

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

LIBERTARIAN NATIONAL	)	
COMMITTEE, INC.,	)	
	)	Civ. No. 11-562 (RLW)
Plaintiff,	)	
	)	
v.	)	
	)	RESPONSES TO PLAINTIFF'S
FEDERAL ELECTION COMMISSION,	)	FACTS SUBMITTED FOR
	)	CERTIFICATION
Defendant.	)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S  
RESPONSES TO PLAINTIFF'S FACTS SUBMITTED FOR CERTIFICATION**

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Defendant Federal Election Commission (“Commission” or “FEC”) hereby submits the following responses to plaintiff Libertarian National Committee’s Facts Submitted for Certification, filed on May 4, 2012 (Docket No. 25-3). Set forth below are each of plaintiff’s facts submitted for certification and the Commission’s specific responses and objections, including references to the relevant portions of the Commission’s Proposed Findings of Fact (“FEC Facts”) and supporting exhibits, filed on May 4, 2012 (Docket No. 24).

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

FEC RESPONSE: None.

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

FEC RESPONSE: The Commission has exclusive *civil* enforcement authority over the Federal Election Campaign Act (“FECA”), 2 U.S.C. §§ 431-57, and other statutes. (FEC Facts ¶ 1.)

3. LNC is a not-for-profit organization incorporated under the laws of the District of Columbia, which maintains its headquarters in Washington, D.C. LNC has approximately 14,500 current dues paying members, in all 50 states and the District of Columbia. Approximately 278,446 registered voters identify with the Libertarian Party in the 25 states in which voters can register as Libertarians. Throughout the Nation, 154 officeholders (including holders of non-partisan offices), are affiliated with the Libertarian Party. Redpath Decl., ¶ 2.

FEC RESPONSE: None.

4. LNC’s purpose is to field national Presidential tickets, to support its state party affiliates in running candidates for public office, and to conduct other political activities in furtherance of a libertarian public policy agenda in the United States. Redpath Decl., ¶ 3.

FEC RESPONSE: None.

5. Founded in 1971, the Libertarian Party has yet to elect a federal office holder, and no current federal office holder is affiliated with the Libertarian Party. Redpath Decl., ¶ 4.

FEC RESPONSE: None.

6. Unlike its two major competitors, the Libertarian Party’s national committee is forced to spend the bulk of its resources securing access to the ballot, leaving comparatively little for actual campaigning—an expensive activity in and of itself. Redpath Decl., ¶ 5.

FEC RESPONSE: The Commission objects to this fact as speculative and lacking foundation to the extent it characterizes how the LNC’s unspecified “two major competitors” spend their resources. The Commission further objects to this fact as contrary to the record to the extent it claims the LNC “spend[s] the bulk of its resources securing access to the ballot.” As reflected in the LNC’s proposed finding of fact number 7, *infra*, the record demonstrates that in the last presidential election year, 2008, the LNC spent only 39.9 % of its available resources on ballot access. (*See* Pl.’s Mot. to Certify Facts and Questions (“LNC Mot.”) (Docket No. 25), Decl. of William Redpath (“Redpath Decl.”) ¶ 5 (Docket No. 25-15); LNC Mot., Exh. B (Docket No. 25-4) (LNC budget showing \$510,257 in ballot access spending out of an available \$1,280,103 in 2008).) In other years, the LNC spent far *less* of its available resources on ballot access:

- 2007: 5.1 % (\$62,808 out of an available \$1,220,267)
- 2009: 0.6 % (\$5,367 out of an available \$857,465)
- 2010: 11.8 % (\$132,635 out of an available \$1,121,822)

(*See* LNC Mot., Exh. B.) Moreover, the Commission objects to this fact as lacking foundation to the extent it suggests that the LNC’s spending on ballot access *caused* it to spend little on “actual campaigning.” In 2008, the LNC spent only \$500 on candidate support despite the fact that \$769,846 remained in the LNC’s available resources after it spent \$510,257 on ballot access.

(*See id.*)

7. In the last presidential election year, “ballot access” was LNC’s largest budgetary item, at \$510,257, drawn against available resources of \$1,280,103. Redpath Decl., ¶ 5; exh. B. Candidate support that year totaled a mere \$500. Id.

FEC RESPONSE: The Commission objects to this fact as lacking foundation to the extent it suggests that the LNC’s ballot access spending *caused* the LNC to spend little on candidate support. In 2008, the last presidential election year, the LNC spent only \$500 on candidate support despite the fact that \$769,846 remained in the LNC’s available resources after it spent \$510,257 on ballot access. (*See* LNC Mot., Exh. B.)

8. The Libertarian Party’s ballot access costs typically dwarf items such as candidate support, media relations, outreach, member communications, and voter registration — combined. Exh. B.

