IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S CERTIFICATION MOTION

Comes now the Plaintiff, Libertarian National Committee, Inc. ("LNC"), by and through undersigned counsel, and submits its Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Reply to Defendant's Opposition to Plaintiff's Certification Motion.

Dated: August 13, 2012

Respectfully submitted,

Allen Dickerson
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
703.894.6800/Fax: 703.894.6811
adickerson@campaignfreedom.org

By: /s/ Allen Dickerson
Allen Dickerson

Alan Gura
Gura & Possessky, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085/Fax: 703.997.7665
alan@gurapossessky.com

By: /s/ Alan Gura
Alan Gura
Attorneys for Plaintiff

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PRELIMINARY STATEMENT

The question before the Court is not whether Plaintiff Libertarian National Committee, Inc. ("LNC") or Defendant Federal Elections Commission ("FEC") correctly assesses the constitutionality, or lack thereof, of applying federal campaign contribution limits to decedents' estates. That decision is explicitly left to the D.C. Circuit, acting *en banc*. 2 U.S.C. § 437h. Nor is the question whether the deceased enjoy constitutional rights.

Rather, the question here is whether the LNC—a corporation that operates a political party—presents a frivolous claim in asserting that *its* solicitation, acceptance, and spending of political contributions from testamentary bequests enjoys First Amendment protection from contribution limits aimed at curbing corruption and the appearance thereof. Manifestly, if it takes the government forty pages to explain why the case is frivolous—to say nothing of FEC's request for additional briefing on the topic of which facts would be certified, the FEC's massive volume of proposed exhibits it considers relevant to the case, and one-hundred-thirty-nine proposed facts spanning forty-eight pages—the case is not frivolous.

The substance of the government's briefing confirms the signal indicated by its sheer volume. After opening with a wholly irrelevant attack on the alleged non-rights of dead people not parties to the litigation, the FEC misstates the standard for certification: the LNC's questions should be certified to the Court of Appeals unless they are "frivolous," with frivolity understood to encompass cases that have been legally foreclosed. The procedure found at 2 U.S.C. § 437h is not the familiar one where district courts determine the merits of a claim, subject to appeal.

Even the Commission's motion, read in its entirety, does not show that issues involving the First Amendment rights of a testator to make, an estate to contribute, and a political party to receive, bequests have ever been litigated. This fact alone is sufficient to mandate certification.

But the Commission goes further. Despite claiming on one hand that the LNC's case is "not substantial," the Commission then spends the bulk of its motion on a parade of (hypothetical) horribles whereby this case will "partially reopen the floodgates closed by BCRA." FEC Mem. In Support of Summary Judgment ("Mem") 1. Such rhetoric is unhelpful, especially when uttered by a Federal agency. Of course, only the Commission's administrative orders, and not FECA or BCRA themselves, ever considered bequests.

The Commission's rhetoric also, on the whole, simply begs the question. The very issue posed by this case is whether bequests are, or are not, as likely as individual contributions to lead to corruption or its appearance. The Commission has not proved that they will, merely that *entirely different* contributions were once, *on a different record* found to justify the Commission's restrictions.

LNC plainly presents a case of first impression in the Federal courts. It raises a serious and novel question of First Amendment law. That is precisely the situation envisioned by Section 437h, and this case should and must be certified to the Court of Appeals.

RELEVANT FACTUAL BACKGROUND

At this stage of litigation, both parties have submitted facts for certification by the Court, and both parties have also objected to many of each-other's facts. The Court has yet to rule on which facts, if any, it will certify. In the interim, we proceed under the well-worn presumption that disputed facts must be decided in favor of the non-moving party when deciding dispositive motions. *Nat'l Fedn. of Fed. Employees-IAM* v. *Vilsack,* 681 F.3d 483, 488 (D.C. Cir. 2012) (for summary judgment, courts "must draw all justifiable inferences in favor of the non-moving party") (citation omitted). While Plaintiff has submitted its proposed facts for

certification, as well as its objections to the Commission's proposed facts, it here recites certain facts it believes to be uncontested.

Plaintiff Libertarian National Committee, Inc. is the national committee of the Libertarian Party of the United States. Answer, ¶ 4. Founded in 1971, the Party has yet to elect a federal office holder, and no current federal office holder is affiliated with the Libertarian Party. Redparth Decl., ¶ 4. Unlike the two major party committees, the Libertarian party's national committee is forced to spend the bulk of its resources securing access to the ballot, leaving comparatively little for actual campaigning. Redpath Decl., ¶ 5.

