UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 1:11-cv-00562-RLW REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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As defendant Federal Election Commission ("Commission" or "FEC") explained in its opening memorandum, the question that plaintiff Libertarian National Committee, Inc. ("LNC") proposes under 2 U.S.C. § 437h — whether contribution limits on bequests to national political party committees violate the First Amendment — is insubstantial, and therefore the question should not be certified to the *en banc* court of appeals. Instead, this Court should grant summary judgment to the Commission. First, the LNC has not stated a valid First Amendment claim since it again fails to demonstrate that bequeathed contributions, which are made by contributors who by definition are already deceased, are protected by the First Amendment. Second, the Commission's evidence clearly shows that the government's interest in reducing the risk of corruption and the appearance of corruption arising from unlimited bequeathed contributions to national political party committees is strong enough to justify any First Amendment burden that may exist.

In response, the LNC offers no evidence that rebuts the Commission's showing, but instead presents a series of incorrect factual and legal assertions that are insufficient to prevent summary judgment. The LNC incorrectly claims that this Court should automatically certify its proposed question — no matter how insubstantial — to the *en banc* court of appeals merely because the question is novel. The LNC relies on a law review article that clearly confirms that bequests are *not* protected by the First Amendment. The LNC continues to wrongly claim that *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 130 S. Ct. 876 (2010) — which comprehensively addressed the corruption caused by unlimited contributions to national party committees — has nothing to do with this case, which seeks unlimited contributions to national party committees from bequests. And the LNC largely

ignores the Commission's substantial evidence showing that unlimited bequeathed contributions can lead to corruption even though a testator cannot receive preferential access after death.

Thus, the LNC's has failed to show that its question is worthy of review by the *en banc* court of appeals. Accordingly, the FEC's motion for summary judgment should be granted.

ARGUMENT

I. THE COURT MUST EVALUATE THE MERITS OF THE LNC'S CLAIM TO ADDRESS THE PENDING MOTIONS

A. The Court Must Evaluate the Merits of the LNC's Proposed Question for Certification to Determine Whether It Is Substantial

The LNC does not contest that it must demonstrate that its proposed question concerning the constitutionality of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57, is "substantial" in order to qualify for review by the *en banc* court of appeals under 2 U.S.C. § 437h.[1] (Def. FEC's Mem. in Opp'n to Pl.'s Mot. to Certify Facts and Questions and in Support of Def.'s Mot. for Summ. J. ("FEC MSJ") at 5-7 & n.3 (Docket No. 29).) However, in its opposition, the LNC attempts to functionally eliminate this requirement and to minimize this Court's gatekeeper role under section 437h by asserting that the Court cannot examine the merits of the LNC's claim. (Pl. LNC's Mem. of Points and Authorities in Opp'n to Def.'s Mot. for Summ. J. and Reply to Def.'s Opp'n to Pl.'s Certification Mot. ("Pl.'s Opp'n") at 6-10 (Docket No. 34).) The LNC's argument is contrary to the law and must be rejected.

The LNC's claim is belied by its own reliance on the district court's ruling in *Cao v. FEC*, which explained that when determining whether an as-applied challenge is substantial, the

[1] Despite its frequent use of the term "frivolous" to describe the section 437h standard, the LNC does not dispute that in this context it must present a *substantial* constitutional question to warrant review by the *en banc* court of appeals. (*See, e.g.*, Pl. LNC's Mem. of Points and Authorities in Opp'n to Def.'s Mot. for Summ. J. and Reply to Def.'s Opp'n to Pl.'s Certification Mot. at 14 (correctly referring to "frivolous or substantial" as the section 437h standard) (Docket No. 34).)

standard of review lies "'somewhere between a motion to dismiss . . . and a motion for summary judgment.'" (Pl.'s Opp'n at 7 (quoting 688 F. Supp. 2d 498, 503 (E.D. La.), *aff'd and remanded sub nom. In re Cao*, 619 F.3d 410 (5th Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 1718 (2011)).) The *Cao* court further explained that, under this standard, "some 'merits' review is appropriate," since a court "could not effectively assess the 'frivolousness' of the claims in [a] motion to certify without undertaking a thorough review of the controlling law." 688 F. Supp. 2d at 502. And in an as-applied challenge, "some review of the facts is inherently necessary to determine if a colorable claim has been raised" that warrants certification. *Id.* Accordingly, the *Cao* court rejected the plaintiffs' contentions "that the FEC ha[d] inappropriately argued the merits" while opposing certification. *Id.*

