# APPENDIX A

## United States Court of Appeals
### FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued November 30, 2018 Decided May 21, 2019

No. 18-5227

LIBERTARIAN NATIONAL COMMITTEE, INC.
APPELLANT

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

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On Certification of Constitutional Questions
from the United States District Court
for the District of Columbia
(No. 1:16-cv-00121)

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*Alan Gura* argued the cause and filed the briefs for appellant.

*Timothy Sandefur* and *Aditya Dynar* were on the brief for *amicus curiae* Goldwater Institute in support of appellant.

*Allen Dickerson* and *Zac Morgan* were on the brief for *amicus curiae* Institute for Free Speech in support of appellant.

*Jacob S. Siler*, Attorney, Federal Election Commission, argued the cause for appellee. With him on the

brief were *Kevin A. Deeley*, Associate General Counsel, and *Harry J. Summers,* Assistant General Counsel.

*Paul M. Smith*, *Tara Malloy*, *Megan P. McAllen*, *Fred Wertheimer*, and *Donald J. Simon* were on the brief for *amici curiae* Campaign Legal Center, et al. in support of appellee.

Before: GARLAND, *Chief Judge*, and HENDERSON, ROGERS, TATEL, GRIFFITH, SRINIVASAN, MILLETT, PILLARD, WILKINS, and KATSAS, *Circuit Judges.**

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* GRIFFITH.

Opinion concurring in part, concurring in the judgment in part, and dissenting in part filed by *Circuit Judge* KATSAS, with whom *Circuit Judge* HENDERSON joins.

TATEL, *Circuit Judge*. When Joseph Shaber passed away, he left over $235,000 to the Libertarian National Committee (LNC). This case is about when and how the LNC can spend that money. The LNC argues that the Federal Election Campaign Act (FECA), which imposes limits on both donors and recipients of political contributions, violates its First Amendment rights in two ways: first, by imposing *any* limits on the LNC's ability to accept Shaber's contribution, given that he is dead; and second, by permitting donors to triple the size of their contributions, but only if the recipient

* Circuit Judge Rao did not participate in this matter.

party spends the money on specified categories of expenses. Scrutinizing each provision in turn, we find no constitutional defects and reject the LNC's challenges.

## I.

Over half a million voters have registered as Libertarians. *See* Findings of Fact ("CF") ¶ 3, *Libertarian National Committee, Inc. v. Federal Election Commission*, 317 F. Supp. 3d 202 (D.D.C. 2018). The LNC, the national committee of the Libertarian Party, has over 130,000 members and about 15,000 active donors. *See* CF ¶¶ 1, 3.

During his lifetime, Joseph Shaber was one of those donors, contributing a total of $3,315 in a series of relatively small donations over some twenty-five years. *See* CF ¶¶ 109–10. Unbeknownst to the LNC, Shaber intended to be a donor in death as well. *See* CF ¶ 115. In 2015, shortly after Shaber had passed away, the LNC learned that Shaber left it the generous sum of $235,575.20. *See* CF ¶¶ 117, 121.

But the LNC had a problem. Under FECA, "no person," 52 U.S.C. § 30116(a)(1), may make a contribution to a national political party committee above an inflation-adjusted annual limit, *see id.* § 30116(c)—which, in 2015, capped contributions at $33,400, *see* CF ¶ 119—and national party committees, in turn, "may not solicit, receive, . . . or spend any funds" donated in excess of that limit, 52 U.S.C. § 30125(a). Furthermore, the Federal Election Commission (the "Commission"), the agency charged with enforcing FECA, interprets

"person" to include the dead and their estates. *See* FEC Advisory Opinion 1999-14 (Council for a Livable World), 1999 WL 521238, at *1 (July 16, 1999) ("[A] testamentary estate is the successor legal entity to the testator and qualifies as a person under the Act. . . ."). Taken together, these restrictions prohibited the LNC from accepting more than $33,400 of Shaber's donation into the LNC's general fund in 2015.

But there was another way. Just the previous year, in 2014, Congress had amended FECA to permit donors to contribute, over and above their general-purpose contributions, amounts up to three times the base limit into each of three new kinds of "separate, segregated" party-committee accounts. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. N, § 101, 128 Stat. 2130, 2772–73 (2014) (codified at 52 U.S.C. § 30116(a)(1)(B), (a)(9)). Recipient parties may use these accounts to pay for "presidential nominating convention[s]," party "headquarters buildings," and "election recounts . . . and other legal proceedings." 52 U.S.C. § 30116(a)(9). In 2015, then, the LNC could have accepted up to $334,000 from Shaber's bequest, taking $33,400 into its general fund and $100,200 into each of three segregated funds.

The LNC, however, preferred not to tie up the majority of Shaber's gift in segregated accounts, and the trustee in charge of distributing Shaber's gift concluded that she had no authority to require the LNC to accept the full bequest into a combination of general- and dedicated-purpose accounts because she "could not impose restrictions on Mr. Shaber's bequest that

Mr. Shaber did not himself place." CF ¶¶ 126–27. Accordingly, the LNC accepted only $33,400 of Shaber's donation, *see* CF ¶ 119, and the trustee asked the Commission for an advisory opinion on what to do with the rest, *see* 52 U.S.C. § 30108(a) (requiring the Commission to issue written advisory opinions upon request). In that request, the trustee proposed to put the balance of Shaber's bequest into an escrow account that would disburse the maximum base-limit contribution into the LNC's general fund each year until the entire gift had been depleted (about seven years in total). *See* FEC Advisory Opinion 2015-05 (Shaber), 2015 WL 4978865, at *1 (Aug. 11, 2015). The Commission approved this plan, with the caveat that the escrow agreement must prevent the LNC from "exercis[ing] control over the undisbursed funds." *Id.* at *3 n.4.

In September 2015, the trustee and the LNC signed an agreement under which the remaining $202,175.20 of Shaber's bequest would be deposited into an escrow account. *See* CF ¶ 128. Pursuant to the escrow agreement, in January of every year the LNC receives a payment equal to the inflation-adjusted contribution limit. *See* CF ¶ 128; *see also* Defendant Federal Election Commission's Memorandum in Support of its Motion to Dismiss and in Opposition to Plaintiff's Motion to Certify Facts and Questions, Ex. 27 ("Escrow Agreement") ¶ 3, *Libertarian National Committee*, 317 F. Supp. 3d 202 (No. 16-cv-00121), ECF No. 26-31. Although the escrow agreement prohibits the LNC from requesting any money in excess of the contribution limit, it does allow the committee to accept the "entire balance of the

Escrow Fund" if it successfully "challenge[s] the legal validity of the [c]ontribution [l]imit in federal court." Escrow Agreement ¶ 3.

The LNC now seeks to do just that. On January 25, 2016, it filed this action challenging both the application of FECA's contribution limits to Shaber's bequest and FECA's new two-tiered limit on contributions to general and segregated accounts. *See* Complaint ¶¶ 21–34, *Libertarian National Committee*, 317 F. Supp. 3d 202 (No. 16-cv-00121), ECF No. 1. Proceeding under FECA's special judicial review provision, the district court then certified factual findings and "non-frivolous constitutional questions" to this en banc court. *Holmes v. Federal Election Commission*, 875 F.3d 1153, 1157 (D.C. Cir. 2017) (en banc); *see also* 52 U.S.C. § 30110 ("The district court immediately shall certify all questions of constitutionality of [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.").

With the benefit of the district court's findings of fact and certification order, we now consider the three legal questions articulated by the district court. *See* Order, *Libertarian National Committee*, 317 F. Supp. 3d 202 (No. 16-cv-00121), ECF No. 34 ("Certification Order"). First:

> Does imposing annual contribution limits against the bequest of Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?

*Id.* at 2. Second:

> Do [FECA's contribution limits], on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its contributions above [the] general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?

*Id.* Or, put more simply, does FECA's two-tiered contribution limit, on its face, violate the First Amendment? And third:

> Do [FECA's contribution limits] violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend that portion of the bequest of Joseph Shaber that exceeds [the] general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?