Contributions to the national committees of political parties are limited pursuant to 2 U.S.C. § 441a(a)(1). That statute does not mention testamentary bequests, but the FEC has extended those limitations to such bequests by administrative action. Response to Request for Admission No. 4; FEC Advisory Opinions 2004-02 and 1999-14.

On April 26, 2007, Raymond Groves Burrington passed away, leaving a Last Will and Testament in which the Libertarian Party was named as a legatee. This bequest totaled $217,734.00. The Libertarian Party had no knowledge of this bequest prior to Mr. Burrington's passing. Apart from the bequest, Burrington had only once donated to the Libertarian party, in the amount of $25, on May 19, 1998.

Because the LNC could not accept the entirety of Mr. Burrington's bequest in any election cycle, but was constrained by the FEC's regulations to accept only up to the limit provided by Section 441a. This had a significant impact on the LNC's efforts during the 2008 and 2010 elections. An additional $160,734.00 would have covered nearly the entirety of LNC's operating deficit in 2008, and would have more than sufficed to cover the Party's ballot access costs in 2010. Redpath Decl., ¶ 11.

Plaintiff seeks the certification of a single question to the U.S. Court of Appeals for the District of Columbia Circuit: "Does imposing annual contribution limits against testamentary bequests directed at, or accepted or solicited by political party committees, violate First Amendment speech and associational rights?"

Defendant seeks summary judgment, arguing that this question is inappropriate for certification under 2 U.S.C. § 437h. Because the question is novel, has not been determined by any court known to either party, and has not been foreclosed by Supreme Court decisions, the Commission's motion should be denied.

ARGUMENT

I. THE FEC MISSTATES THE STANDARD OF REVIEW FOR CERTIFICATION, WHICH IS NON-FRIVOLITY—NOT A FULL MERITS DETERMINATION.

The Federal Election Campaign Act (FECA) contains an extraordinary judicial review provision designed to ensure that "serious question[s] as to the constitutionality of th[e] legislation" are resolved "at the earliest possible time." *Bread PAC* v. *FEC*, 455 U.S. 577, 582 (1982). This provision, 2 U.S.C. § 437(h) reads in full:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

"Despite the mandatory phrasing of the certification provision, district courts presented with complaints brought under section 437h need not automatically certify every constitutional question raised to the en banc court of appeals." *Mott* v. *FEC*, 494 F. Supp. 131, 133 (D.D.C. 1980). The Supreme Court has stated questions which are frivolous or "involve purely hypothetical applications of the statute" need not be certified to the court of appeals. *Ca. Med. Ass'n* v. *FEC*, 453 U.S. 182, 192 n.14 (1981). Some courts have viewed the

district court's role in a § 437h case as "similar to that of a single judge presented with a motion to convene a three judge court to hear constitutional challenges." *Mott*, 494 F. Supp. at 134 (citation omitted).

Thus, the "'frivolousness' standard . . is somewhere between a motion to dismiss . . . and a motion for summary judgment." *Cao* v. *FEC*, 688 F. Supp. 498, 503 (E.D. La. 2010). To find whether or not a constitutional challenge is frivolous or not, a district court "must . . . determine if the Supreme Court's previous rulings have foreclosed the challenges before it, if such a window remains open." *Id.* at 547; *see also Goland* v. *United States*, 903 F.2d 1247, 1258 (9th Cir. 1990). This Court is not called upon to determine the actual merits of any claim; courts may certify questions to the appropriate court of appeals that the district court may find dubious. *Cao*, 688 F. Supp.2d at 541-42; *SpeechNow.org* v. *FEC*, No. 08-0248-JR, 2009 U.S. Dist. LEXIS 89011, at *2 (D.D.C. 2009) ("The task before me is not to answer any constitutional questions, or to render a judgment of any kind."). The standard is simply that the issue remains unconsidered by the Supreme Court.

In its motion, the Commission slyly suggests that as-applied challenges were not initially covered by § 437h, and posits that the Court ought to look askance at the LNC's case because it is an as-applied challenge to the statute. Mem. at 6. Yet, as-applied challenges are routine under § 437h; which is perhaps

unsurprising given that most facial challenges to FECA were disposed of nearly four decades ago in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Most recently, this Court certified an as-applied challenge in *SpeechNow.org* v. *FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

The Commission further suggests that some form of a higher threshold is demanded for as-applied challenges.[1] While the Commission's case citations are correct, the Commission reads them out of context. The standard remains whether or not a claim is frivolous; courts must simply look closer at as-applied challenges to make certain that the challenge was not foreclosed by a facial challenge.