The LNC repeats the *Cao* plaintiffs' error and seeks to reduce the section 437h inquiry simply to a question of whether the LNC raises an issue that "remains unconsidered by the Supreme Court." (Pl.'s Opp'n at 7.) However, because frivolous claims are often novel, such a permissive section 437h standard would functionally eliminate the Supreme Court's requirement that certified questions be *substantial* in addition to being unsettled. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) (explaining that section 437h certification is appropriate when the issues "are neither insubstantial nor settled"). Because certified questions must be both unsettled *and* substantial, not every as-applied challenge to FECA that raises a novel issue automatically qualifies for certification. *Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) ("'[N]ot every sophistic twist that arguably presents a 'new' question should be certified.'" (quoting *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990))).

For example, in *Goland*, the plaintiff challenged FECA's contribution limits as applied to anonymous donations to minor party candidates and argued, just as the LNC does here, that his

claim should be certified simply because the Supreme Court had not squarely addressed this particular scenario when upholding the contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Goland*, 903 F.2d at 1252-53. The Ninth Circuit acknowledged that the challenge "involve[d] a 'unique set of facts' and [was] 'unlike any other considered in the reported decisions of the federal courts,'" but the court nevertheless affirmed the district court's ruling *denying* certification because the claim, though novel, was insubstantial under the principles of *Buckley*. *Id.* at 1253, 1258.

By reserving access to the *en banc* court of appeals only for constitutional questions that are both new and substantial, the district courts prevent plaintiffs from abusing the section 437h process and from unnecessarily burdening the courts of appeals. *See Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982); *Cal. Med. Ass'n*, 453 U.S. at 192 n.14. The LNC argues that concerns of abuse are misplaced because only a "limited class of parties" may utilize section 437h; however, as the LNC also points out, one of those classes includes "any qualified voter." Pl.'s Opp'n at 10; *see* 2 U.S.C. § 437h (allowing "any individual eligible to vote" in a Presidential election to bring claim). Given that 131 million people voted in the 2008 presidential election, this is hardly a limiting feature of section 437h.[2]

Finally, even if this Court were to find that the LNC's claim is insubstantial and grant summary judgment to the Commission, the LNC would still have its day in court — it could appeal that merits determination to a *panel* of the D.C. Circuit in the ordinary course. *See, e.g.*, *In re Cao*, 619 F.3d at 415, 417-20 (affirming district court's dismissal of four questions found to be insubstantial under section 437h, in appeal consolidated with review of certified questions); *Goland*, 903 F.2d at 1252, 1262 (denying appeal of district court's dismissal of four questions

[2] *See* Thom File and Sarah Crissey, *Voting and Registration in the Election of November 2008*, U.S. Census Bureau, 1 (July 2012), http://www.census.gov/prod/2010pubs/p20-562.pdf.

found to be insubstantial under section 437h). Such a ruling, however, would properly reserve to the *en banc* court of appeals the most serious questions of FECA's constitutionality.

B. The LNC Is Required to Put Forth Competent Evidence Demonstrating a Genuine Issue of Material Fact to Avoid Summary Judgment

The LNC does not dispute that if the Court finds that its proposed question of FECA's constitutionality fails to qualify for certification under 2 U.S.C. § 437h, the Commission is entitled to summary judgment. (FEC MSJ at 7 (citing *Cao*, 688 F. Supp. 2d at 503).)

The LNC incorrectly claims, however, that on a motion for summary judgment "disputed facts must be *decided* in favor of the non-moving party." (Pl.'s Opp'n at 3 (emphasis added).) To the contrary, the Court need only "draw all justifiable inferences in favor of the non-moving party." *Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack*, 681 F.3d 483, 488 (D.C. Cir. 2012). Once the moving party has met its initial burden of demonstrating the absence of a genuine issue of material fact, "the non-movant's opposition must contain more than unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial" in order to avoid summary judgment. *Banks v. District of Columbia*, 377 F. Supp. 2d 85, 88-89 (D.D.C. 2005) (internal quotation marks omitted). Even if a genuine issue of material fact exists, "the movant is entitled to summary judgment against 'a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* at 88 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The material adjudicative facts of this case are largely undisputed, notwithstanding minor objections by both parties. (*See generally* Def. FEC's Resps. to Pl.'s Facts Submitted for Certification (Docket 28-1); Pl.'s Objections to Def.'s Facts Submitted for Certification (Docket No. 30); *see also* Def. FEC's Reply Mem. in Supp't of its Proposed Findings of Fact ("FEC Fact