FEC RESPONSE: The Commission objects to this fact as vague and ambiguous as to its use of “dwarf.” The Commission further objects to this fact as contrary to the record, which shows that sometimes the LNC spends nearly as much or more on candidate support, media relations, outreach, and member communications as it does on ballot access. In 2009, the LNC spent more on media relations (\$5,745) and member communications (\$33,092) than it did on ballot access (\$5,367). (LNC Mot., Exh. B.) In 2007, the LNC spent nearly as much on member communications (\$56,838) as it did on ballot access (\$62,808), and spent far more on candidate support, media relations, member communications and outreach combined (\$105,457) than it did on ballot access (\$62,808). (*See id.*)

9. A party’s ability to solicit donations depends in part on having adequate financial resources on hand. Donors, voters, and prospective political candidates who might be attracted to the party’s ideology are nonetheless dissuaded from supporting the party by its lack of resources. Redpath Decl., ¶ 6.

FEC RESPONSE: The Commission objects to this fact as speculative and lacking foundation to the extent it states 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.” The LNC was unable to identify any such donors, voters, or prospective political candidates in response to a Commission interrogatory, and the LNC merely asserted that “[i]t is common to encounter [such] people.” (FEC Facts, Exh. 5 at 3 (Interrogatory No. 9) (Docket No. 24-2).)

10. Approximately 265,000 voters registered as Libertarians do not donate to the Party, and the Party reasonably believes that its ideology is attractive to many more than those Americans who are actual members. Redpath Decl., ¶ 6.

FEC RESPONSE: The Commission objects to this fact as speculative and lacking foundation to the extent it claims that it is “reasonabl[e]” to believe that the LNC’s “ideology is attractive to many more than those Americans who are actual members.” The LNC was unable to name any “donors, voters, [or] prospective political candidates . . . who might be attracted to the Libertarian Party’s ideology but nonetheless were dissuaded from supporting the Libertarian Party due to its alleged lack of resources” in response to a Commission interrogatory, and merely asserted that “[i]t is common to encounter [such] people.” (FEC Facts, Exh. 5 at 3 (Interrogatory No. 9).)

11. Numerous Americans donate money to various organizations and causes which share the Libertarian Party’s ideology, but do not find it effective to donate to the Party. It is common to encounter people who are sympathetic to the Party’s ideology but do not believe the Party has the resources to be viable and make an impact. Redpath Decl., ¶ 7.

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, and lacking foundation to the extent it refers to unspecified “[n]umerous Americans” and “various organizations and causes.” The Commission further objects to this fact as speculative and lacking foundation to the extent it claims knowledge of the donating habits and motivations of such “[n]umerous Americans” and their opinions on whether it is “effective” to donate to the LNC. The LNC was unable to name any “donors, voters, [or] prospective political candidates . . . who might be attracted to the Libertarian Party’s ideology but nonetheless were dissuaded

from supporting the Libertarian Party due to its alleged lack of resources” in response to a Commission interrogatory. (FEC Facts, Exh. 5 at 3 (Interrogatory No. 9).)

12. The Libertarian Party might achieve greater electoral success than it has historically achieved if it were to obtain greater financial resources. Exh. C, Response to Request for Admission No. 14.

FEC RESPONSE: None.

13. The Libertarian Party’s ability to influence elections is in some measure related to its ability to raise and expend money. Exh. C, Response to Request for Admission No. 15.

FEC RESPONSE: None.

14. National committees of political parties, candidates for federal office, and federal office holders, may grant preferential treatment and access to certain individuals. Exh. C, Response to Request for Admission No. 1.

FEC RESPONSE: None.

15. National committees of political parties, candidates for federal office, and federal office holders, may grant preferential treatment and access to potential donors in the unilateral hope that such preferential treatment and access would be remembered with a donation. Exh. C, Response to Request for Admission No. 2.

FEC RESPONSE: None.

16. Individuals may donate money to political parties, candidates for federal office, and federal office holders, because they appreciate the treatment and access they are afforded by federal office holders. Exh. C, Response to Request for Admission No. 3.

FEC RESPONSE: None.

17. “[N]o person shall make contributions — (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed \$ 25,000.” 2 U.S.C. § 441a(a)(1).

FEC RESPONSE: None.

18. No political committee can “solicit, receive or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements” of 2 U.S.C. § 441a(a)(1). 2 U.S.C. § 441i.

FEC RESPONSE: The Commission objects to this fact on the ground that the quoted language is from 2 U.S.C. § 441i(a)(1), but that provision applies only to the “national committee[s] of a political party (including a national congressional campaign committee of a political party)[,]” not to other kinds of political committees.

19. The contribution limits set forth in Section 441a(a)(1) are indexed for inflation. 2 U.S.C. § 441a(c).

FEC RESPONSE: The Commission objects to this fact on the ground that under 2 U.S.C. § 441a(c), only the contribution limits set forth in subparagraphs (A) and (B) of section 441a(a)(1) are indexed for inflation.

20. The current annual limit on contributions to political parties is \$30,800. <http://www.fec.gov/info/contriblimits1112.pdf>.

FEC RESPONSE: The current annual limit on contributions to “the political committees established and maintained by a national political party” under 2 U.S.C. § 441a(a)(1)(B) is \$30,800. (FEC Facts ¶ 4.) This limit applies separately to each of a political party’s national party committees. 11 C.F.R. § 110.1(c)(3). This limit does not apply to state and local political parties; the limit on contributions to those political parties is governed by 2 U.S.C. § 441a(a)(1)(D).