There is good reason for the Commission's desire to dilute the standard for review. Despite citing 37 cases in its motion for summary judgment, the Commission proffers not a single case discussing the constitutional relationship between bequests and contribution limits. This is not surprising, as FECA—and the United States' scheme of campaign finance regulation generally—is aimed directly at transactions and activities that usually can only be performed by the living. It is only because of the FEC's own interpretations of FECA as applying to

[1] Mem. at 6 (citing *Goland*; *Khachaturian* v. *FEC*, 980 F.2d 330, 331 (5th Cir. 1992)). (In *Khatchaturian*, the Fifth Circuit found that the district court had simply failed entirely to either certify facts or conduct a frivolousness analysis.)

both living and dead contributors that the statute now covers bequests.[2] This is the first time that this issue has ever been litigated in the courts, and therefore has not—by definition—been foreclosed by a previous ruling of the Supreme Court.

The Commission maintains that the LNC's challenge is simply a "sophistic twist." This is false. In *Goland*—a case cited by the Commission for the proposition that as-applied challenges must be reviewed under "a higher threshold"—a challenge was deemed "sophistic" when a contributor attempted to argue that *Buckley* did not dispose of his challenge because only named contributors to campaigns were affected by the $1,000 contribution limit. The *Goland* court properly found this suggestion "creative", but entirely without merit (for extremely obvious reasons). *Goland*, 903 F.2d at 1258-59. *Buckley* did, after all, flatly uphold the contribution limit as well as FECA's disclosure and reporting provisions. Meanwhile, in this case, the Commission is attempting to apply contribution limits to the deceased; something that has never been litigated.

This is not a trivial matter—expressive rights are at risk, and so is a significant amount of money. The remainder of Mr. Burrington's bequest would provide the Libertarian Party with vital resources necessary to maintaining ballot access. Redpath Decl., ¶ 5. It is possible that, but for Mr. Burrington's bequest,

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[2] FEC Advisory Opinion, Council for a Livable World (AO 1999-14).

voters in some parts of the country will not be given the option to cast a ballot for Libertarian nominees for office.

Section §437h does not give courts the option of certifying a case after determining that the issue has not been foreclosed. Rather, it *must* certify the case. Doing otherwise would entirely contradict the statute, and usurp the authority and jurisdiction Congress specifically bestowed upon the Court of Appeals.

Finally, any concern that the §437h process is subject to abuse is simply misplaced. Only three types of plaintiffs are permitted to bring a challenge under this expedited review provision: the FEC itself, any political party's national committee, and any qualified voter. *Bread*, 455 U.S. at 581; *Athens Lumber Co.* v. *FEC*, 689 F.2d 1006, 1010 n.4 (11th Cir. 1982). All "[o]thers, evidently, are remitted to the usual remedies." *Bread*, 455 U.S. at 584. Section 437h is an extraordinary provision, designed to permit a limited class of parties, including the LNC, to quickly focus judicial scrutiny on unsettled constitutional questions concerning the national electoral process.

II. DECEDENTS' CONSTITUTIONAL RIGHTS TO TESTATE—WHICH THE SUPREME COURT HAS, IN FACT, RECOGNIZED—ARE NOT DISPOSITIVE.

As noted in LNC's opening brief, the Supreme Court has only upheld contribution limits against First Amendment scrutiny in the context where political

contributions were considered a form of association. But the dead do not associate with political parties (nor does LNC purport to associate with the dead, removing them immediately from its membership rolls). And however much speech figures into the equation when the living make political donations intended to be received in their lifetime, testation is, plainly, expressive activity.

The unavoidable implication of these facts is that LNC's case is one of first impression. Since the Supreme Court has only spoken of contribution limits in a context that is inapplicable to the present circumstances, and as the Supreme Court has expressly recognized the potential for as-applied challenges to federal contribution limits, this as-applied challenge is one for the D.C. Circuit to determine.

FEC nonetheless opens with an interesting argument: "FECA cannot infringe a testator's First Amendment rights after death because the deceased have no constitutional rights." Mem. at 8 (citations omitted). However, none of the cases cited for this proposition have anything to do with testation. And the FEC errs in offering that "a person's ability to bequeath property is not protected under the Constitution." *Id.* at 10.

Directly to the contrary: the Supreme Court struck down—as a violation of the Fifth Amendment's Takings Clause—that provision of the Indian Lands

Consolidation Act which barred decedents from devising land parcels falling below a certain size or value threshold, stating:

> In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases 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. The difference in this case is the fact that both descent and devise are completely abolished . . .