Reply") at 3 n.2 (Docket No. 37).) The material *legislative* facts the FEC has submitted are also undisputed, despite the LNC's meritless hearsay objections. (*See* FEC Fact Reply at 1, 3-6.) Even if the LNC disputed the Commission's legislative facts, such disputes would not preclude summary judgment because legislative facts, unlike adjudicative facts, lie "outside the domain of the clearly indisputable" and thus are not subject to the Federal Rules of Evidence. Fed. R. Evid. 201(a), Advisory Comm. Notes (1972) (internal quotation marks omitted); *see* FEC Fact Reply at 3-6. Thus, the Court is free to find the Commission's legislative facts persuasive, and on that basis, to deny certification and grant summary judgment to the FEC.

II. THE LNC'S QUESTION IS INSUBSTANTIAL BECAUSE THE LIMIT ON CONTRIBUTIONS TO NATIONAL PARTY COMMITTEES DOES NOT BURDEN ANY FIRST AMENDMENT RIGHTS AS APPLIED TO BEQUESTS

A. The Authorities on Which the LNC Relies Actually Confirm That There Is No First Amendment Right to Bequeath a Contribution

The LNC's proposed question is insubstantial because it fails to state a valid First Amendment claim. When the contribution limit that the LNC challenges, 2 U.S.C. § 441a(a)(1)(B) ("Contribution Limit"), is applied to a bequest, it does not burden any First Amendment rights because, in contrast to living donors, the deceased have no constitutional rights. (FEC MSJ at 8-15.) In its opposition, the LNC does not dispute that when FECA limits a bequeathed contribution, the donor is by definition already deceased. (FEC MSJ at 9 n.6, 11.) Nevertheless, despite the overwhelming authority stating that the deceased do not have constitutional rights that FECA could violate (FEC MSJ at 8-9), the LNC continues to incorrectly maintain that "testation is, plainly, expressive activity" and thus protected by the First Amendment (Pl.'s Opp'n at 11).

The LNC's argument relies on a law review article (Pl.'s Opp'n at 13-14) that recognizes — on its first page — that "there has long been consensus that the Constitution does not apply to

limits on testamentary freedom." David Horton, *Testation and Speech*, 101 Geo. L.J. (forthcoming 2012) (manuscript at 1), *available at* http://ssrn.com/abstract=2037400 (emphasis omitted). As the article further explains, and as the FEC itself has argued (*cf.* FEC MSJ at 10)), it is "widely-accepted" that "testation is a posthumous transfer of property — no different than other decisions about using, conveying, or investing assets," Horton, *supra* at 46, and involves no exercise of Constitutional rights, *id.* at 27 & n.212 (citing Daniel J. Kornstein, *Inheritance: A Constitutional Right?*, 36 Rutgers L. Rev. 741, 787 (1984) ("There is no right of inheritance in the United States Constitution."); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary, Restraints on Conjugal and Religious Choices*, 1999 U. Ill. L. Rev. 1273, 1289 (1999) ("[W]e can approach the question of testation . . . as a purely normative one without concerning ourselves with any constitutional objections to restricting testation."). To be sure, the author of the forthcoming law review article on which the LNC relies advocates a *change* in the law, *see* Horton, *supra* at 27 ("I challenge the conventional wisdom and argue that some limits on testamentary freedom violate the First Amendment."), but this Court, of course, must follow the law as established.

The LNC also argues that a Fifth Amendment Takings Clause case, *Hodel v. Irving*, 481 U.S. 704 (1987), somehow supports its assertion that the deceased have First Amendment rights. (Pl.'s Opp'n at 12 (also citing *Babbitt v. Youpee*, 519 U.S. 234 (1997).) But as the law review article upon which the LNC relies correctly explains, *Hodel* does no such thing: "[S]cholars unanimously" agree that "*Hodel* only bars the government from stripping owners of their ability to transmit an asset after death by any means — will, trust, or intestacy — without providing just compensation. Other than prohibiting this extreme measure, the Constitution supposedly gives the government carte blanche to regulate testation." Horton, *supra* at 27. Thus, *Hodel* did not

(as the LNC claims, Pl.'s Opp'n at 12) limit *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942), which held that "[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." To the contrary, *Hodel* explicitly "*reaffirm*[*ed*] the continuing vitality of the long line of cases" — including *Irving Trust* — "recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." *Hodel*, 481 U.S. at 717 (emphasis added).

