id.* ¶ 132.) And the LNC has achieved this success while subject to FECA's contribution limits, which have been in place since 1974. *See Buckley*, 424 U.S. at 6-7.

Consistent with this history, the record contains no evidence demonstrating that the LNC cannot engage in effective advocacy. Instead, the LNC offers argument and a declaration reflecting its efforts *to become a major party*. (*See* LNC Mem. at 5, 15.) For example, the LNC argues that the "Libertarian Party might achieve *greater* electoral success than it has historically achieved if it were to obtain greater financial resources." (*Id.* at 5 (emphasis added).) And its Treasurer, William Redpath, who testified regarding the LNC's political successes (FEC Facts ¶¶ 130-35), declares that the "Libertarian Party's ability to advocate for and elect its candidates would still be *improved* today if the Party could take possession of the remainder of the

Burrington bequest." (LNC Mem. at 15 (emphasis added).) But a contribution limit has prevented effective advocacy only where it has "render[ed] political association ineffective, drive[n] the sound of a candidate's voice below the level of notice, and render[ed] contributions *pointless*." *Shrink Mo.*, 528 U.S. at 397 (emphasis added). None of the LNC's evidence begins to rise to this level.

Even if the LNC's ability to engage in effective advocacy were limited, the Contribution Limit as applied to bequeathed contributions would not be the cause. Burrington is the only person to ever bequeath the LNC an amount of money in excess of the Contribution Limit. (FEC Facts ¶ 14.) And there is no evidence that the $189,234 of that bequest that the LNC could not immediately accept in 2007 (*see id.* ¶ 16) is all that stands between the LNC and what it considers effective advocacy. *Cf. Buckley*, 424 U.S. at 34 & n.40 (FECA did not prevent the Libertarian Party from engaging in effective advocacy since the party had only ever received ten contributions in excess of the limits); *see also Shrink Mo.*, 528 U.S. at 395-96 (rejecting effective advocacy claim by candidate who only identified one contributor who would have donated more than the limit allowed).[17]

Finally, even if the LNC's "ability to compete" (LNC Mem. at 15) were equated with effective advocacy — an equation never articulated by the Supreme Court — the LNC's competitive status would likely be *harmed*, not improved, if unlimited bequeathed contributions were legal. The LNC claims that the Contribution Limit violates the First Amendment rights of

[17] Moreover, there are other potential explanations for any financial restraints on the LNC's activities. The LNC claims that "[d]onors, 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," and that "[i]t is common to encounter [such] people." (LNC Mem. at 4-5.) Yet the LNC could not name one such person. (*See* FEC Facts, Exh. 5 (Resp. to Def.'s Interrogatories) at 3 (Interrogatory No. 9) (Docket No. 24-2).) Some potential donors may not donate to the LNC simply because they believe other libertarian groups will more effectively spend their money.

all national party committees (FEC Facts ¶ 8; LNC Mot. at 1); it follows that, if the LNC prevails here on that theory, all parties — including its major-party rivals — would be able to accept unlimited bequeathed contributions, likely putting the LNC at a further competitive disadvantage. *Cf. Buckley*, 424 U.S. at 33 (explaining that the 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"). It is telling that, while the LNC has been bequeathed only $247,065 in its entire history (*see* FEC Facts ¶ 84), the DNC was bequeathed over $1.2 million from just 2005 to 2009 (*see id.* ¶¶ 94, 96-100), and the RNC was bequeathed in excess of $574,000 in just one 2008 bequest (*id.* ¶ 95).

In sum, the LNC cannot demonstrate that the Contribution Limit's application to bequests renders its advocacy ineffective.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the LNC's motion for section 437h certification and grant the Commission's motion for summary judgment.

Respectfully submitted,

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