21. Although the term “person,” as used in 2 U.S.C. § 441a(a)(1), is not specifically defined to include an individual’s testamentary estate, Defendant FEC extends this definition to include testamentary estates. Exh. C, Admission No. 4; Exh. D, FEC Advisory Opinion 2004-02; Exh. E, FEC Advisory Opinion 1999-14.

FEC RESPONSE: FECA defines the term “person,” which is used in 2 U.S.C. § 441a(a)(1), as including “an individual, partnership, committee, association, corporation, labor

organization, or any other organization or group of persons.” 2 U.S.C. § 431(11). In advisory opinions, “the Commission has concluded that the 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 and prohibitions applicable to the decedent in the decedent’s lifetime.” FEC Advisory Op. 2004-02 (citing FEC Advisory Op. 1999-14).

22. The national committees of political parties may not receive bequests exceeding the federal contribution limits applicable to individuals. In the event such bequests are nonetheless made, defendant FEC does not permit national party committees to receive such bequests into escrow funds over which they exercise control, including control by the direction of the funds’ investment strategies or choice as to whether or in what amount withdrawals might be made in any particular year. 2 U.S.C. § 441i; Exhs. D, E.

FEC RESPONSE: National party committees may not receive contributions of bequeathed funds exceeding the limits or prohibitions that would have been applicable to the decedent during his or her lifetime. FEC Advisory Op. 2004-02. If an individual dies and bequeaths an amount in excess of an applicable FECA contribution limit to a political committee, the individual’s estate may not make a contribution from those bequeathed funds to the political committee that exceeds the applicable FECA contribution limit. *See id.* A contribution is made “when the contributor relinquishes control over the contribution,” and that occurs when the contribution “is delivered by the contributor to the . . . political committee.” 11 C.F.R. § 110.1(b)(6). An estate has relinquished control over a contribution and delivered it to a political committee if it deposits the contribution in a third-party account (such as an escrow account) over which the recipient political committee can exercise control. FEC Advisory Ops. 2004-02, 1999-14.

23. On April 26, 2007, Raymond Groves Burrington of Knox County, Tennessee, passed away, leaving a Last Will and Testament in which the Libertarian Party was named as a legatee. Exh. F.

FEC RESPONSE: None.



24. Burrington's bequest to the Libertarian Party totaled \$217,734.00. Exh. G.

FEC RESPONSE: Burrington's will contained a residual bequest for the Libertarian Party of 25% of his estate remaining after the payment of his debts and specific bequests. (FEC Facts ¶ 10.) The estate later determined that this bequest would amount to \$217,734. (*Id.* ¶¶ 9, 11.)

25. The Libertarian Party had no knowledge of Burrington's bequest prior to Mr. Burrington's passing. Kraus Decl., ¶ 2.

FEC RESPONSE: None.

26. Apart from the bequest, Burrington had only once donated to the Libertarian Party, in the amount of \$25, on May 19, 1998. Kraus Decl. ¶ 3.

FEC RESPONSE: None.

27. Owing to Defendant FEC's application of federal contribution limits, LNC could not accept Burrington's entire bequest at once, as it would use at least some if not all of the money on federal election efforts. Rather, the LNC accepted annual distributions from the Burrington Estate in the amounts of \$28,500.00 in 2007 and 2008, with the balance of \$160,734.00 being deposited in an escrow account that complies with Defendant FEC's restrictions. Kraus Decl., ¶ 5.

FEC RESPONSE: The Commission objects to this fact to the extent it suggests that the LNC could not accept Burrington's entire bequest at once because the LNC "would use at least some if not all of the money on federal election efforts." The LNC could not legally accept a contribution made from Burrington's bequest in an amount in excess of 2 U.S.C. § 441a(a)(1)(B)'s limit regardless of whether the LNC would use the money for federal or non-federal-election purposes. *See* 2 U.S.C. § 441i(a)(1). The Commission further objects to this fact to the extent it draws the legal conclusion that the escrow account containing the Burrington bequest "complies with Defendant FEC's restrictions."

28. The escrow account is established pursuant to an agreement among the Estate, the LNC, and the escrow agent, the Mercantile Bank of Michigan. The agreement provides, *inter alia*, that the Estate remains an escrowee, that the deposited funds may be invested only in the Bank's money market or certificate of deposit products, and that the LNC must annually withdraw the maximum amount permitted by the individual contribution limits. The agreement explicitly provides, however, that the LNC may challenge the legal validity of the contribution limit in federal court, and demand payment of the full amount remaining in the account should its challenge succeed. Exh. G.