Hodel v. *Irving*, 481 U.S. 704, 717 (1987) (citing and limiting, *inter alia*, *Irving Trust Co.* v. *Day*, 314 U.S. 556 (1942), relied upon by FEC). Indeed, *Hodel* rejected the government's prudential standing challenge to the case on account that it was brought by heirs, who "do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken." *Id.* at 711.

When Congress amended the provision without curing its basic constitutional defect, in that it denied the right to devise property without compensation, the Supreme Court again struck down the act. *Babbitt* v. *Youpee*, 519 U.S. 234 (1997).

Hodel and *Babbitt* are clear: decedents have the constitutional right to devise property. While, as the cases cited by FEC correctly indicate, property rights are largely creatures of state law, and states enjoy a police power to regulate

testation, property rights retain constitutional protection even in death. A different result would be absurd. If the FEC were correct that "a person's ability to bequeath property is not protected under the Constitution," Mem. at 10, the government could simply seize any property from any estate, and estates could be barred from litigating their property interests on behalf of putative heirs, as they routinely do today.[3]

And if, as the Supreme Court twice confirmed, the Fifth Amendment's Takings Clause protects testation's property aspects, it stands to reason that the First Amendment would protect testation's expressive aspects. That argument is comprehensively—and compellingly—addressed in David Horton, *Testation and Speech*, 101 GEORGETOWN L. J. ___ (forthcoming Nov. 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037400&## (last visited August 13, 2012).[4]

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[3]Indeed, much of the property routinely devised and controlled by estates is intellectual and, inherently, expressive in nature, such as copyrights, trademarks, and rights of publicity. On this score, even Congress extends "expressive" rights by statute to heirs long after death. *See, e.g.* 17 U.S.C. § 302(a) (copyright terms for life of the author plus seventy years).

[4]Even if testation were merely the transfer of property and was not considered a form of expression, application of the contribution limits to testamentary bequests would violate the rule of *United States* v. *O'Brien*, 391 U.S. 367 (1967). Assuming that FECA is within the government's constitutional power, its application to bequests does not further any important or substantial governmental interests, is

To be sure, as Prof. Horton notes, some commentators view testation purely as a transaction of property, but the matter has not been squarely addressed by the Supreme (or, apparently, any other) Court. And while LNC would not argue that law review publication, *per se*, is the benchmark for non-frivolity, Prof. Horton's is a serious academic work. The FEC's declaration that all aspects of testation are beyond constitutional scrutiny is demonstrably wrong in view of existing precedent such as *Hodel* and *Babbitt*, and its argument that the First Amendment, specifically, would not be implicated by restrictions on testation would plainly be in substantial dispute.

Alas, there is no need for this Court to contemplate whether a First Amendment claim to decedents' expression is frivolous or substantial, nor would the D.C. Circuit need to determine the question on the merits upon certification, because neither Raymond Burrington nor his Estate are plaintiffs here. The only plaintiff here is the LNC—a corporation that operates a political party, and enjoys substantial First Amendment rights in so doing. Of course, the FEC's conduct violates the rights of Burrington and his Estate, but

> [t]his lawsuit seeks to enjoin application of the Party Limit to the contribution, solicitation, acceptance, and spending of decedents' bequests,

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related directly to the suppression of speech, and its impact is much greater than necessary to vindicate any anti-corruption motive.

> as said application violates *the LNC's First Amendment speech and associational rights and those of its supporters*.

First Am. Complaint, ¶ 3 (emphasis added); Mem. at 3.

The First Amendment indisputably protects *the LNC's* ability to solicit, accept, and spend money. The primary question here is whether limits on *the LNC*'s abilities to solicit, accept, and spend money are constitutional when that money comes from decedents' estates. LNC does, in fact, have standing to represent the expressive First Amendment interests of its deceased donors, just as the heirs in *Hodel* and *Babbitt* had standing to assert the testational rights of those who bequeathed them real property. "For obvious reasons, it has long been recognized that the surviving claims of a decedent must be pursued by a third party." *Hodel*, 481 U.S. at 711.

In any event, the question of whether Burrington's rights to give LNC money are being violated is inextricable from the question of whether *LNC's rights* to receive Burrington's money are being violated. And even if Burrington's First Amendment rights are extinguished by death, the LNC's First Amendment (and other) rights in the bequest are very much alive.