Even if *Hodel* stood for the proposition that "decedents have the constitutional right to devise property," as the LNC erroneously claims (Pl.'s Opp'n at 12), such a right would be implicated under *Hodel* only when "both descent and devise are *completely abolished*," 481 U.S. at 717 (emphasis added). Here, the LNC will receive every cent Raymond Groves Burrington bequeathed to it; FECA does not "abolish" any right to devise but rather merely limits the amount that can be contributed annually from that bequest.[3]

Finally, the LNC alleges that even if testation is "not considered a form of expression," applying the Contribution Limit to bequests would still violate the First Amendment under *United States v. O'Brien*, 391 U.S. 367 (1967). (Pl.'s Opp'n at 13 n.4.) However, *O'Brien*'s well-known constitutional test for evaluating content-neutral laws is inapplicable here because that test only applies to *expressive* conduct recognized under the First Amendment. *Id.* at

[3] Thus, the conclusion that the Contribution Limit does not burden any First Amendment rights of the deceased does not mean that the "government could simply seize any property from any estate," nor would it prevent estates from enforcing statutorily created descendible property interests, such as a copyright, as the LNC argues. (*See* Pl.'s Opp'n at 13 & n.3 (citing 17 U.S.C. § 302(a)).) In fact, the LNC's allusion to federal copyright law proves the Commission's point: Congress must *statutorily create* posthumous "expressive" rights, like copyrights, for the very reason that such potential rights are not protected by the Constitution.

376-82. In *O'Brien*, the Supreme Court proceeded "on the assumption that the alleged *communicative element* in O'Brien's conduct" — the burning of a draft card — "is sufficient to bring into play the First Amendment." 391 U.S. at 376 (emphasis added). In contrast, the transfer of money through bequests has no protection under the First Amendment as expressive conduct, so the *O'Brien* test does not apply. *See, e.g.*, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) ("*O'Brien*, . . . has no relevance to a statute directed at [limiting] nonexpressive activity."). Instead, *no* constitutional scrutiny applies, since there is no burden on the First Amendment. *See, e.g.*, *id.* (applying no scrutiny after concluding that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against" a book store).

B. The Principle That There Is No First Amendment Right to Bequeath a Contribution Is Fatal to the LNC's Claim

The conclusion that, because the contributor is deceased, there is no First Amendment element to a bequeathed contribution is fatal to the LNC's claim. Simply stated, that principle means that the LNC cannot have suffered a First Amendment injury. While the Supreme Court has held that contribution limits on their face may burden the First Amendment rights of living contributors, no court has held the same for contribution *recipients*. (FEC MSJ at 13-14.) The LNC identifies no case to the contrary. (*See, e.g.*, Pl.'s Opp'n at 26-27.)[4] But even assuming *arguendo* that a general right to receive contributions from living donors exists, the Contribution Limit could not burden this right when applied to bequests. That is because any claimed right to *receive* a bequest must be subject to the state's plenary authority to regulate a testator's ability to

[4] Contrary to the LNC's assertion (Pl.'s Opp'n at 27), simply because it is an open question whether there is a general, First Amendment right to receive contributions from *living* donors does not mean that the LNC's current claim applying this unestablished right in a context involving *deceased* donors (who have no First Amendment rights) is substantial.

make that bequest in the first place. FEC MSJ at 12-13; *cf.* 28 Am. Jur. Estates § 9 ("A mere expectation of property in the future is not a vested right and may be changed, modified, or abolished by legislative action."). Moreover, the receipt of a contribution via bequest cannot be considered a First Amendment-protected act of association or speech by the recipient because the contributor is by necessity deceased and thus incapable of engaging in association or speech with that recipient. (FEC MSJ at 13-14.)

Therefore, it is beside the point that Burrington and his estate are not parties to this case, as the LNC stresses. (Pl.'s Opp'n at 14.) For the LNC to state a valid First Amendment claim, it must at least be possible for the LNC to have suffered a First Amendment injury, and in this case, it is not. The Commission does not challenge the LNC's standing, as plaintiff implies (Pl.'s Opp'n at 15), because the LNC's claimed financial injury is likely sufficient to qualify as an injury-in-fact, *see, e.g.*, First Am. Compl. ("Compl.") ¶ 15 (Docket No. 13); *cf. Dean v. Blumenthal*, 577 F.3d 60, 66 n.4 (2d Cir. 2009). But whether the LNC has standing has nothing to do with whether it has managed to state a valid First Amendment claim. *Dean*, 577 F.3d at 66 n.4 (warning against "erroneously conflat[ing] the requirement for an injury-in-fact with the constitutional validity of [a] claim"). The LNC suggests that its claim asserts the First Amendment injuries of its deceased donors in a survival action. (Pl.'s Opp'n at 15 (citing *Hodel*, 481 U.S. at 711).) However, the LNC overlooks the fact that normally survival actions can be prosecuted only by a decedent's estate or other entity with statutory authority to do so, *see Hodel*, 481 U.S. at 711, and the LNC does not even allege that it meets either of these criteria. In any event, no LNC donor suffered a First Amendment injury *while living* that could be the subject of a survival action since, as the LNC does not dispute, FECA only limits bequests after a testator has died. (*See* FEC MSJ at 9 n.6.)