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent it states that "the Estate remains an escrowee" under the escrow agreement. An escrowee is the "third-party depository of an escrow," and is also known as an "escrow agent." Black's Law Dictionary 565 (7th ed. 1999). The escrow agreement, dated December 22, 2008, designates the Mercantile Bank of Michigan as the "Escrow Agent," which shall "act as escrowee for the purposes and upon the conditions set forth in this Agreement." (LNC Mot., Exh. G at 1, ¶ 1 (Docket No. 25-9).) Upon the estate's delivery of the bequest to the Mercantile Bank of Michigan, "all duty, responsibility and liability of the Co-Executors [of the Estate] to the [Libertarian Party]" terminated. (*Id.* at 2, ¶ 2.) Furthermore, it appears that the estate may have ceased to exist after entering into the escrow agreement. On November 13, 2008, approximately one month before the execution of the escrow agreement, a Burrington estate co-executor wrote to an LNC attorney that he was "ready to close the estate," and that he felt it was not "wise or prudent to keep the estate open for an indefinite time frame in order that the estate could serve as a prospective plaintiff in litigation contemplated by the Libertarian Party," and that "the administration of the estate has already taken more time than anticipated and the estate needs to be closed." (FEC Facts, Exh. 7 (Docket No. 24-2).) The Commission further objects to this fact as contrary to the record to the extent it states that "the deposited funds may be invested only in the Bank's money market or certificate of deposit products." Although the bequest may have been invested in the bank's money market or certificate of deposit accounts at the time the

agreement was executed (*see* LNC Mot., Exh. G at 8), the escrow agreement appears to grant the Libertarian Party complete discretion to “alter[] or amend[] from time to time” how the funds are invested (*id.* at 2, ¶ 2).

29. LNC does not knowingly associate with dead people. When LNC learns that a member has passed away, the deceased is removed from the Party’s membership rolls. Kraus Decl., ¶ 4; Redpath Decl., ¶ 8.

FEC RESPONSE: The Commission objects to this fact to the extent it implies the legal proposition that it is possible to engage in First Amendment protected-association with a deceased person. *See, e.g., 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.”)

30. Upon learning of the bequest, LNC removed Burrington from the membership rolls on which he had appeared owing to his 1998 \$25 donation. Kraus Decl., ¶ 4.

FEC RESPONSE: None.

31. Leaving a bequest to a political party is a form of political expression. Redpath Decl., ¶ 8; Exh. C, Response to Request for Admission No. 5.

FEC RESPONSE: The Commission objects to this fact as vague and ambiguous as to its use of “[l]eaving a bequest.” Moreover, as the Commission stated in response to the cited request for admission, to the extent “[l]eaving a bequest’ refers to the act of a living person causing his or her will to contain a provision that provides for a bequest to a political party upon his or her death,” leaving a bequest could be a form of political expression. (LNC Mot., Exh. C at 2 (Request for Admission No. 5) (Docket No. 25-5) (alteration in original).) In contrast, “to the extent ‘[l]eaving a bequest’ refers to a testamentary estate’s transfer, distribution, donation, or contribution of funds provided for in a bequest to a political party,” leaving a bequest is not a form of political expression. (*Id.* (alteration in original).)

32. “[T]he act of a living person causing his or her will to contain a provision that provides for a bequest to a political party upon his or her death” is expressive. Exh. C, Response to Request for Admission No. 5.

FEC RESPONSE: None.

33. FEC “views the testamentary estate of a decedent as the successor legal entity to the testator and thus will apply the Act and its limits to that entity as the alter ego of the living testator.” Exh. H, FEC Advisory Opinion 1983-13.

FEC RESPONSE: None.

34. Leaving a bequest to a political party is not necessarily a means of maintaining affiliation with the party after the donor’s passing. Exh. C, Response to Request for Admission No. 6.

FEC RESPONSE: The Commission objects to this fact as vague and ambiguous as to its use of “[l]eaving a bequest” and “maintaining affiliation.” See FEC Response to ¶ 31 *supra*.

35. FEC can neither admit nor deny that political parties do not generally count the deceased among their membership, Exh. C, Response to Request for Admission No. 7.

FEC RESPONSE: None.

36. The Libertarian Party does not associate with the dead and does not maintain deceased members. Redpath Decl., ¶ 8; Kraus Decl., ¶ 4.

FEC RESPONSE: The Commission objects to this fact to the extent it implies the legal proposition that it is possible to engage in First Amendment protected-association with a deceased person. See, e.g., *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.”).

37. Individuals who leave testamentary bequests for political parties often have no idea which candidates might benefit from the contribution. People cannot always predict their death, they cannot predict who will run in future political campaigns, and bequests are often disbursed many years after they are first recorded. For example, the bequest at issue in this case was made October 13, 2000, Exh. F, nearly seven years before the donor’s death. Sometimes, multiple contingencies must occur before a bequest is received by a political party. For example, the Libertarian Party received a \$19,331.40 bequest from a donor’s trust only after the trust’s initial beneficiary passed away. Exh. I. At least one individual who presently intends to bequeath

LNC significant assets cannot predict when that gift might come to pass, or which candidates would benefit from it. Redpath Decl., ¶ 9; see also Exh. C, Response to Request for Admission No. 8.