Of course, the FEC's "death" argument is self-defeating. If this case is merely about the non-existent rights of the deceased, what is it, exactly, that the

FEC is regulating, if not the relationship of the deceased to the political process? It is odd to conceptualize of the situation as one where death has terminated the deceased's ability to enjoy First Amendment expressive interests, but not their ability to corrupt the political process, or to give that appearance to the American public. It is theoretically possible to express oneself without corrupting, and LNC submits that this is the natural order of things under the First Amendment; but it is difficult if not impossible, as the FEC suggests, to corrupt without expressing.

III. *McConnell* Does Not Apply to the Facts of this Case, and Consequently Does Not Foreclose the LNC's Constitutional Challenge.

The Commission relies, in too great part, on *McConnell* v. *FEC,* 540 U.S. 93 (2003). For the reasons already stated in the LNC's opposition to the Commission's Proposed Facts, *McConnell*'s factual findings are inadmissible. The Commission is required by the laws of evidence to rely upon the record it developed over the course of its (substantial) taking of discovery in *this* case.

Moreover, *McConnell* is not the silver bullet the Commission appears to believe. *McConnell* was decided on a specific and lengthy factual record, dealt with a *facial* challenge to BCRA, did not foreclose subsequent as-applied challenges and—most importantly—at no point contemplated testamentary bequests or the facts presented by this case.

A. *McConnell* does not contemplate the deceased, and therefore does not render this challenge frivolous.

While the Commission's three-page reiteration of *McConnell*'s holding, Mem. at 20-23, is in large measure correct, it is wholly unhelpful here. The FEC's discussion of *McConnell* does not address at least one substantial distinguishing factor in this case: those supposedly engaged in corrupting behavior in *McConnell* were *alive*. *McConnell* "did not purport to resolve future as-applied challenges." *Wis. Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 411-12 (2006) ("WRTL I").

Indeed, for all of the Commission's (and *McConnell*'s) discussion of the constitutionality of contribution limits, the LNC does not challenge these limits as upheld in *McConnell* (and subsequently modified by Congress to guard even more vigilantly against actual or apparent corruption). Instead, the LNC seeks only to receive contributions from an estate in accordance with 2 U.S.C. § 441a(a)(1)(B).

B. *McConnell* was based on a substantial factual record, which has not been established here.

For as much as the Commission seeks to rely on *McConnell*—whose applicability is limited—it has failed to satisfy one of *McConnell*'s necessary preconditions: the establishment of a sufficient factual record. Indeed, since the LNC has not yet been allowed its day in court, the record is scant. Moreover, the Commission adds insult to injury by attempting to rely on its own proposed

"facts"—many of which the LNC has objected to as inconsistent with the Federal Rules of Evidence[5]—as a sufficient record for assessing this constitutional claim.

Indeed, the FEC cites to the voluminous factual record established by the District Court in *McConnell*, as if to suggest that these same findings of fact should be sufficient to assess the LNC's wholly distinct challenge. Mem. at 20 n.11. Indeed, it appears that under the FEC's view, *McConnell* effectively repealed Section 437h altogether, resolving finally and forever all facts necessary to adjudicate any challenges to campaign finance regulations.[6] Instead, the Commission's argument merely highlights the contrast between the extensive findings of fact that were necessary for constitutional adjudication of the facial challenge in *McConnell*. It thereby emphasizes the *lack* of a record in this case.

The Chief Justice made a similar point for the Court in *Wisconsin Right to Life* v. *FEC,* 551 U.S. 449 (2007) ("*WRTL II*"). There, he rejected the suggestion that the Court in *McConnell* had "established the constitutional test for

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[5] *See* Plaintiff's Objections to Defendant's Facts Submitted for Certification at 1 ("Despite this Court's clearly limited role, Defendant seeks to certify 'facts' that are argumentative, conclusory, inadmissible and – in many cases – conclusions of law reserved to the Court of Appeals.").

[6] The FEC apparently took the same approach, unsuccessfully, in *Speechnow*, submitting the *McConnell* record there as purportedly controlling the outcome of that as-applied challenge.

determining if an ad is the functional equivalent of express advocacy." *Id.* at 465. Rather, he pointed out that the FEC had read too much into *McConnell* by failing to note that its "analysis was grounded in the evidentiary record before the Court" and, consequently, that the standards and statements announced in that case were heavily fact-dependent. This was because, again, *McConnell* was a facial challenge and, consequently, the Court needed only find *some* circumstances in which the challenged statutes were valid.

The LNC's question is novel. It was not addressed by *McConnell,* nor was any record developed on which the *McConnell* court could have made such a ruling in any event. *McConnell* does not foreclose the LNC's suit.