The LNC's question is insubstantial because it fails to state a valid First Amendment claim. Thus, the LNC's request for certification should be denied, and the FEC's motion for summary judgment should be granted.

III. THE LNC'S QUESTION IS INSUBSTANTIAL BECAUSE THE CONTRIBUTION LIMIT AS APPLIED TO BEQUESTS IS CLOSELY DRAWN TO MATCH THE GOVERNMENT'S IMPORTANT ANTI-CORRUPTION INTERESTS

Even if the Contribution Limit burdened First Amendment rights when applied to bequests, the LNC's question would still be insubstantial and thus unworthy of section 437h certification because it is clear that any purported First Amendment burden would be justified by the government's important interest in preventing corruption and the appearance of corruption. (FEC MSJ at 15-40.)

In its opposition, the LNC does not contest the Commission's showing that if the Contribution Limit were subject to constitutional scrutiny, that scrutiny would be intermediate, not strict. (FEC MSJ at 15-18.) Nor does the LNC dispute that the Supreme Court in *Buckley* and *McConnell* already squarely rejected the LNC's contention that it cannot engage in corruption simply because it is a minor party lacking federal officeholders. (FEC MSJ at 33-34 & n.16.)[5] Finally, the LNC does not dispute, nor could it, that under the facts and law of

[5] The LNC continues to stress its minor-party status and its lack of federal officeholders when those facts might appear to support the party's position here. (*See, e.g.*, Pl.'s Opp'n at 26-30.) But as the Commission has pointed out (FEC Fact Reply at 7-8), the LNC does not seek relief only as to the Burrington bequest or only as to bequests the LNC might receive. The LNC's proposed question for certification asks whether FECA may constitutionally limit *any* bequest to *any* national party committee. (LNC's Mot. to Certify Facts and Questions at 1 ("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?" (emphasis omitted)) (Docket No. 25); *see also* Pl.'s Opp'n at 5.) Moreover, the LNC's complaint seeks a broad permanent injunction banning the FEC from enforcing FECA's contribution limits as to contributions resulting from *any* bequests to *any* national party committee. (*See* Compl., Prayer for Relief 1-2.) Thus, the issue of whether

McConnell, national party committees selling preferential access to their candidates or officeholders in exchange for unlimited contributions can create corruption and the appearance of corruption.

Nevertheless, the LNC contends with a straight face that *McConnell* has no relevance to this case and claims, and, without support, that unlimited contributions through bequests to national party committees cannot cause corruption or its appearance.

A. *McConnell* Is Directly Relevant to This Case

In its opposition (Pl.'s Opp'n at 16-19), the LNC continues its efforts to distance itself and this case from *McConnell*, despite *McConnell*'s clear relevance here. (*See also* FEC Fact Reply at 1-2 (pointing out the LNC's false representation to the Court that it was not a party to *McConnell*).) As the Commission explained in its Reply Memorandum in Support of its Proposed Findings of Fact, *McConnell* is directly relevant because it held that unlimited contributions to national party committees threaten corruption and the appearance of corruption. (FEC Fact Reply at 7-8.) The fact that this case involves the added element of bequests does not render *McConnell* "wholly unhelpful," as the LNC argues (Pl.'s Opp'n at 16-17); instead, *McConnell* sets a helpful baseline for this Court's consideration of whether the rampant troubles the Supreme Court described therein would be avoided merely because an unlimited contribution is bequeathed (*see* FEC Fact Reply at 8; FEC MSJ at 23-35). To further aid the Court's consideration of that question, the Commission has offered many additional facts relating to

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corruption and its appearance would result if the *major* political parties could accept unlimited bequests is central to this case.

bequests and the LNC and has described in detail how those facts show that bequests present the same threat of corruption as soft-money donations. (FEC MSJ at 23-35.)[6]