FEC RESPONSE: The Commission objects to this fact as vague and ambiguous to the extent it refers to unnamed “[i]ndividuals who leave testamentary bequests for political parties.” The Commission further objects to this fact as speculative and lacking foundation as to its claim that these unnamed individuals “have no idea which candidates might benefit from the[ir] contribution.” Furthermore, the Commission objects to this fact as contrary to the record to the extent it claims that people cannot predict who will be a federal candidate at the time of their death. The record demonstrates that individuals have named specific federal candidates and officeholders in their bequests. (FEC Facts ¶ 128.) Finally, the Commission objects to this fact to the extent it suggests that it is legally relevant whether a testator can identify what federal candidates or officeholders might benefit from his or her bequest to a political party, given that candidates and officeholders place substantial value on contributions to their political parties without regard to how the party uses the contributions. (*See id.* ¶¶ 73-75.)

38. A political party’s federal office candidates cannot reliably count on receiving money from particular bequests in many cases. A prospective donor might defy the odds and outlast actuarial or medical predictions — or change his or her mind. Redpath Decl., ¶ 10.

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, speculative and lacking foundation to the extent it claims that unnamed “federal office candidates cannot reliably count on receiving money from particular bequests in many cases.” The record demonstrates that individuals have named specific federal candidates and officeholders in their bequests. (FEC Facts ¶ 128.) Finally, the Commission objects to this fact to the extent it suggests that it is legally relevant whether a federal candidate or officeholder could count on receiving money from a particular bequest, given that candidates and

officeholders place substantial value on contributions to their political parties without regard to how the party uses the contributions. (*See id.* ¶¶ 73-75.)

39. The Libertarian Party does not offer any benefits in exchange for being remembered in an individual's will, apart from perhaps a simple expression of gratitude.

FEC RESPONSE: The Commission objects to this fact as lacking foundation to the extent it suggests that the LNC has rules barring it from offering benefits in exchange for a bequest or would never offer benefits in exchange for a bequest. The LNC's representative testified that the LNC could grant someone membership in one of its major-donor groups, which could offer preferential access to federal candidates, in exchange for the person showing the LNC his or her will providing for a bequest in an amount large enough to qualify for membership, or in exchange for a person not revoking such a bequest. (FEC Facts ¶¶ 54, 109.) Furthermore, the LNC's representative testified that if the LNC received a bequest in an amount large enough to qualify for membership in one of its major-donor groups, the LNC could allow a family member of the decedent-contributor to take the decedent's place in the major-donor group, and the LNC has no rules that barring such a substitution. (*Id.* ¶ 122.) Moreover, the record reflects that the LNC is planning to implement a planned-giving program to solicit bequests exceeding FECA's current limits if it obtains the relief it seeks in this litigation. (*Id.* ¶ 104.) While the details of the LNC's potential planned-giving program have not "been totally thought through at this point" (*id.*, Exh. 20 at 69:9-15 (Docket No. 24-3)), the LNC does know that it would solicit people who are "well-to-do" for large bequests, including at events involving federal candidates (*id.* ¶ 104), which would provide opportunities to offer preferential access to federal candidates in exchange for bequests.

40. Once a political party receives a testamentary bequest, neither it, nor its candidates, risk offending the deceased donors. Exh. C, Response to Request for Admission No. 10.

FEC RESPONSE: None.

41. Apart from leaving bequests, and perhaps arranging for the posthumous publication or other dissemination of his or her political views, decedents are not in a position to engage in independent political expression, to associate actively through volunteering their services to political campaigns, or to support candidates and committees with financial resources. Exh. C, Response to Request for Admission No. 12.

FEC RESPONSE: The Commission objects to this fact as vague and ambiguous as to its use of “leaving bequests.” See FEC Response to ¶ 31 *supra*. The Commission further objects to this fact to the extent it implies the legal proposition that decedents can engage in any First Amendment-protected activity. See, e.g., *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.”)

42. Testamentary bequests are likely to be more generous than donations made in one’s lifetime. Redpath Decl., ¶ 8; see also discussion of FEC records survey, *infra*. For example, Burrington gave the Libertarian Party only \$25 throughout his life — but \$217,734 upon his death, a staggering 870,936% increase. Kraus Decl., ¶ 3; Exhs. F, G. James Kelleher bequeathed the Libertarian Party \$10,000, Exh. J, although during his life he had given the party only \$100. Kraus Decl., ¶ 6. And Joseph Reitano bequeathed the Libertarian Party \$19,331.40, Exh. I, although there is no record that he ever donated to the Party while alive. Kraus Decl., ¶ 7.

FEC RESPONSE: None.

43. FEC does not track political contributions received from testamentary bequests. Clark Decl., ¶ 2.

FEC RESPONSE: The Commission objects to this fact as contrary to the record. The Commission tracks contributions and donations regardless of whether they consist of bequeathed funds. (See FEC Facts, Exh. 2, ¶ 1.) However, the Commission does not require recipients of contributions or donations to report that a contribution or donation came from bequeathed funds. (*Id.* ¶ 2.) If a recipient chooses to indicate that a contribution or donation came from bequeathed

funds, the recipient is not required to use any standardized method of reporting that fact. (*Id.*) Thus, the Commission is able to ascertain some information about which contributions came from bequeathed funds, but that information likely does not capture all contributions that have been made pursuant to bequests. (*Id.* ¶¶ 3-4.)