*Id.* Again, put more simply, does FECA's two-tiered contribution limit, as applied to Shaber's bequest, violate the First Amendment?

After assuring ourselves of subject-matter jurisdiction, we address each question in turn.

## II.

"[T]he 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable

judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal citation omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Commission sees three defects in the LNC's standing. We see none.

The Commission first argues that by electing to place the balance of Shaber's gift into escrow instead of accepting it into segregated accounts, the LNC has inflicted its own injury. *See National Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (explaining that self-inflicted harm "does not amount to an 'injury' cognizable under Article III," nor is it "fairly traceable to the defendant's challenged conduct"). Of course the Commission is correct in the most literal sense: the LNC did, indeed, put pen to paper and sign the escrow agreement. But as the district court explained in rejecting the Commission's self-infliction argument, the LNC's injury stems not from its inability to accept the entire bequest immediately (which it could have done), but rather from the committee's "inability to accept [immediately] the entire bequest for *general expressive purposes*" (which FECA prohibits). *Libertarian National Committee, Inc. v. Federal Election Commission*, 228 F. Supp. 3d 19, 25 (D.D.C. 2017). The Commission forced the LNC to choose between immediate access to the money and long-term flexibility in spending it; that the committee chose the lesser of two evils hardly transforms FECA's limitation into a self-imposed restriction.

The Commission, however, has a response: because "[m]oney is fungible," a dollar contributed into a

segregated account "is an extra dollar from the . . . general account that becomes available for [the LNC's] general expressive purposes." Federal Election Commission's Motion to Dismiss for Lack of Subject-Matter Jurisdiction ("Motion") at 14–15. Perhaps so, but the arithmetic just does not work. In 2015, the year the LNC first gained access to Shaber's $235,575 bequest, it spent only $341 on its 2016 presidential nominating convention and $7,261 on legal proceedings. Therefore, even assuming the LNC could have maxed out its headquarters spending at $100,200 and accepted an additional $33,400 into its general account, some $94,373 of Shaber's bequest would have remained unused as of December 31, 2015.

Contrary to the Commission's argument, we have no need to examine the LNC's "2016 budget expectations and expenditures." Motion at 17. True, the LNC must demonstrate standing "as of the time [its] suit commence[d]" in January 2016, *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009), and expense reports reveal that by the end of 2016, the LNC had incurred enough convention, headquarters, and legal costs to have fully absorbed what remained of Shaber's donation—assuming the money it spent on those expenses was itself unrestricted and thus fully fungible. But by January 2016, Shaber's bequest sat locked in an escrow account over which—at the Commission's direction—the LNC exercised "no control." FEC Advisory Opinion 2015-05 (Shaber), 2015 WL 4978865, at *3 (Aug. 11, 2015). The relevant date is therefore September 2015, when the LNC

committed itself to the escrow arrangement. At that time, although the committee may have projected certain expenses, it lacked perfect information about what costs it would incur and what other donations it might receive in the new year. We cannot rely on hindsight to fault the LNC for its failure of foresight, and in any event, our task is not to assess the committee's financial planning acumen. Rather, we must determine only whether the LNC suffered a cognizable injury in fact that is fairly traceable to the Commission's conduct (and, by extension, to FECA). The LNC easily clears that bar.

Next, the Commission argues that a favorable judicial determination could not redress the LNC's injury because this suit, filed in 2016, seeks only injunctive and declaratory relief for harm suffered a year earlier in 2015, when Shaber's bequest became available. To be sure, our Article III authority does not include the power to turn back time. Nonetheless, much of the money remains tied up in escrow, and we most certainly do have authority to invalidate the challenged portions of FECA—which, per the escrow agreement, would afford the LNC immediate access to the remainder of the bequest for all purposes. *See* Escrow Agreement ¶ 3. That is redress.

Finally, the Commission points out that the LNC "lacks standing to the extent its claims" depend on the allegation that the challenged contribution limits "place the Libertarian Party at a competitive disadvantage vis-à-vis other political parties," which, the Commission argues, "is akin to the oft-rejected argument that

a party is harmed because it is at a fundraising disadvantage to its competitors." Motion at 20–21. But according to the LNC, "that extent is zero." Plaintiff's Opposition to Defendant's Motion to Dismiss ("Opposition") at 15. Taking the LNC at its word, we conclude, as did the district court, that the committee has alleged a cognizable harm in its inability to accept immediately "the entire bequest for *general expressive purposes*." *Libertarian National Committee, Inc.*, 228 F. Supp. 3d at 25.

## III.

We proceed to the first certified question: whether applying FECA's annual contribution limits specifically to Shaber's bequest violates the LNC's First Amendment rights.

### A.

As the Supreme Court recognized in *Buckley v. Valeo*—its first and seminal case examining FECA's constitutionality—contribution limits "operate in an area of the most fundamental First Amendment activities." 424 U.S. 1, 14 (1976) (per curiam). "There is no right more basic in our democracy," the Chief Justice explained in his recent plurality opinion in *McCutcheon v. Federal Election Commission*, "than the right to participate in electing our political leaders." 572 U.S. 185, 191 (2014) (plurality opinion).

In fact, political contributions implicate two distinct First Amendment rights: freedom of speech and freedom of association. "When an individual contributes money to a candidate, he exercises both of those rights: The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" *McCutcheon*, 572 U.S. at 203 (plurality opinion) (quoting *Buckley*, 424 U.S. at 21–22). The recipient, too, has First Amendment interests in accepting campaign contributions. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money," from "distributi[ng] . . . the humblest handbill," to "hiring a hall and publicizing" rallies, to purchasing airtime on "television, radio, and other mass media." *Buckley*, 424 U.S. at 19. And, of course, just as contributors associate with candidates and parties by making donations, so, too, do recipients associate with contributors by accepting donations. *See id.* at 18, 22 (explaining that contributions "enable[] like-minded persons to pool their resources in furtherance of common political goals" and that contribution limits therefore restrict "association by persons, groups, candidates, and political parties").

Altogether, then, in the world of political contributions, the First Amendment protects two kinds of rights (speech and association) belonging to two different rights-holders (donors and recipients). As the parties argue this case, however, the First Amendment interests at issue occupy only one box of the rights/rights-holders two-by-two matrix. Because "Shaber's

death ended his expression and association," and because the LNC "does not associate with the dead," the committee admits that "[t]his case concerns primarily the LNC's *speech* rights with respect to the Shaber bequest." Appellant's Br. 34–35. We thus find ourselves in the speech-recipient box.

According to the Commission, contribution limits have only minimal bearing on a recipient's free-speech rights. On the one hand, as the Commission observes, the Court held in *Buckley* that "restriction[s] on the amount of money a . . . group can *spend* on political communication during a campaign"—that is, expenditure limits—"necessarily reduce[ ] the quantity of expression" and therefore receive "the exacting scrutiny applicable to limitations on core First Amendment rights." *Buckley*, 424 U.S. at 19, 44–45 (emphasis added). On the other hand, restrictions on the amount of money someone can *donate*—that is, contribution limits—"merely . . . require candidates and political committees to raise funds from a greater number of persons" "rather than . . . reduce the total amount of money potentially available to promote political expression." *Id.* at 22. Therefore, as the Court explained in *Buckley* and reiterated in *McConnell v. Federal Election Commission*, "[b]ecause the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, . . . contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell v. Federal*

*Election Commission*, 540 U.S. 93, 135 (2003) (third alteration in original) (quoting *Buckley*, 424 U.S. at 21); *see also Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion) (explaining that contribution limits fail "to survive First Amendment scrutiny" if they "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy' " or "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage" (alteration in original) (quoting *Buckley*, 424 U.S. at 21)).