The LNC repeatedly criticizes the Commission for allegedly not compiling a record in this case relating to bequests as voluminous as the record in *McConnell*.[7] (Pl.'s Opp'n at 17-19, 24.) But that argument completely ignores the fact that *McConnell* addressed a challenge to a soft-money restriction that had just been enacted, and that unlimited soft money had been legal for years before the case, allowing the government to build an extensive record of corruption. *See, e.g.*, 540 U.S. at 114, 146-52. In contrast, here, the LNC seeks to overturn a Contribution Limit that has applied to bequests for the last 35 years. To the extent there is less evidence of corruption relating to bequests, as the LNC complains, that difference strongly suggests that the Contribution Limit *works*, not that bequests do not corrupt. *See Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting the difficulty of mustering evidence to support long-enforced statutes). "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]." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) ("*Colorado II*"). The recent experience of

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[6] The FEC's proposed findings of fact offer 43 legislative facts from *McConnell* (Def. FEC's Proposed Findings of Fact ¶¶ 20-21, 23, 28-31, 33-51, 63-64, 66, 69-71, 73-75, 80-82, 118-119, 123, 129, 136 (Docket No. 24)), as well as at least 71 facts relating directly to bequests or the LNC (*id.* ¶¶ 2-19, 32, 83-114, 117-22, 124-28, 130-35, 137-39). Thus, the LNC's suggestion (Pl.'s Opp'n at 17-18) that the Commission relies solely on *McConnell* is wrong.

[7] Ironically, a great deal of the extensive factual record in *McConnell* that the LNC extols here was composed of legislative facts of the sort that the LNC has recently argued are based on inadmissable hearsay. (*See generally* Pl.'s Objections to Def.'s Facts Submitted for Cert. (Docket No. 30).) Moreover, the LNC's assertion that the Commission "neglect[ed]" the fact that *McConnell*'s conclusions were "based on an extensive factual record" is puzzling (Pl.'s Opp'n at 21-22) in light of the fact that the Commission filed and sent to plaintiff a DVD containing *every* unsealed exhibit from *McConnell* with the Commission's proposed findings of fact. (Docket No. 24-7.)

McConnell, together with the FEC's substantial, unrebutted additional evidence relating to bequests, confirms that this threat is serious and that the LNC's claim is insubstantial.

B. The LNC Has Failed to Rebut the FEC's Evidence Showing That Bequeathed Contributions Threaten Corruption and Its Appearance

The evidence the Commission has assembled clearly shows that unlimited bequests would pose the same threat of corruption arising from unlimited contributions to national party committees that was described in *McConnell*. The record shows that, if bequeathed contributions were unlimited, donors could exploit the new loophole by contributing vast amounts to the parties through their wills.[8] (FEC MSJ at 24-26.) Donors and the parties could arrange for such contributions to directly benefit particular federal candidates and officeholders, but in any event, the money need not actually benefit any particular officeholder to result in corruption. (*Id*. at 26-28.) To encourage large bequests, the national party committees could sell preferential access to their federal candidates and officeholders (via major donor programs or otherwise) in exchange for donors recording or otherwise promising large bequests, just as the parties once sold access for soft money. (*Id*. at 28-31.) Alternatively, the national party committees could, upon receiving a large bequest, grant the access the deceased donor purchased and would have received to his or her friends, family, or associates. (*Id*. at 31-33.)

[8] It is very unlikely that donors seeking to influence a candidate's election would "not bother" with unlimited bequeathed contributions in lieu of giving money to a so-called "Super PAC," as the LNC contends. (Pl.'s Opp'n at 21.) Party and candidate contributions are inherently more valuable to candidates and thus more effective for obtaining preferential access and legislative favors than are a Super PAC's independent expenditures, which cannot be coordinated with any federal candidates. *See Citizens United*, 130 S. Ct. at 908 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (internal quotation marks omitted)).