44. Attempts to search FEC's database for records of testamentary bequests produce underinclusive results. Clark Decl., ¶¶ 3, 4. For example, the FEC's largest bequeathed political party donation, Martha Huges' \$250,000 gift to the Democratic Party, Clark Decl., Table 2, is eclipsed by Eleanor Schwartz's \$574,332.33 bequest to the Republican Party, discovered in this case. Clark Decl., ¶ 3. The Burrington bequest, which would be second on the FEC's table of alltime highest bequests to political parties, does not appear in FEC's search generated top five list.

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent it confuses bequests with contributions or donations made from bequests. The FEC's database contains records of contributions and donations, not testamentary bequests. (FEC Facts, Exh. 2 ¶ 1.) Those records sometimes reflect that a contribution or donation was made from bequeathed funds, *i.e.*, when contribution recipients choose to report that information. (*Id.* ¶ 2.) But because recipients do not always report that a contribution or donation was made from bequeathed funds, the number of records reflecting contributions and donations made from bequeathed funds most likely does not reflect the actual number of contributions and donations that have in fact been made from bequeathed funds. (*Id.* ¶¶ 3-4.)

The underinclusive nature of the FEC's records, however, is not the reason that the full amount of the Schwartz and Burrington bequests do not appear on the FEC's table of the "Five Largest Contributions or Donations Made By an Estate from Bequeathed Funds to a National Political Party Committee" (*see id.* at 5, Table 2), which the LNC incorrectly refers to as a "table of alltime highest *bequests* to political parties" (emphasis added). That table, like all of the FEC's records, reflects *contributions or donations* made from bequests, and not the size of the



underlying bequest itself. Thus, even where a report does clearly indicate that a contribution was made from bequeathed funds, that record (if it post-dates 2002) would still not indicate the entire amount of the underlying bequest from which the contribution was made. (*See id.* ¶ 9.) For example, Burrington bequeathed the LNC \$217,734 in 2007. (First Amended Compl. (“Compl.”) ¶ 14 (Docket No. 13).) Yet the LNC’s reports to the FEC only indicate the size of the contributions made from that bequest, since the FEC only requires reporting of contributions. (*See, e.g.*, FEC Facts, Exh. 15 (indicating a \$30,400 contribution from the Burrington estate to the LNC in 2010) (Docket No. 25-2).) And even though the LNC clearly indicated in that report that the contribution was made from bequeathed funds, that report still does not indicate the overall size of the Burrington bequest. (*Id.*) Thus, the Burrington bequest does not appear in the “FEC’s search generated top five list” in Table 2 of the Clark Declaration. (*Id.*, Exh. 2 at 5, Table 2.) In contrast, Martha Huges’ \$250,000 bequeathed donation to the Democratic National Committee (“DNC”) in 2002 does appear in the FEC’s records because at that time, before the Soft-Money Ban was enacted, national party committees could accept an entire bequest as one donation so long as it was designated as soft money. (*Id.* ¶ 8-9 & Table 2.)

45. BCRA’s prohibition of so-called soft-money makes it difficult for FEC to identify oversized bequests made since 2002. Clark Decl., ¶ 9. Nonetheless, FEC identified \$2,260,799.70 in funds bequeathed to national political party committees since the inception of its database in 1978. Clark Decl., Table 3.

FEC RESPONSE: None.

46. FEC estimates that “the average hard-money contribution made by estates to national political party committees from bequeathed funds was approximately \$9,041.09, [and] the average soft-money donation made by estates to national political party committees from bequeathed funds was \$62,117.23,” Clark Decl., ¶ 11, understate the true disparity between the two variables, as some of the donations classified as “hard money” are maximum annual withdrawals against what would otherwise be “soft money” donations. For example, averaged in to the \$9,041.09 “hard money” figure are annual withdrawals from the Burrington trust in amounts of \$28,500 and \$30,800 dollars, while the “soft money” average should include, but does not, the total of Burrington’s \$217,734 gift.

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent it confuses bequests with contributions or donations made from bequests. The “average soft-money donation” figure of \$62,117.23 correctly does not include the total of Burrington’s \$217,734 bequest, because the total amount of that bequest was never contributed or donated to the LNC. (FEC Facts ¶¶ 16-18.) The FEC’s records track contributions and donations, not bequests. (*See id.*, Exh. 2, ¶ 1.) Bequeathed funds do not become a contribution or donation until an estate relinquishes control over the funds by transferring them to the recipient. *See* FEC Advisory Op. 2004-02. BCRA banned soft-money donations in 2002, and thus, Burrington’s entire \$217,734 bequest in 2007 could not become a soft-money donation that would be averaged into the \$62,117.23 figure in Table 3 of the Clark Declaration. (FEC Facts, Exh. 2 ¶¶ 8-9, 11 & Table 3.)