If that is the test, then FECA's contribution limit as applied to Shaber's bequest clearly passes. The LNC nowhere claims that it needs Shaber's money in order to "amass[] the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Surely, Shaber's gift hardly represents a make-or-break sum for the committee's ability to engage in political communication. We doubt, moreover, that the LNC could make such a showing given that FECA's current contribution limits are no lower than the ceilings the Court approved in *McConnell*.

With respect to *donors'* rights, by contrast, contribution limits tread closer to core First Amendment activity. To be sure, the speech embodied by a political contribution lacks nuance: because a contribution "does not communicate the underlying basis for the [donor's] support," "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." *Buckley*, 424 U.S. at 21. That said, the ability to express support through monetary donations provides an "important means of

associating with a candidate or committee," *id.* at 22—and a particularly important means, at that, for "individuals who do not have ready access to alternative avenues for supporting their preferred politicians," such as volunteering in person, *McCutcheon*, 572 U.S. at 205 (plurality opinion). To protect contributors' heterogeneous First Amendment interests in making political donations, therefore, the Court has announced a single unified test that applies an intermediate level of scrutiny to contribution limits. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388 (2000) (explaining that "a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well"). "Closely drawn" scrutiny, as the Court now calls it, requires that "the [government] demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment" of First Amendment rights. *Buckley*, 424 U.S. at 25; *see also McCutcheon*, 572 U.S. at 197 (plurality opinion) (same).

But these decisions have left open the question whether closely drawn scrutiny—usually justified as a mechanism to safeguard donors' rights—also applies to a law limiting a recipient's right to receive a donation absent a corollary restriction on a contributor's right to contribute. Because the typical donor is a living human being capable of both speaking and associating, neither the Supreme Court nor we have had occasion to untangle a recipient's rights from its donors'. But even though Shaber no longer speaks nor associates, *Buckley* and its progeny hardly foreclose

application of closely drawn scrutiny to the contribution limit at issue in this case. We shall therefore assume, without deciding, that closely drawn scrutiny applies to the imposition of contribution limits on Shaber's bequest. And because we conclude that FECA's limits survive even that heightened standard of review, we have no need to interrogate that assumption further.

**B.**

"In a series of cases over the past 40 years," the Supreme Court has repeatedly recognized the government's interest in imposing contribution limits to combat "'quid pro quo' corruption [and] its appearance." *McCutcheon*, 572 U.S. at 192 (plurality opinion) (emphasis omitted). The risk that candidates might exchange political favors for money is far from hypothetical. As the Court explained in *McConnell*, "[t]he idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible." 540 U.S. at 144. Indeed, both *Buckley* and *McConnell* cited "deeply disturbing examples" of "pernicious practices" in then-recent election cycles. *Buckley*, 424 U.S. at 27; *see also McConnell*, 540 U.S. at 122 (noting "disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections"). Therefore, given the threat posed by actual and apparent corruption to "the integrity of our system of representative democracy," *Buckley*, 424 U.S. at 26–27, the Court has long held that "the

Government's interest in preventing quid pro quo corruption or its appearance . . . may properly be labeled 'compelling,'" *McCutcheon*, 572 U.S. at 199 (plurality opinion) (emphasis omitted) (quoting *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496 (1985)).

The risk of quid pro quo corruption does not disappear merely because the transfer of money occurs after a donor's death. Individuals planning to bequeath a large sum to a political party have two points of leverage during their lifetimes: they may tell the party about their intentions, and they may change their minds at any time. That latter possibility, as the district court found, "creates an incentive for a national party committee to limit the risk that a planned bequest will be revoked" and could cause that party, "its candidates, or its office holders to grant political favors to the individual in the hopes of preventing the individual from revoking his or her promise." CF ¶ 100 (first quoting Findings of Fact ¶ 92, *Libertarian National Committee, Inc. v. Federal Election Commission* (*LNC I*), 930 F. Supp. 2d 154, 186 (D.D.C. 2013), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014); then quoting Defendant Federal Election Commission's Proposed Findings of Facts ¶ 80, *Libertarian National Committee*, 317 F. Supp. 3d 202 (No. 16-cv-00121), ECF No. 26-3) (internal quotation marks omitted). In other words, a donor's death simply imposes a sequencing constraint on a quid pro quo exchange. Instead of money for votes, the donor requires votes for money—or, to be more precise, political favors *now* for the

promise of money *later*. And even that constraint evaporates in the case of corrupt donors seeking favors for their survivors. Although an individual's death terminates his ability to profit personally from a corrupt quo in exchange for his bequeathed quid, the donor's surviving friends and family remain all too capable of accepting political favors that their deceased benefactor may have pre-arranged for their benefit.

What's more, where the courts have observed a risk of corruption, so too will the electorate. As the Court explained in *Buckley*, "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. Voters lack the means to examine the intentions behind suspiciously sizable contributions, a problem that becomes especially acute in the case of a deceased donor who, of course, is forever unavailable to answer inquiries. As a result, the corruptive potential of unregulated contributions, including the unregulated contributions of the dead, inflicts almost as much harm on public faith in electoral integrity as corruption itself.

The LNC acknowledges these risks. "Nobody here disputes the theoretical corruption potential of bequests," declares the committee. Reply Br. 13. And as a result, the LNC has declined, both before the district court and on appeal, to "revisit" the conclusion that bequests "generally warrant[] . . . subjection to FECA's contribution limits." Appellant's Br. 35; *see also* CF

¶ 93 ("'[I]t is possible for a bequest to raise valid anti-corruption concerns,' as the LNC has 'concede[d].'" (alterations in original) (quoting *LNC I*, 930 F. Supp. 2d at 166)).

It is precisely because the LNC concedes "the theoretical corruption potential of bequests," Reply Br. 13, that we do not share our dissenting colleague's concern that "the [Commission] points to nothing substantiating" the same, Op. at 10 (Katsas, J.). The government may, just like any other litigant in any other case, accept an opposing party's concession. Moreover, among the district court's findings that the LNC declines to dispute, *see* Oral Arg. Rec. 32:01-18 (conceding that this court is bound by the district court's findings of fact unless clearly erroneous), are several that amount to substantial evidence demonstrating the government's anticorruption interest in regulating bequests. To begin with, contrary to the dissent's assertion that "bequests are rarely used for political contributions," Op. at 10 (Katsas, J.), the district court found that since 1978 donors have contributed "more than $3.7 million in bequeathed funds," not infrequently in five- and six-figure amounts. CF ¶ 102; *see also* CF ¶¶ 103–08 (listing bequeathed contributions to national political party committees). And that figure is "likely underreported," as "reporting entities are not required to inform the [Commission] that a particular contribution they received came from a bequest." CF ¶ 102. In fact, the LNC did not report Shaber's bequest as such. *See* CF ¶ 102. Furthermore, the district court found that "nothing prevents a living person from informing the

beneficiary of a planned bequest about that bequest," CF ¶ 94; that "[p]olitical committees 'could feel pressure to . . . ensure that a (potential) donor is happy with the committee's actions lest [that donor] revoke the bequest,'" CF ¶ 100 (second and third alterations in original) (quoting *LNC I*, 930 F. Supp. 2d at 167); and that this pressure could cause a "national party committee, its candidates, or officeholders . . . [to] grant that individual political favors," CF ¶ 99 (internal quotation marks omitted). Altogether, the district court's 178 paragraphs of findings amount to much more than "'mere conjecture,'" Op. at 11 (Katsas, J.) (quoting *McCutcheon*, 572 U.S. at 210 (plurality opinion)), that bequests pose a threat of quid pro quo corruption.

Disclaiming any "categorical challenge to the limitation of all bequests," the LNC instead asks us to conduct an "as-applied" inquiry "narrowly focused on one particular bequest": "whether Shaber's bequest, specifically, warrants government limitation." Appellant's Br. 30, 35. It does not, says the LNC, because the bequest was not corrupt and the government therefore has no legitimate interest in its restriction.