The LNC makes little effort to dispute this scenario and offers no evidence to refute the Commission's evidence. Instead, the LNC repeatedly asserts that corruption cannot result from bequests because the donors are "not alive to receive the benefits of a *quid pro quo*." (Pl.'s Opp'n at 20; *see also id.* at 22, 26-27.) But the FEC does not argue that the deceased can receive benefits, and more importantly, there is simply no requirement that a party must grant benefits to a contributor *after* it receives his or her contribution in order for corruption to result. (FEC MSJ at 30-31.) As the Commission's evidence demonstrates, the national party committees, including the LNC, already grant preferential access to encourage future donations. (Def. FEC's Proposed Findings of Fact ("FEC Facts") ¶¶ 64-65 (Docket No. 24).) The national party committees have in fact sold preferential access based on contributors' promises to donate in the future. (*Id*. at ¶¶ 66-68.) For example, during the soft-money era, donors could join the Republican National Committee's "Team 100" major-donor group and enjoy preferential-access benefits on the basis of an immediate $100,000 donation and a commitment to donate another $75,000 over the next three years. (*Id*. at ¶ 66.) The LNC permits donors to become a member of its "Chairman's Circle" major-donor group — which offers access to its presidential candidate among others — before they finish paying the full required annual donation amount. (*Id*. at ¶ 68.) Groups other than political parties — such as the National Rifle Association — already offer immediate benefits to their future donors who promise to leave a bequest. (FEC MSJ at 30; FEC Facts ¶¶ 111-14.) And finally, the LNC admits that it could grant someone membership in one of its major-donor groups if the person merely showed the LNC his or her will providing for a bequest large enough to qualify for membership (FEC Facts ¶¶ 109-10); admits that other national party committees could do the same (*id*. at ¶¶ 106-07); and admits that corruption based on the promise of a future bequest is possible if the bequest is sufficiently imminent (Mem. of Points

and Authorities in Supp't of Pl.'s Mot. to Certify Facts and Questions at 23-24 (suggesting corruption could arise from "soliciting a bequest from a terminally-ill individual") (Docket No. 25-1).

In response to this evidence, the LNC offers *no evidence* of its own — instead, it merely dismisses the Commission's position as "speculative" and "hypothetical." (Pl.'s Opp'n 24-25.) But again, the LNC's claims ignore the fact that, because FECA has limited bequeathed contributions for decades, it is neither possible nor required that the FEC produce a voluminous record of corruption on par with that compiled in *McConnell* in order to defend the Contribution Limit. *See supra* pp. 13-14. Congress is not required to wait until rampant corruption results before it can limit contributions; indeed, the Supreme Court reviews contribution limits with lesser scrutiny in order to "provide[] Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137. The LNC's unsupported allegations and denials are insufficient to survive summary judgment. *Banks*, 377 F. Supp. 2d at 89.

The Commission's evidence also demonstrates that unlimited bequests to national party committees could result in corruption and its appearance in another way: A national party committee could sell a testator preferential access for his or her friends, family, or associates upon the party's receipt of the testator's bequest. (FEC MSJ at 31-33.) Instead of offering evidence in response, the LNC essentially invents a new requirement for corruption, suggesting that a national party committee must be under a *binding obligation* to grant preferential access in exchange for a bequest for corruption to result and that the FEC's evidence does not reach that level. (Pl.'s Opp'n at 25-26.) But this is a textbook straw man. No court has ever held that *quid pro quo* corruption requires a binding obligation between donor and recipient. To the contrary,

the Supreme Court has explained that the premise behind limits on contributions to national party committees is that they "threaten to create . . . a *sense* of obligation." *McConnell*, 540 U.S. at 144 (emphasis added).[9] Moreover, the LNC appears to contend (Pl.'s Opp'n at 26) that the recipient of preferential access must be the same person who purchased that access in order for corruption to exist, but the LNC cites no authority to support that view. So long as an officeholder's official actions are unduly influenced by contributions instead of the public interest, it is irrelevant that a testator's friends, family, or associates are the beneficiaries of the testator's largess.

In sum, the Commission's evidence demonstrates that "experience under the present law confirms a serious threat of abuse" from unlimited bequests to national political parties. *See Colorado II*, 533 U.S. at 457. In response, the LNC offers only incorrect or irrelevant assertions. Because "no colorable constitutional claims are presented on the facts," the Court should grant the FEC's motion for summary judgment and deny certification for the LNC's insubstantial question of constitutionality under section 437h. *See Cao*, 688 F. Supp. 2d at 502 (internal quotation marks omitted).

IV. THE LNC HAS NOT DEMONSTRATED THAT THE CONTRIBUTION LIMIT IS SO LOW THAT IT PREVENTS EFFECTIVE ADVOCACY

The LNC argues (Pl.'s Opp'n at 28-30) that the Contribution Limit as applied to bequests has somehow prevented the LNC from engaging in effective advocacy, but the limit is plainly

[9] *See also McConnell*, 540 U.S. at 154-55 ("[I]t is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect."); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999) ("The [anti-corruption] interest arises from the recognition that as the magnitude of a contribution grows, so grows the likelihood that the candidate will *feel beholden* to the source of those contributio[n]s. And, once elected, the candidate may *feel obliged* to take official action that is not in the public interest to meet the demands of the contributor." (emphases added)).