47. A rough approximation of average size of bequests to political parties can be determined by dividing FEC’s “Total Amount of Bequeathed Funds Contributed or Donated,” \$2,260,799.70, by the “Total Number of Contributions or Donations Made From Bequeathed Funds,” 162: \$13,955.55. Of course this number is too low, as post-BCRA bequests that exceed contribution limits are broken down into smaller “hard money” donations.

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent it confuses bequests with contributions or donations made from bequests. The FEC’s database tracks contributions and donations, and not the size of the bequests from which those contributions and donations were made. (FEC Facts, Exh. 2 ¶¶ 1, 9.) Thus, an “approximation of [the] average size of *bequests* to political parties” (emphasis added) cannot be made by dividing the total amount of bequeathed funds *contributed or donated* by the total number of *contributions or donations* made from bequeathed funds. For example, Burrington bequeathed the LNC \$217,734 in 2007. (Compl. ¶ 14.) Yet the LNC’s reports to the FEC only indicate the size of the contributions made from that bequest, since the FEC only requires reporting of

contributions. (*See, e.g.*, FEC Facts, Exh. 15 (indicating a \$30,400 contribution from the Burrington estate to the LNC in 2010).) That record does not indicate the overall size of the Burrington bequest. (*Id.*) Thus, the LNC’s arithmetic does not give a “rough approximation of [the] average size of *bequests* to political parties” (emphasis added), but instead it indicates the average size of *contributions or donations* made to political parties from bequeathed funds. (FEC Facts, Exh. 2, Table 3.)

48. LNC’s average contribution is \$45.98. Kraus Decl., ¶ 9.

FEC RESPONSE: None.

49. There is no reason to suppose that LNC’s donors are poorer or less generous with their party than are supporters of other political parties. Dividing amounts contributed or donated, by the number of bequeathed contributions and donations by party as supplied by FEC’s survey, Clark Decl., Table 4, yields the following average bequest per party:

Libertarian: \$16,255.39

Republican: \$10,531.93

Democratic: \$18,824.06

Green: \$20,303.84

FEC RESPONSE: The Commission objects to this fact as contrary to the record to the extent it confuses bequests with contributions or donations made from bequests. The size of the “average *bequest* per party” (emphasis added) cannot be determined from the FEC’s records, since the FEC’s records track contributions and donations, and not the size of the bequests from which those contributions and donations were made. (*See* FEC Facts, Exh. 2 ¶¶ 1, 9.) For example, Burrington bequeathed the LNC \$217,734 in 2007. (Compl. ¶ 14.) Yet the LNC’s reports to the FEC only indicate the size of the contributions made from that bequest, since the FEC only requires reporting of contributions. (*See, e.g.*, FEC Facts, Exh. 15 (indicating a \$30,400 contribution from the Burrington estate to the LNC in 2010).) That record does not indicate the overall size of the Burrington bequest. (*Id.*) Thus, the LNC’s arithmetic does not

yield an “average *bequest* per party” (emphasis added), but rather the average *contribution or donation* made to political parties from bequeathed funds. (FEC Facts, Exh. 2, Table 4.)

50. An additional \$160,734.00 in 2008 would have had a material impact on LNC’s ability to advocate for and elect its candidates, covering nearly the entirety of LNC’s operating deficit that year. Exh. B; Redpath Decl., ¶ 11. That same amount of money in 2010 would have more than sufficed to cover the Party’s ballot access costs. *Id.*

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, speculative, and lacking foundation as to its prediction that “\$160,734.00 in 2008 would have had a material impact on LNC’s ability to advocate for and elect its candidates.” Assuming the “material impact” the LNC refers to is an improved ability to advocate for and elect candidates, the record does not support the LNC’s assertion. First, in 2008, the LNC spent only \$500 on candidate support despite the fact that \$769,846 remained in the LNC’s available resources after it spent \$510,257 on ballot access. (*See* LNC Mot., Exh. B.) There is no evidence that an additional \$160,734 would have caused the LNC to spend more on candidate support that year. Second, the record reflects that the LNC’s ability to “elect its candidates” would likely be harmed, not improved, were it able to accept unlimited bequeathed contributions, such as Burrington’s bequest. The LNC claims that FECA violates the First Amendment rights of *all* national party committees, and thus if the LNC prevails in this litigation, all national parties, including its major-party rivals, would be able to accept unlimited bequeathed contributions, putting the LNC at a further competitive disadvantage in elections. *Cf. Buckley v. Valeo*, 424 U.S. 1, 33 (1976) (per curiam) (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”). The record shows that while the LNC has only been bequeathed \$247,065.40 in its entire history (FEC Facts ¶ 84), the DNC

was bequeathed more than \$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).

51. The Libertarian Party's ability to advocate for and elect its candidates would still be improved if today the Party could take possession of the remainder of the Burrington bequest. Redpath Decl., ¶ 12.