As to the first half of the LNC's argument, we have no trouble making the unremarkable assumption that Shaber's contribution was not, in fact, part of a corrupt quid pro quo exchange. *Buckley* rested on precisely the same assumption—that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Buckley*, 424 U.S. at 29. Indeed, the LNC's observation that contribution limits restrict legitimate as well as corrupt donations is

wholly unsurprising. The Court has often "noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 357 (2010) (emphasis omitted).

But that is precisely the point: it is "difficult to isolate suspect contributions" in the sea of legitimate donations. *Buckley*, 424 U.S. at 30. As the LNC sees it, because the government's interest lies in preventing quid pro quo corruption, the government may restrict only corrupt contributions. The government, however, already has those restrictions on the books: they are called bribery laws. But bribery laws "deal with only the most blatant and specific attempts of those with money to influence governmental action," *id.* at 28, and if those laws were sufficient to achieve the government's compelling interest in preventing quid pro quo corruption and its appearance, then Congress would have had no need in the first place to impose contribution limits to combat prior decades' "deeply disturbing" quid pro quo arrangements, *id.* at 27. Accordingly, the problem with the LNC's proposed regime—one under which *actually* noncorrupt contributions could exceed FECA's limits—is that corruption is notoriously difficult to ferret out, and "the scope of . . . pernicious practices can never be reliably ascertained." *Id.* Because "the First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law,' " *McConnell*, 540 U.S. at 144 (quoting *Federal Election Commission v.*

*Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 457 (2001)), "prophylactic" contribution limits, *McCutcheon*, 572 U.S. at 221 (plurality opinion), are permissible—even vital—to forestall the worst forms of political corruption.

Critically, moreover, even if through some omniscient power courts could separate the innocent contributions from the nefarious, an appearance of corruption would remain. Although "Congress may not regulate contributions simply to reduce the amount of money in politics," *id.* at 191 (plurality opinion), it may certainly do more than ask the public to place groundless faith in a bribery-prevention scheme that has failed to thwart corruption in the past. "It is therefore reasonable," the Court explained in *McConnell*, "to require that all parties and all candidates follow the same set of rules" in order to prevent "'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'" 540 U.S. at 136, 159 (quoting *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 208 (1982)).

That is not to say as-applied challenges to FECA's contribution limits are impossible. Because restrictions that strike a permissible balance between governmental and individual interests may nonetheless "impose heavy burdens on First Amendment rights in individual cases," *John Doe No. 1 v. Reed*, 561 U.S. 186, 203 (2010) (Alito, J., concurring), people may bring as-applied challenges to demonstrate that, in their unique

circumstances, the law in question works too harshly. For example, "a nascent or struggling minor party can bring an as-applied challenge" to a contribution limit that "prevents [the party] from 'amassing the resources necessary for effective advocacy,'" *McConnell*, 540 U.S. at 159 (quoting *Buckley*, 424 U.S. at 21), and, similarly, a group may bring an as-applied challenge to a campaign-contribution disclosure provision that subjects its donors to "'threats, harassment, or reprisals,'" *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 198); *see also Doe, 1 v. Federal Election Commission*, 920 F.3d 866, 871 (D.C. Cir. 2019) ("*Citizens United* left open the possibility of an as-applied First Amendment challenge, but only if the donor proved that revealing its identity would probably bring about threats or reprisals."). But while an individual may demonstrate that, in his particular case, a contribution limit imposes an impermissibly high burden, donors and recipients may not use the guise of an as-applied challenge merely to relitigate the government's settled interest in enforcing "preventative" limits, *Citizens United*, 558 U.S. at 357, against *all* contributions—corrupt and noncorrupt alike. "[A] plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision." *Republican National Committee v. Federal Election Commission*, 698 F. Supp. 2d 150, 157 (D.D.C.) (three-judge panel), *aff'd*, 561 U.S. 1040 (2010).

Unlike the LNC and the dissent, *see* Op. at 18 (Katsas, J.), we see nothing to the contrary in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). In that case, we sustained an as-applied challenge to a contribution limit on the grounds that "the government ha[d] no anti-corruption interest in limiting contributions to an independent expenditure group," *id.* at 695, but we did not do so because of anything special about the government's anti-corruption interest "in that case" in particular, Op. at 18 (Katsas, J.). Instead, we explained that because the Supreme Court had recently held in *Citizens United* "as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption," neither could contributions to independent expenditure-only groups "corrupt or create the appearance of corruption." *SpeechNow.org*, 599 F.3d at 694 (emphasis omitted). In this case, by contrast, the LNC raises no challenge to *Buckley* nor to the anticorruption interest that case and its successors recognized. *See* Appellant's Br. 60 n.13 ("[T]his case does not challenge *Buckley*.").

The dissent suggests that even if the government has an interest in limiting bequests disclosed during donors' lifetimes, it lacks a similar interest in regulating the class of bequests kept secret until donors' deaths. *See* Op. at 12–14 (Katsas, J.). The trouble, however, is that because the LNC states in no uncertain terms that its "as-applied Shaber challenge . . . does not contest any contribution limit's general sweep," Reply Br. 11, we are limited to addressing only the

matters raised and litigated by the parties and certified to this court for review, *see* 52 U.S.C. § 30110—that is, whether "imposing annual contribution limits against the bequest of Joseph Shaber" violates the LNC's First Amendment rights. Certification Order 2. Indeed, the LNC expressly foreswears any broader challenge. *See supra* at 17. Perhaps, as the dissent proposes, the Commission might be able to "police" bequest disclosures in the same manner it distinguishes coordinated from independent expenditures. Op. at 14 (Katsas, J.). But there are significant differences, both practical and constitutional, between independent expenditures, coordinated expenditures, and contributions. *See supra* at 11–12; *see also McConnell*, 540 U.S. at 221 (explaining that coordinated expenditures "may be regulated as indirect contributions"). For now, then, we simply observe that the task of distinguishing truly uncoordinated from covertly disclosed bequests would seem to require the same sorts of fact-intensive inquiries and give rise to the same sorts of appearance-of-corruption concerns that prophylactic contribution limits are designed to avoid. Without the parties to guide us, we decline to venture into such challenging terrain. *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

We thus return to the LNC's bottom line: "[W]hat about *Shaber*?" Reply Br. 14. By the LNC's logic, the

only individuals who must keep their contributions under FECA's limits are those who intend to violate the bribery laws. That just cannot be what the First Amendment requires. We therefore answer the first certified question in the negative: imposing FECA's contribution limits on Shaber's bequest does not violate the LNC's First Amendment rights.

## IV.

This brings us to the second and third certified questions—a facial and an as-applied challenge—which ask whether it offends the First Amendment that donors may contribute above the base limit only if they make their contributions into segregated, dedicated-purpose accounts.

### A.

The only portion of FECA at issue here is an amendment contained in the Consolidated and Further Continuing Appropriations Act—what we reluctantly assent to calling the "cromnibus" amendment. The LNC assures us, as it must, that it "would not have brought, and the District Court would not have certified, a challenge to the sort of contribution limits that the Supreme Court upheld in *McConnell*." Appellant's Br. 40. Instead, the LNC contends that because the 2014 cromnibus amendment "radically altered FECA's nature and structure," *id.*, we must now apply a heightened level of scrutiny. What was constitutional before, the theory goes, is constitutional no longer.

Accordingly, we begin by considering precisely what "sort of contribution limits . . . the Supreme Court upheld in *McConnell*." *Id.* A little history will help.

In the FECA Amendments of 1976, Congress imposed a $20,000 limit on "contributions" to national party committees. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 487 (codified as amended at 52 U.S.C. § 30116(a)(1)(B)). But not all donations qualified as contributions. Instead, FECA defined "contribution" as a gift "made . . . for the purpose of influencing any election for Federal office," thus leaving unregulated any money ostensibly donated for the purpose of influencing state and local elections. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1340 (1980) (codified as amended at 52 U.S.C. § 30101(8)). And so "soft money" was born. While FECA subjected contributions for the purpose of influencing federal elections (so-called hard money) to its limits, parties remained free to "raise [soft money] in massive dollops from single contributors." *Shays v. Federal Election Commission*, 414 F.3d 76, 81 (D.C. Cir. 2005). "Over time, political parties took increasing advantage of . . . soft money opportunities," *id.*, causing, as the Senate Committee on Governmental Affairs described it, "a 'meltdown' of the campaign finance system," *McConnell*, 540 U.S. at 129 (quoting S. Rep. No. 105-167, vol. 4, at 4611 (1998); *id.*, vol. 5, at 7515).