IV. THE FEC'S APPLICATION OF CONTRIBUTION LIMITS TO TESTAMENTARY BEQUESTS IS NOT CLOSELY DRAWN TO A COMPELLING GOVERNMENTAL INTEREST.

A. Unlimited Bequeathed Contributions Do Not Present the Same Concerns as Soft-Money Contributions.

Unlimited bequeathed contributions to national party committees have no resemblance to the soft-money loophole and further present no threat of corruption and its appearance. The essence of corruption is a *quid pro quo* arrangement, in which a donor gives money in exchange for some sort of benefit or access to a political party or candidate. Testamentary gifts fundamentally differ from soft-

money contributions in the simple fact that testators are, by definition, not alive to receive the benefits of a *quid pro quo*. This distinction is substantial enough that the Commission's comparison to soft money is inappropriate, and its motion for summary judgment must be denied.

In a motion for summary judgment, all facts must be taken in the light most favorable to the non-moving party. While the Commission has presented several hypothetical scenarios and anecdotes under which one could possibly find some possibility of corruption, mere speculation is simply not enough for a motion for summary judgment. Indeed, even if the court accepts the factual assertions of the Commission, these assertions simply do not command the conclusions that the Commission reaches.

B. Unlimited Bequeathed Contributions Do Not Provide a New Access Point for Donors

In its motion to dismiss, the Commission makes note of the rise of so-called "Super PACs" in the recent election cycle and the fact that such organizations can receive unlimited individual funds. Mem. at 24. The Commission correctly notes that Super PACs are a recent creation, a consequence of *SpeechNow*. The Commission also contends that Super PACs provide a new avenue for individuals to contribute vast sums to defeat or support candidates. Mem. at 24.

The Commission notes that "individuals have historically exploited the ability to make unlimited contributions to influence federal elections." *Id.* (internal citations omitted). It then discusses massive individual donations to Super PACs that have occurred during the current election cycle. *Id.* Of course, no court can accept this assertion as an example of a loophole being "exploited," because as a matter of law no corruption can be present when funds are given for independent expenditures. The Commission's point merely begs this case's central question: what possible threat does the testamentary bequest contribution present?

But even under the Commission's theory, an individual seeking to influence or corrupt an election would not bother with a bequest when the option of contributing to an independent-expenditure-only PAC is available and, more importantly, gives the individual some form of access *before* he dies. A bequest will necessarily appear less corrupt than an *inter vivos* gift because the bequeathing donor will necessarily have difficulty reaping the rewards of his gift.

C. The Commission has failed to assert facts showing a threat of corruption or the appearance thereof.

The Commission suggests that large soft-money contributions created actual or apparent indebtedness. Mem. at 27 (citing *McConnell*, 540 U.S. at 155). Significantly and without explanation, the Commission neglects the internal

citations of *McConnell* which show that this conclusion by the Court was based on an extensive factual record. *McConnell*, 540 U.S. at 128, 132, 146, 148 n. 47, 150, 151, etc. The FEC then simply asserts that, because soft-money contributions posed a threat in *McConnell*, unlimited bequests therefore also fall under the *McConnell* rationale. This assertion fails for two reasons. First, the court does not have a factual record before it which establishes that unlimited bequests present the same threat of corruption as soft-money contributions. Without any such factual record, the court is missing one of the legs on which *McConnell* stands, and therefore there is no reason to bring unlimited bequests under the same umbrella as soft-money. Additionally, on summary judgment, this court assumes all contested facts in the light most favorable to the *non-moving* party, and so the Commission's assertion of a threat of corruption is simply not adequate to overcome the presumption against summary judgment.

There is a more fundamental reason why the Commission's reliance on *McConnell* is inappropriate: soft money contributions are fundamentally different from bequests. Specifically, a donor who bequests money necessarily cannot benefit *because he is deceased*. Surely this fact precludes the Commission's uncritical application of *McConnell* to the present case.

The Commission makes two additional assertions that undermine the casual comparison to *McConnell*. First, the Commission notes that many members of Congress have "safe" seats, and so contributors can often be reasonably certain that they may end up benefitting a particular office holder. Mem. at 28. LNC does not dispute the existence of relatively "safe" seats, but these particular candidates seem to present the smallest threat of corruption or the appearance of corruption. An incumbent with a secure seat is likely *less* beholden to any individual contributor, and indeed a donor should be far less likely to contribute to a candidate who has a secure reelection. But regardless of how "safe" candidates behave, the Commission does not and cannot contend that the LNC has *ever* had a "safe" candidate because the Libertarian Party has *never elected a candidate to Federal office.*

The Commission further claims that a testator's family, friends, or associates could "inform the national party committee which federal candidates the decedent would have wanted to benefit from the request." *Id.* Yet the only factual support that the Commission presents for this assertion is an anecdote that a trustee made such a request of the Democratic National Committee in 2010. *Id.* at 32. Yet a trustee is merely a fiduciary of the estate, not a benefactor nor even necessarily a relative or friend of the decedent. A national party committee is

unlikely to engage in a *quid pro quo* with a trustee who is merely fulfilling his fiduciary obligation to the estate. Nor would there be any mechanism by which a national party committee would be forced to honor such a hypothetical request.