not so low that it prevents the LNC or any other national party committee from engaging in such advocacy. A contribution limit prevents effective advocacy only when the limit is "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." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000). In *Buckley v. Valeo*, the Supreme Court upheld the constitutionality of FECA's then-$25,000 limitation on total contributions during a calendar year, which, like the Contribution Limit here, was meant to prevent donors from circumventing the candidate contribution limit through "huge contributions to the candidate's political party." 424 U.S. at 38. The Court found "no indication" that "the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." *Id.* at 21. In a subsequent case, the Supreme Court held that contribution limits bearing a "striking resemblance to the limitations sustained in *Buckley*," did not prevent effective advocacy, *Shrink Mo.*, 528 U.S. at 395, and indeed, has only once struck down limits, which it found to be "suspiciously low," *Randall v. Sorrell*, 548 U.S. 230, 238, 261 (2006) ($200-$400 for candidates in state races). The annual Contribution Limit the LNC attacks stands today at $30,800 — higher than the *aggregate* limit on all contributions upheld in *Buckley*. The LNC has offered no evidence that contributions to national party committees have been rendered "pointless" because the parties are unable to accept bequests of more than $30,800 in one calendar year. Thus, the LNC's effective advocacy claim fails.

In its opposition, the LNC continues to narrowly describe its claim as if it were an as-applied challenge involving only bequests to the LNC. (Pl.'s Opp'n at 28-30.) But as explained *supra* p. 11 n.5, the relief the LNC seeks and its proposed question make clear that it is challenging the Contribution Limit as it applies to all bequests to all national political parties.

(*See also* FEC Fact Reply at 7-8.) Thus, the LNC's arguments that the LNC itself has been prevented from engaging in effective advocacy are *per se* insufficient to sustain its claim. *See Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010) (explaining that where the "claim and the relief that would follow . . . reach beyond the particular circumstances of the[] plaintiffs," "[t]hey must . . . satisfy [the] standards for a facial challenge to the extent of that reach.").

In any event, the Contribution Limit as it applies to bequests has not prevented the LNC from engaging in effective advocacy. The Commission put forth evidence demonstrating that the LNC is, in fact, able to engage in effective advocacy and is not a "nascent or struggling minor party," as *McConnell*, 540 U.S. at 159, noted would be required as part of a valid as-applied challenge. (FEC MSJ at 38.) On the contrary, the Commission showed that the LNC is more than 40 years old and describes itself as the "*number one* . . . minor party in the United States." (FEC Facts ¶ 131 (emphasis added).) In response, the LNC offers no evidence, but instead argues, in effect, that because it has been unable to elect a federal officeholder yet, it is *per se* unable to engage in effective advocacy. (Pl.'s Opp'n at 29-30.) Not only does this claim wrongly conflate advocacy with electoral success, but, if true, it would effectively create an across-the-board exemption from FECA's contribution limits for all minor parties that had no federal officeholder. The Supreme Court, however, has repeatedly rejected similar attempts by the Libertarian Party and the LNC to achieve such an exemption. *See Buckley*, 424 U.S. at 33-35 & n.40; *McConnell*, 540 U.S. at 158-59.

The LNC makes no effort to explain how its inability to immediately accept the full amount of the Burrington bequest — the only bequest in excess of the Contribution Limit it has ever received — caused its alleged inability to advocate effectively. (FEC MSJ at 39.) Instead, it claims only that the money would have partially eliminated its operating deficit and helped its

ballot access operations. (Pl.'s Opp'n at 30.) In any event, the Contribution Limit does not prevent the LNC from receiving the entirety of the Burrington bequest; it only requires that it be disbursed over several years.

Finally, the LNC has no response to the Commission's observation that the LNC would likely be put at a competitive *disadvantage* in elections were it to win this case, since *all* national party committees, including those of the Democratic and Republican parties, would be permitted to accept unlimited bequeathed contributions. As the evidence demonstrates, donors have bequeathed far more money to the Democrats and Republicans than to the LNC. (FEC MSJ at 39-40.)

CONCLUSION

The LNC has failed to show that bequests are protected by the First Amendment and thus has failed to state a valid First Amendment claim. It has also failed to rebut the Commission's showing that unlimited bequeathed contributions to national party committees threaten to cause corruption and the appearance of corruption, so the Contribution Limit easily satisfies intermediate scrutiny. For either of these reasons, the Court should deny certification of the LNC's proposed question under 2 U.S.C. § 437h and grant the Commission's motion for summary judgment.

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