Seeking to close the "soft-money loophole," *McConnell*, 540 U.S. at 133, Congress enacted the Bipartisan Campaign Reform Act in 2002. *See* Bipartisan

Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Through that statute, known as BCRA, Congress took a two-pronged approach to purging federal elections of soft money: it prohibited national political party committees from accepting or "spend[ing] any funds" "not subject to" FECA, and it prohibited (with limited exceptions) state, district, and local party committees from "expend[ing] or disburs[ing] for Federal election activity" any funds raised outside FECA's limits. *Id.* § 101 (codified at 52 U.S.C. § 30125(a), (b)). Approving these soft-money restrictions in *McConnell*, the Supreme Court rejected the argument that BCRA imposes an impermissible expenditure limit rather than a permissible contribution limit. According to the Court, BCRA's soft-money ban, though styled as a restriction on party "spending," "simply limit[s] the source and individual amount of donations" without "limit[ing] the total amount of money parties can spend." *McConnell*, 540 U.S. at 139. "[I]t is irrelevant," the Court explained, "that Congress chose . . . to regulate contributions on the demand rather than the supply side." *Id.* at 138.

So what changed? The 2014 cromnibus amendment introduced gradations into the political party contribution limit where none had been before. As previously explained, *see supra* at 3–4, FECA now permits donors to contribute up to three times the inflation-adjusted base limit into any of three new "separate, segregated account[s] . . . used . . . to defray expenses incurred with respect to" presidential nominating

conventions, headquarters buildings, and recounts and other legal proceedings. 52 U.S.C. § 30116(a)(9).

Insisting that this case differs meaningfully from *Buckley* and *McConnell*, the LNC argues that we must apply strict scrutiny to FECA's new two-tiered scheme. We disagree.

The LNC first contends that because the statute now restricts how certain funds may be "used," 52 U.S.C. § 30116(a)(9), the cromnibus amendment "transformed" FECA's contribution limit into an expenditure limit, Appellant's Br. 41. But *McConnell* forecloses this argument. That decision teaches that the difference between an expenditure limit and a contribution limit hinges not on the statute's use of magic words such as "spend" (as in BCRA) or "use" (as in the cromnibus amendment), but rather on a functional test. "The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not." *McConnell*, 540 U.S. at 138–39.

That test makes this an easy case. Neither the general-purpose contribution ceiling nor the 300%-higher dedicated-purpose contribution ceiling "in any way limits the total amount of money parties can spend." *Id.* at 139. The cromnibus amendment says nothing about how much money political party committees may expend on general purposes, conventions, headquarters, and recounts. Instead, the two-tiered scheme does nothing more than its single-tiered predecessor:

it "simply limit[s] the source and individual amount of donations" for each category of expenses. *Id.* Or, as the Court put it in *Buckley*, "[t]he overall effect of the Act's contribution ceilings is merely to require . . . political committees to raise funds from a greater number of persons . . . rather than to reduce the total amount of money potentially available to promote political expression." 424 U.S. at 21–22. That is a contribution limit through and through.

The LNC's second tack is somewhat more creative, albeit no more successful. Consider, the LNC posits, a contribution from Donor Doe that exceeds the base limit by $1, i.e., a $33,401 donation. Under the cromnibus amendment's two-tiered contribution limit, the committee may use Doe's extra dollar to pay for a presidential nominating convention but not a midterm convention, or for a sign on its headquarters but not a billboard on the street. According to the LNC, then, regardless of whether the two-tiered limit imposes a permissible contribution ceiling on donors, with respect to recipients, FECA's "spending purpose restrictions directly limit how the LNC may express itself" based on the content of its speech. Appellant's Br. 46; *see also* Reply Br. 20 (criticizing the Commission's "obsessive focus on contributors' interests" as "irrelevant, because the restrictions at issue target *the parties'* accounts" and because "[i]t is not the donors who are barred from spending beyond the accounts' segregated purposes"). For this proposition, the LNC relies on *Reed v. Town of Gilbert*, in which the Court recently held that laws "defining regulated speech by particular subject matter,

. . . function[,] or purpose," "are subject to strict scrutiny." 135 S. Ct. 2218, 2227 (2015); *see also* Appellant's Br. 47–48 (arguing that "[c]haracterizing FECA's revised contribution limit as a pure contribution limit does not alter the fact that it 'target[s] speech based on its communicative content,' 'by particular subject matter, and . . . by its function or purpose' " (second and third alterations in original) (citation omitted) (quoting *Reed*, 135 S. Ct. at 2226–27)).

But the LNC misses one crucial element in the "content-based restriction on speech" inquiry: speech. Recall that *Buckley* drew a clear distinction between spending money (expenditures) and receiving money (contributions). Restrictions on the former regulate speech, as "virtually all meaningful political communications in the modern setting involve the expenditure of money" so that an absolute limit on a political party's expenditures necessarily restricts its total amount of expression. *Buckley*, 424 U.S. at 11. Restrictions on the latter, however, are something different. Receiving money *facilitates* speech, to be sure, but a bank account balance becomes speech only when spent for expressive purposes. This is why the Court has made clear "that contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] . . . political committees from amassing the resources necessary for effective advocacy.' " *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21).

So there lies the solution to the Donor Doe problem. The LNC's speech occurs when it spends Doe's money on political expression. That speech remains

unencumbered by FECA because, as discussed above, *see supra* at 24–25, the cromnibus amendment's two-tiered contribution limit imposes no expenditure limit. True, the LNC may not spend Doe's additional dollar on a billboard. But it may spend as many dollars from as many non-Does as it wants on billboards, so long as it spends no more than $33,400 from any single donor. The LNC's speech is thus subject to no restriction, content-based or otherwise.

We emphasize that this case implicates only the sort of line-drawing exercises that inhere in a system of federal campaign finance regulation—that is, lines that define in evenhanded terms covered recipients, donors, and contributions. This case, in other words, presents no plausible claim that FECA's two-tiered contribution limit restricts contributions based on the donor's identity or viewpoint.

And yet, the LNC argues that FECA's two-tiered contribution limit merits strict scrutiny. Consequently, by the LNC's logic, FECA would be rife with content-based restrictions on recipients' speech. For example, the *McConnell*-approved BCRA prohibits national party committees from "spend[ing] any funds," 52 U.S.C. § 30125(a)(1), donated in excess of FECA's limits, which, in turn, apply to contributions made "for the purpose of influencing any election for Federal office," *id.* § 30101(8)(A)(i). Likewise, BCRA's soft-money ban prohibits state party committees from spending non-FECA contributions on "Federal election activity." *Id.* § 30125(b). If, as the LNC argues, a limit on contributions made to segregated accounts dedicated to particular

"uses" counts as a content-based restriction on speech, then so, too, would restrictions on spending donations "made . . . for the purpose of influencing any election for Federal office" or on expending funds for "Federal election activity." But that, of course, is not the case: as the Court explained in *McConnell*, BCRA does not "burden[] speech in a way that a direct restriction on the contribution itself would not." 540 U.S. at 139.