D. The Commission's threat of preferential access is wholly speculative

The Commission asserts that a national party could set up a structure in which potential donors receive access in exchange for assurances of their bequests. Yet the system which the Commission envisions does no such thing. The Commission notes that the contributor would simply provide "some reasonable assurance that the donor had recorded the bequest" but then also notes that "the donor could revoke the recorded bequest at any time before death." Mem. at 29. The Commission seems to believe that this theoretical system has potential problems, but proffers no real evidence of such problems. To support the existence of this hypothetical threat, the Commission asserts that preferred-access systems existed for soft money contributions, and also notes that the Republican National Committee maintains a system which gives access for a promise of a future contribution *plus a down payment*. Mem. at 30-31. Again, the LNC notes the significance of the fact that the Commission is unable to produce anything more than mere speculation about what *could* happen rather than what *has* happened.

There is little better proof than that fact to demonstrate that the LNC's case is novel and outside the experience of the Commission or the courts.

E. National party committees have no obligation to give access to associates or relatives of a decedent.

Once again, the Commission has chosen to rest its case entirely on speculative grounds, absent any real evidence. In its motion to dismiss, the Commission references an instance where a trustee of a decedent's estate wrote to the Democratic National Committee and stated that "while I [the trustee] believe he [decedent] 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." Mem. at 32 (internal citations omitted). The Commission contends that this is evidence that, contrary to the LNC's earlier assertion, that national party committees are under some obligation to enact the wishes of the deceased.

This argument is unpersuasive, and finds no support in the facts as asserted by the Commission. The trustee in question specifically acquiesces that the Democratic National Committee may spend the money "in the way [it] think[s] best." *Id.* It is unclear from the plain language how this amounts to any sort of obligation other than, at best, a non-binding amorphous moral duty. The only

"obligation" that the Commission asserts is that friends of decedent may decline to donate in the future. *Id.* at 32-33. This stretches the meaning of an "obligation" beyond what the word can tolerate.

Moreover, the Commission's example fails to address a central point in the LNC's argument. Corruption is based on a fear of *quid pro quo* corruption, but once the testator has died, he is incapable of receiving his *quo*. The hypothetical trustee or family member has broken the alleged chain of corruption.

V. THE LNC'S MINOR PARTY STATUS, HAVING NEVER ELECTED A FEDERAL CANDIDATE, IS RELEVANT TO THE NOVELTY OF ITS CONSTITUTIONAL CLAIMS AND, CONSEQUENTLY, HELPS RENDER ITS CASE NON-FRIVOLOUS.

The Commission makes much of the supposed lack of a First Amendment right to receive contributions. For this purpose it cites a Second Circuit case, *Dean* v. *Blumenthal,* 577 F.3d 60 (2d Cir. 2009), to show that there is no "decision [that] specifically held that a candidate has a First Amendment right to receive campaign contributions." Mem. at 14. But it neglects to add that the Second Circuit made this point in the context of activity arising years before *Randall* v. *Sorrell*, 548 U.S. 230 (2006); see *Dean*, 577 F.3d at 63 ("From 1995 to October 2002, Attorney General Richard Blumenthal included and enforced the following provision in contracts with outside counsel"). Moreover, the Court wrote to

> emphasize that, although [it did] not consider the right to receive campaign contributions to have been well-established during the relevant time period, we do not agree with the district court's conclusion that such a right is "inconsistent with the structure of the [Supreme Court's] opinion in *Randall*."

Dean, 577 F.3d at 69. Indeed, while noting (in dicta) that it did not believe *Randall* established a right to receive contributions, the Second Circuit noted that *Randall*'s "analysis did not foreclose such recognition." *Id.* In short, the position of the court cited by the Commission is this: the Supreme Court has not foreclosed a right to receive contributions – meaning, of course, that a suit claiming such a right is not frivolous.