FEC RESPONSE: The Commission objects to this fact as speculative and lacking foundation. The record does not support the LNC's assertion that its "ability to advocate for and elect its candidates would . . . be improved" if it could accept unlimited bequeathed contributions, such as Burrington's bequest. First, in 2008, the LNC spent only \$500 on candidate support despite the fact that \$769,846 remained in the LNC's available resources after it spent \$510,257 on ballot access. (*See* LNC Mot., Exh. B.) There is no evidence that an additional \$160,734 would have caused the LNC to spend more on candidate support that year. Second, the record reflects that the LNC's ability to "elect its candidates" would likely be harmed, not improved, were it able to accept unlimited bequeathed contributions, such as Burrington's bequest. The LNC claims that FECA violates the First Amendment rights of *all* national party committees, and thus if the LNC prevails in this litigation, all national parties, including its major-party rivals, would be able to accept unlimited bequeathed contributions, putting the LNC at a further competitive disadvantage in elections. *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"). The record shows that while the LNC has only been bequeathed \$247,065.40 in its entire history (FEC Facts ¶ 84), the DNC was bequeathed more than \$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).

52. LNC's inability to raise large sums from bequests has contributed to the LNC being unable to amass the resources necessary for effective advocacy in every election impacted by the application of contribution limits to bequests to political parties. Redpath Decl., ¶ 13.

FEC RESPONSE: The Commission objects to this fact to the extent it draws a legal conclusion. The Commission further objects to this fact as lacking foundation and contrary to the record as to its claim that the LNC is unable to amass the resources necessary for effective advocacy. The record shows that the Libertarian Party, which is more than 40-years old, is 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.) Currently, the LNC has 154 officeholders nationwide. (LNC Mot., Redpath Decl. ¶ 2.)

The Commission further objects to this fact as lacking foundation and contrary to the record to the extent it claims that the "LNC's inability to raise large sums from bequests has contributed" to the LNC's alleged inability to amass the resources necessary for effective advocacy "in every election impacted by the application of contribution limits to bequests to political parties." Burrington is the only person to ever bequeath the LNC an amount of money in excess of FECA's contribution limit. (FEC Facts ¶ 14.) There is no evidence that the \$189,234 of that bequest that the LNC could not immediately accept in 2007 (*id.* ¶ 16) is all that stands between the LNC and effective advocacy. *Cf. Buckley*, 424 U.S. at 33-34 & n. 40 (FECA did not prevent the Libertarian Party from engaging in effective advocacy since the party had only ever received 10 contributions in excess of the limits). Had the LNC been able to accept the entire Burrington bequest in 2007, there is no indication in the record that the LNC would have

spent the funds on advocacy. For example, in 2008, the LNC spent only \$500 on candidate support despite the fact that \$769,846 remained in the LNC's available resources after it spent \$510,257 on ballot access. (*See* LNC Mot., Exh. B.) There is no evidence that an additional \$160,734 would have caused the LNC to spend more on candidate support that year.

53. LNC's ability to raise and accept at once and without limitations, bequests the size of that left by Burrington to the Libertarian Party, would have a profoundly positive impact on the Libertarian Party's ability to compete. Redpath Decl., ¶ 14.

FEC RESPONSE: The Commission objects to this fact as vague, ambiguous, speculative, lacking foundation, and contrary to the record. The record reflects that the LNC's "ability to compete" would likely be harmed, not improved, were it able to accept unlimited bequeathed contributions, such as Burrington's bequest. The LNC claims that FECA violates the First Amendment rights of *all* national party committees, and thus if the LNC prevails in this litigation, all national parties, including its major-party rivals, would be able to accept unlimited bequeathed contributions, putting the LNC at a further competitive disadvantage in elections. *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"). The record shows that while the LNC has only been bequeathed \$247,065.40 in its entire history (FEC Facts ¶ 84), the DNC was bequeathed more than \$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).

54. The LNC refrains from taking immediate possession of the entirety of the Burrington bequest, and refrains from actively soliciting and accepting testamentary bequests without limitation, owing to the FEC's application of federal contribution limits against testamentary bequests. Redpath Decl., ¶ 15.

FEC RESPONSE: The Commission objects to this fact to the extent it suggests incorrectly that 2 U.S.C. § 441i(a)(1) bars the LNC from soliciting funds that are to be received in accord with the limitations of FECA.

55. The LNC has placed advertisements in its newsletter, LP News, seeking testamentary bequests. Exhibit K.

FEC RESPONSE: None.

56. The option of remembering the LNC in one's will has also been conveyed to delegates at the Party's conventions, and indeed, the LNC intends on soliciting bequests from time to time. Redpath Decl., ¶ 16.

FEC RESPONSE: None.

57. Were the Court to enjoin enforcement of federal contribution limits against testamentary bequests to LNC, LNC would immediately launch a comprehensive planned giving program. LNC would establish a planned giving page for its website, address planned giving through direct mail solicitations, emails, personal solicitations, stories in the LNC's newspaper for members, LP News, and through announcements at its National Conventions by the National Chair. The LNC would also solicit bequests at its presidential nominating convention banquets. Redpath Decl., ¶ 17.

FEC RESPONSE: None.

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