Consequently, the LNC essentially asks us to conclude that *Reed*'s application of strict scrutiny to laws that "defin[e] regulated speech by particular subject matter, . . . function[,] or purpose," 135 S. Ct. at 2227, overruled, by implication alone, *McConnell*'s application of closely drawn scrutiny to FECA's contribution limits. To put it mildly, we have our doubts. But if the Supreme Court had intended to shake the constitutional foundation of FECA's contribution-limit architecture, then it is the Supreme Court's province to say so. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). Unless and until the Court expressly abrogates *McConnell*, this "inferior court" lacks authority to "conclude [that the Supreme Court's] more recent case[]" has, "by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

**B.**

With no reason to apply strict scrutiny to the cromnibus amendment's two-tiered contribution limit, we again assume that closely drawn scrutiny supplies the appropriate test. We say "assume" because it remains unclear whether closely drawn scrutiny applies to a recipient's First Amendment interests alone, *see supra* at 13, and the LNC declines to invoke the rights of its donors, *see supra* at 11, 25–26. Nevertheless, because we conclude that the cromnibus amendment's two-tiered contribution limit survives closely drawn scrutiny, we have no need to determine whether a less stringent standard of review may apply.

In applying closely drawn scrutiny, "we must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon*, 572 U.S. at 199 (plurality opinion). "[I]f a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' " closely drawn review. *Id.* (internal citation omitted) (quoting *Buckley*, 424 U.S. at 25, 29).

The LNC makes no attempt to challenge the government's significant anticorruption interest served by limiting the size of contributions to political parties. Indeed, the LNC invokes the district court's factual finding on this point: "[T]he essential truth," says the committee, "is that '[*a*]*ll* contributions to political parties can create the risk of corruption or its appearance regardless of the way that money is ultimately

spent. . . .'" Appellant's Br. 57 (alterations in original) (quoting CF ¶ 36). Rather than contesting the need for contribution limits, the LNC makes a more refined point. "It is one thing to generalize that larger contributions pose a greater risk, and for that reason, impose a simple contribution limit," argues the committee, but "[r]estricting how a party spends 90% of a contribution, in 30% tranches tied to presidential nominating conventions, buildings, and litigation, cannot be explained on a corruption-fighting rationale." *Id.* at 56. In other words, conceding the need for an overall contribution limit, and taking no issue with drawing that line at either $33,400 or $334,000, the LNC questions whether the government can demonstrate an anticorruption interest in treating general- and dedicated-purpose contributions differently.

Right out of the gate, the LNC's argument faces a high hurdle: the cromnibus amendment *increased* the total amount individuals may contribute to a political party. Before 2014, the LNC could accept only a base-limit sized contribution from any one person; now it may accept ten times that amount. Consequently, the LNC's argument sounds very much like a grievance with Congress's decision to *raise* contribution limits. But so long as contribution limits apply equally to all donors and recipients, "[t]here is . . . no constitutional basis for attacking contribution limits on the ground that they are too high." *Davis v. Federal Election Commission*, 554 U.S. 724, 737 (2008). If, as the LNC concedes, the government had a legitimate anticorruption interest in keeping individual contributions below

$33,400, then, by simple mathematics, it must also have an interest in keeping contributions below $334,000.

We hasten to add a caveat. Although a law does not offend the First Amendment merely because it "conceivably could have restricted even greater amounts of speech in service of [its] stated interests," a law's underinclusivity—in this case, the fact that FECA restricts some contributions less than others—nonetheless "can raise 'doubts about whether the government is in fact pursuing the interest it invokes.'" *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (quoting *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011)). But we see no reason for such skepticism in this case, as allowing donors to make larger contributions into each of the new dedicated-purpose accounts serves Congress's legitimate interest in relaxing restrictions on First Amendment activity where, as it has concluded here, it can achieve its anticorruption interest with less stringent limits.

Take the new, higher limit on contributions to pay for presidential nominating conventions. In April 2014, Congress ended public funding for such conventions, leaving parties on their own. *See* Gabriella Miller Kids First Research Act, Pub. L. No. 113-94, 128 Stat. 1085 (2014). The cromnibus amendment gives parties a tool for making up for that shortfall, ensuring, as Congress must, that parties remain capable of "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

Equally benign are the other two new dedicated-purpose accounts, one for party headquarters and the other for election recounts and "other legal proceedings." 52 U.S.C. § 30116(a)(9). As the Court explained in *McConnell*, the donations "that pose the greatest risk of . . . corruption" are "those contributions . . . that can be used to benefit federal candidates directly." 540 U.S. at 167. Congress could have permissibly concluded that unlike contributions that can be used for, say, television ads, billboards, or yard signs, contributions that fund mortgage payments, utility bills, and lawyers' fees have a comparatively minimal impact on a party's ability to persuade voters and win elections. Indeed, congressional leaders supporting the cromnibus amendment emphasized that "many" of the "expenditures made from the [dedicated-purpose] accounts" are "not for the purpose of influencing federal elections." 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid); *id.* at H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner). That makes good sense: headquarters, once built, exist regardless of whether an election is afoot, and recounts, by definition, can occur only after votes have been cast. In fact, before BCRA, the Commission entirely excluded donations for both party headquarters and election recounts from the definition of "contribution." *See* 11 C.F.R. § 100.7(b)(12) (2002) ("A gift . . . made to a national committee . . . of a political party is not a contribution if it is specifically designated to defray any cost incurred for construction or purchase of any office facility which is not acquired for the purpose of influencing the election of any candidate in any particular election for

Federal office."); *id.* § 100.7(b)(20) ("A gift . . . made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution. . . .").

We are untroubled in this case by the fact that, as the LNC observes, the cromnibus amendment passed Congress without the sort of robust record of congressional factfinding that accompanied BCRA. In one sense this might be expected; after all, BCRA imposed new contribution limits, so its additional restriction on First Amendment rights required justification. The cromnibus amendment, by contrast, did just the opposite: it relaxed contribution limits. Had BCRA's extensive legislative history identified some troubling finding related specifically to conventions, headquarters, or legal expenses, we would perhaps harbor more concern about the cromnibus amendment's relatively stingy congressional record. But we have discovered in that record no basis for any such concern, leaving us without any reason to conclude that the Congress of 2014 committed constitutional error by determining that, a dozen years after BCRA, times and circumstances had sufficiently changed to permit it to deal more generously with expense categories less directly tied to particular candidates or elections. *See Wagner v. Federal Election Commission*, 793 F.3d 1, 30 (D.C. Cir. 2015) (en banc) (noting that contribution restrictions need not address "speculative" concerns).

Our dissenting colleague worries that Congress may have enacted the cromnibus amendment not to

better tailor contribution limits to serve the government's anticorruption interest, but rather to benefit the major parties that do the most spending on segregated-account activities. *See* Op. at 7–9 (Griffith, J.). But the LNC itself, though displeased that FECA's two-tiered contribution limit more closely "align[s] with the financial needs and goals of the incumbent parties," Appellant's Br. 58 (internal quotation marks omitted), expressly disclaims any argument that "the First Amendment requires a level electoral playing field, free of the advantages that speakers may have owing to their resources," Opposition at 26; *see also id.* at 27 (stating that the LNC's "merits briefing [is] bereft of even a molecule of competitive disadvantage theory" and arguing that "it is absurd for the [Commission] to insist" otherwise). And indeed, the First Amendment requires no such thing. While Congress may not enact contribution limits that "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage," *Randall*, 548 U.S. at 248 (plurality opinion), neither is it "an acceptable governmental objective," "[n]o matter how desirable it may seem," "to 'equaliz[e] the financial resources of candidates,'" *McCutcheon*, 572 U.S. at 207 (plurality opinion) (second alternation [sic] in original) (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748, 750 (2011)). Therefore, "if Congress concludes that allowing contributions of a certain amount does not create an undue risk of corruption or the appearance of corruption," the Court has explained, then "a candidate who wishes to restrict an opponent's fundraising cannot argue that the Constitution demands

that contributions be regulated more strictly." *Davis*, 554 U.S. at 737. By the same token, the mere fact that additional fundraising opportunities will benefit some political parties over others does not itself render Congress's relaxation of contribution limits suspect under the First Amendment. *See Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."). We thus see no reason to "'doubt[] . . . [that] the government is in fact pursuing the interest it invokes,'" *Williams-Yulee*, 135 S. Ct. at 1668 (quoting *Brown*, 564 U.S. at 802), to justify FECA's two-tiered contribution limit: combatting quid pro quo corruption and its appearance.