This is that suit. *Randall* reiterated that "contribution limits might *sometimes* work more harm to protected First Amendment interests than their anti-corruption objectives could justify." *Randall,* 548 U.S. at 247-48 (emphasis in original). The LNC's suit presents just such a case, and does so in two ways. First, as noted above, there is no anti-corruption objective vindicated by limiting bequests, because—short of a séance— there can be no corrupt agreement with the dead. Consequently, there can be no basis for the Commission's regulation surviving even rational basis scrutiny, let alone the heightened scrutiny required here.

But secondly, individual Members of the Court have expressed concern lest too low a limit magnify the "reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge." *Id.* (citing the concurrence of Justices Breyer and Ginsburg in *Nixon* v. *Shrink Missouri PAC*, 528 U.S. 377, 403-404 (2000)). That was one lesson of *Randall,* whose reasoning was not so crabbed that it cannot be applied in this instance to invalidate limitations on bequeathed gifts to the Libertarian National Committee. And where the LNC's argument is not foreclosed, and has not been decided, it is not frivolous and should be certified to the Court of Appeals.

VI. THE LIBERTARIAN PARTY IS A MINOR PARTY THAT, IN PART BECAUSE OF ITS INABILITY TO RECEIVE THE BEQUEST AT ISSUE IN THIS CASE, HAS BEEN UNABLE TO AMASS THE RESOURCES REQUIRED FOR EFFECTIVE ADVOCACY.

The Commission correctly walks through a series of Supreme Court decisions, including language in *Randall, Buckley,* and *McConnell,* noting that a "nascent or struggling minor party" may bring an as-applied challenge to contribution limits. Mem. at 36-37. But in applying those cases, the Commission makes two serious errors. First, it claims that the Libertarian Party is not "nascent or struggling." Second, it again assumes that holdings concerning contributions by live contributors apply to bequests.

The Commission states that the Libertarian Party is not "struggling" because it is "on the ballot in more states, runs more candidates, and raises more funds than *the other minor parties.*" Mem. at 38 (emphasis added). The Commission also touts the LNC's ability to field "over 800… candidates for federal, state, and local offices." *Id.* The Commission goes on to say, without evident irony, that "the LNC has achieved this success while subject to FECA's contributions limits." *Id.*

But, of course, the Party's candidates seldom win, and it has *never* elected a federal candidate. And the purpose of the LNC—like those of all political parties—is to actually *elect* its candidates.

The FEC compounds its errors by suggesting that the LNC cannot be treated as a minor party because it wishes (emphasis in the original)—"*to become a major party.*" *Id.* The Commission goes on to cite statements by the LNC and its officers, with a triumphant flourish of italicization, that the Libertarian Party "might achieve *greater* electoral success" and its ability to advocate "would still be *improved*" through the assistance of this bequest. *Id.* (emphasis supplied by the Commission).

Of course, the LNC would enjoy "greater electoral success" and an "improved" ability to advocate if it manages to elect a single Federal candidate. The Commission's hysterics aside, it attempts to define minor parties out of

existence. A party is to be treated at a major party, in the Commission's view, if it aspires to be one. Even if it has failed to elect a single candidate, it can be lumped in with parties that successfully contend for control of the elected government of the United States. And, of course, it is no party at all if it does *not* have such ambitions.

The Supreme Court has stated that as-applied challenges may be brought by minor parties. *McConnell* at 159. The LNC is doing precisely that.

The LNC has explained how the Burrington bequest would help it along the path of electing its first Federal candidate. It would have erased much of its operating deficit in the last election year. It would have allowed the Party to qualify for more ballot access. Redpath Decl., ¶ 5. These are not activities that threaten corruption. Simply put, the LNC is the national party committee of a minor party, and its ambitions do not – in an as-applied challenge, with no developed record, and with facts assumed in favor of the nonmoving party – transform it into a major party.

Similarly, just as no case has determined the constitutional rights of *any* party to receive unlimited bequests under the First Amendment, there certainly has been no similar ruling for a *minor* party. Indeed, as noted above, the Supreme Court has suggested that as-applied challenges by minor parties are appropriate.

CONCLUSION

The LNC's claims are not frivolous or otherwise foreclosed, and its question should be certified to the Court of Appeals.

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Respectfully submitted,

Allen Dickerson
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
703.894.6800/Fax: 703.894.6811
adickerson@campaignfreedom.org

By: /s/ Allen Dickerson
Allen Dickerson

Alan Gura
Gura & Possessky, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085/Fax: 703.997.7665
alan@gurapossessky.com

By: /s/ Alan Gura
Alan Gura
Attorneys for Plaintiff