At bottom, the cromnibus amendment represents just another tweak in Congress's decades-long project to fine-tune FECA's balance between speech and associational rights, on the one hand, and the government's anticorruption interest, on the other. That balance, to be sure, remains imperfect. But closely drawn scrutiny "require[s] 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served. . . .'" *McCutcheon*, 572 U.S. at 218 (plurality opinion) (internal quotation marks omitted) (quoting *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989)). And lacking any "'scalpel to probe' each possible contribution level," we "defer[] to the legislature's" "empirical judgments"

about "the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. at 248 (plurality opinion) (quoting *Buckley*, 424 U.S. at 30).

Here, Congress drew that line at $33,400 for general-purpose spending and $100,200 for dedicated-purpose spending. The LNC has given us no reason to think that this two-tiered limit would offend the First Amendment. The cromnibus amendment's limits are closely drawn to the government's anticorruption interest, and, as compared to the pre-2014 baseline, they certainly avoid unnecessary infringement of associational and speech rights. We therefore answer the second and third certified questions in the negative: FECA's two-tiered contribution limit, both on its face and as applied to Shaber's bequest, does not violate the LNC's First Amendment rights.

## V.

The task of crafting campaign finance restrictions is, in many ways, a zero-sum game. Make the regime too restrictive, and you threaten "fundamental First Amendment interests" by burdening citizens' political expression. *Buckley*, 424 U.S. at 23. Make the regime too permissive, and you threaten "the integrity of our system of representative democracy" by failing to prevent quid pro quo corruption and its appearance. *Id.* at 26–27. Balancing these interests has turned out to be a difficult and iterative task. For the reasons given above, we conclude that the current version of FECA—

both its application of contribution limits to Shaber's bequest and its use of a two-tiered contribution limit—has achieved a constitutionally permissible balance. Therefore, although we deny the Commission's motion to dismiss for lack of standing, we reject each of the LNC's three constitutional challenges on the merits.

*So ordered.*

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GRIFFITH, Circuit Judge, concurring in part and dissenting in part: When the government restricts First Amendment freedoms, it "bears the burden of proving the constitutionality of its actions." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (plurality opinion) (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000)). Here, the government has not justified the cromnibus amendments' two-tiered scheme for contributions to national political parties. I therefore part ways with the majority on the second and third certified questions.

The appropriate standard of review is closely drawn scrutiny, as the majority assumes and Judge Katsas explains. *See* Maj. Op. at 28; Op. at 1–5 (Katsas, J.). Under this standard, the government must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment" of First Amendment freedoms. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam). The only qualifying interest is combating quid pro quo corruption and its appearance, and we require the government to employ "a means narrowly tailored to achieve the desired

objective." *McCutcheon*, 572 U.S. at 192, 218 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). This standard is "rigorous," and the government will not prevail if there is "a substantial mismatch between [its] stated objective and the means selected to achieve it." *Id.* at 197, 199 (first quoting *Buckley*, 424 U.S. at 29).

The Libertarian National Committee (LNC) would take no issue with a single contribution limit set at $33,400 or $334,000. Maj. Op. at 29. Indeed, a challenge to such a limit would be foreclosed by *McConnell v. FEC*, 540 U.S. 93 (2003). There, the Supreme Court held that the Federal Election Campaign Act permissibly prohibited a donor from contributing more than $25,000 to a national political party because the government showed that the prohibition substantially advanced, and was properly tailored to, the government's interests in preventing corruption or its appearance. *See McConnell*, 540 U.S. at 142–61.

But *McConnell* does not resolve this case, because the two-tiered scheme here differs in important ways from the limit upheld in *McConnell*. Rather than limiting all contributions above a certain level, the scheme prohibits contributions above the general limit of $33,400 but makes exceptions to that general limit by allowing additional contributions of up to $100,200 to each of three segregated accounts for presidential nominating conventions, party headquarters, and election recounts and litigation. *See* 52 U.S.C. § 30116(a)(1)(B),

(a)(9); Maj. Op. at 3–4.[1] This is a new scheme. *McConnell* did not address the propriety of a regime with these exceptions, the presence of which "can raise doubts about whether the government is in fact pursuing the interest it invokes" or "reveal that a law does not actually advance" that interest. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (internal quotation marks omitted). Put differently, the cromnibus amendments introduced a critical feature not present in *McConnell*: "Congress' judgment" that contributions of $300,600 to segregated accounts "do not unduly imperil anticorruption interests." *Davis v. FEC*, 554 U.S. 724, 741 (2008). Given this judgment by Congress, it is now "hard to imagine how" limiting general contributions to $33,400 "serv[es] anticorruption goals sufficiently to justify the resulting constitutional burden"—unless general and segregated contributions differ in a constitutionally meaningful way. *Id.* For these reasons, the government cannot justify treating general contributions more restrictively than segregated contributions based on *McConnell*'s approval of a since-abandoned congressional judgment. Rather, the government must show that a new scheme that differentiates between general and segregated contributions is closely drawn to serve anticorruption interests.

To do so, the government argues that general and segregated contributions raise different corruption concerns. This is because general-account spending is more likely to be for the purpose of influencing elections and

[1] Like the majority, I use the limits adjusted for inflation as of 2015. Maj. Op. at 3–4.

thus raise corruption concerns, while segregated-account spending is less likely to be for the purpose of influencing elections and thus does not raise comparable corruption concerns. *See* FEC Br. 46–50. The record does not support this distinction.

The government relies on identical statements from Senator Reid and Representative Boehner, who both asserted that "many" of the expenditures from segregated accounts are "not for the purpose of influencing Federal elections." 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014); *id.* at H9286 (daily ed. Dec. 11, 2014). But these self-serving assertions by representatives of the major parties do not tell us whether segregated-account spending is any different from general-account spending with respect to influencing elections or raising corruption concerns. Without that information, we simply do not know whether the cromnibus amendments are justified in prohibiting all contributions above the general limit except those made to segregated accounts. And an ambivalent record is not enough to survive closely drawn scrutiny. *See McCutcheon*, 572 U.S. at 217 (rejecting aggregate contribution limits in part because the government did not provide "any real-world examples" that they served anticorruption interests by preventing donors from circumventing the base limits); *McConnell*, 540 U.S. at 145–154 (upholding limits on soft-money contributions only after identifying extensive evidence connecting the limits to the government's legitimate interests); *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666–67 (1994) (in applying intermediate scrutiny to a speech restriction,

explaining that "we cannot determine" whether Congress drew "reasonable inferences based on substantial evidence" without "a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence"); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009) (Easterbrook, J.) ("[T]here must be *evidence*" to carry a First Amendment burden.).

The government's position does not fare any better when we examine the segregated accounts more closely. As the majority points out, the higher limits on contributions to pay for presidential nominating conventions were prompted by the end of public funding for such conventions in 2014. The cromnibus amendments gave parties a "tool for making up for that shortfall." Maj. Op. at 31. That explanation is understandable, but it does not establish that there are lesser corruption concerns with contributions that help put on nominating conventions. There can be no serious doubt that the nominating conventions of the major parties are closely connected to elections. Contributions to their staging therefore appear to raise the same corruption risks as general contributions, and the record provides no reason to think otherwise.

The record is similarly slim as to the segregated accounts for maintaining party headquarters and contesting election results. The majority offers that "Congress could have permissibly concluded that unlike contributions that can be used for, say, television ads, billboards, or yard signs, contributions that fund

mortgage payments, utility bills, and lawyers' fees have a comparatively minimal impact on a party's ability to persuade voters and win elections." *Id.* Perhaps, but that inference lacks record support. The record gives no reason to think that spending on party headquarters or election contests has a different influence on elections than general-account spending, and the majority might just as reasonably have said the opposite: that Congress "could have" determined that elections are significantly influenced by a party headquarters (where parties might host donors and connect them to party leaders and candidates) and election recounts and litigation (which resolve whether an actual candidate wins or loses a particular election). My point is not that either of these potential determinations is more reasonable than the other; my point is that without record support they are "too speculative" to carry a First Amendment burden. *McCutcheon*, 572 U.S. at 210.

Finally, the factual findings made by the district court provide no better support for the government. The district court found that "unrestricted funds are more valuable to national party committees and their candidates than funds that may only be used for particular categories of expenses." Findings of Fact ("CF") ¶ 50, *Libertarian Nat'l Comm. v. FEC*, 317 F. Supp. 3d 202 (D.D.C. 2018). And according to the government, "it is simple common sense that the more a political party values a contribution, the more likely that contribution will be or appear to be part of a quid pro quo corruption scheme," making it more reasonable for the

cromnibus amendments to treat general contributions more restrictively than segregated contributions. FEC Br. 47. The problem for the government, however, is that the district court's findings simultaneously point in the opposite direction: "A political party may in some circumstances value a contribution with use restrictions more highly than a smaller contribution without such restrictions," particularly because money is generally fungible and every dollar received through segregated accounts "potentially frees up another dollar in the recipient's general account for unrestricted spending." CF ¶¶ 38–39. The record does not clarify whether such a "circumstance" is presented by this case; again, we just don't know. Moreover, even if a dollar donated to a general account raised more corruption concerns than a dollar given to a segregated account, the government acknowledges that "larger contributions to political parties are generally more likely to lead to actual or apparent quid pro quo arrangements and can do so regardless of how the funds are ultimately used." CF ¶ 35 (alterations omitted). This further highlights the poor fit of the cromnibus amendments, which treat larger contributions to segregated accounts as if they were *less* likely to raise corruption concerns than substantially smaller contributions to a general account.

In the absence of any corruption-related difference between general and segregated contributions, the government has not carried its burden of showing that the two-tiered scheme is closely drawn to serve anti-corruption interests. This conclusion does not rely on a "freestanding underinclusiveness limitation," as Judge

Katsas fears. Op. at 20 (Katsas, J.) (quoting *Williams-Yulee*, 135 S. Ct. at 1668). Although "the First Amendment imposes no freestanding 'underinclusiveness limitation,'" underinclusivity still "creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way.*" *Williams-Yulee*, 135 S. Ct. at 1668, 1670 (first quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)). That's the problem with the two-tiered scheme in this case. On this record, segregated and general contributions affect the government's anticorruption interests in the same way, yet the scheme restricts general contributions while declining to restrict segregated contributions. Thus, the scheme's underinclusiveness—its exceptions allowing some contributions above the general limit—shows that the government has not justified prohibiting other contributions from exceeding the general limit. *See id.* at 1670; *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (rejecting a speech restriction as "hopelessly underinclusive" under strict scrutiny because it drew distinctions between prohibited and permissible categories of speech in a way that was not justified by the interests asserted by the government); *id.* at 2239 (Kagan, J., concurring in the judgment) (rejecting the same restriction under intermediate scrutiny due to its underinclusivity); *Edwards v. District of Columbia*, 755 F.3d 996, 1007–08 (D.C. Cir. 2014) (rejecting a speech restriction as "fatally underinclusive" under intermediate scrutiny).

That is enough to resolve the second and third certified questions in the LNC's favor, but in closing I note that there are additional reasons to be skeptical of the government's position. The two-tiered scheme's exceptions loosen restrictions on the very contributions that are highly sought by major parties but of little use to minor parties. In my view, this further undercuts the government's position that the scheme pursues the only permissible government interest: combating quid pro quo corruption and its appearance.

Under the scheme, a donor may contribute a total of $334,000 to a political party: $33,400 to the general account and $100,200 to each of the three segregated accounts. The major parties benefit from this scheme because they spend substantial sums on activities that can be paid for through segregated accounts: They put on lavish nominating conventions that are spectacles made for a national audience, they maintain expensive headquarters, and they challenge and defend in court the outcomes of numerous elections across the country. Indeed, from December 2014 through December 2016, the Republican Party received more than $23 million for its convention, $26 million for its headquarters, and $5 million for election recounts and litigation; the Democratic Party received more than $12 million for its convention, $3 million for its headquarters, and $6 million for election recounts and litigation. CF ¶¶ 45–46; J.A. 90. The cromnibus amendments enable the major parties to raise such sums with individual contributions of up to $334,000. What's more, those contributions are in effect no different from general

contributions. So long as a party has segregated-account expenses, a dollar received in a segregated account frees up a dollar in the general account that otherwise might have been used to defray the segregated-account expenses. Therefore, until a party receives enough money to cover its segregated-account expenses, the two-tiered scheme establishes an effective *general* contribution limit of $334,000.

By contrast, minor parties gain little from this scheme because they do not have much use for segregated-account contributions. The LNC, for example, holds more modest conventions and maintains a less expensive headquarters than the major parties, and the LNC has never spent money on election recounts and is unlikely to do so in the future. *See* LNC Br. 13–15. In most years, its expenses for these purposes are less than $500,000. *See id.*; CF ¶¶ 25–29. Lacking further segregated-account expenses, the LNC and similar minor parties do not benefit much from the higher limit for segregated-account contributions. Instead, they seek contributions that can be used for other purposes, and those contributions are limited to $33,400.

In this way, the scheme's exceptions loosen restrictions on those contributions that are useful to major parties but not to minor parties. Of course, this effect is in part attributable to the various levels of support for different parties and the parties' decisions on how to raise and spend contributions. And as the majority notes, this effect alone does not render the scheme unconstitutional. *See* Maj. Op. at 33. Even so, it raises further doubts that the scheme is tailored to

serve anticorruption interests rather than an impermissible interest, such as disadvantaging minor parties. *See Williams-Yulee*, 135 S. Ct. at 1668. This concern overlaps with those that motivate comparative-disadvantage cases, *see, e.g.*, *Randall v. Sorrell* 548 U.S. 230, 248 (2006) (a statute regulating contributions must not "magnify the advantages of incumbency to the point where [it] put[s] challengers to a significant disadvantage"), but it is not an attempt to raise a comparative-disadvantage claim on the LNC's behalf, Maj. Op. at 32–33. It simply provides further record-based reasons to be skeptical that the two-tiered scheme is tailored to serve anticorruption interests.

Because the government has not carried its burden of showing that the scheme is closely drawn to combat corruption or its appearance, I would hold that the scheme violates the First Amendment. Having reached a different decision on the merits, the majority has no occasion to address the appropriate remedy. I therefore do not reach the issue either.[2] But on the

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[2] The appropriate remedy, *i.e.*, the "upshot" of holding that the scheme violates the First Amendment, Op. at 23 (Katsas, J.), is disputed by the parties. The LNC argues that the appropriate remedy is excising the use restrictions while leaving the increased overall limit, allowing a donor to contribute $334,000 for general use. LNC Br. 62–63; *accord* Amicus Br. of the Goldwater Inst. 8. The government urges the pre-cromnibus status quo, which would allow a donor to contribute $33,400 for general use and nothing more. FEC Br. 54–56. Alternatively, the court could remand this matter for further record development. *See* Order, *Holmes v. FEC*, No. 14-5281 (D.C. Cir. Jan. 30, 2015) (en banc) (per curiam); *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam); *see also Turner*, 512 U.S. at 668.

merits of the second and third certified questions, I respectfully dissent.

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KATSAS, *Circuit Judge*, with whom *Circuit Judge* HENDERSON joins, concurring in part, concurring in the judgment in part, and dissenting in part: This case involves statutory limits on contributions that individuals may make to political parties. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court held that these contribution limits are not facially unconstitutional. Here, we consider whether the limits are unconstitutional as applied to contributions made through bequests. We also consider whether the limits became unconstitutional when Congress amended them in 2014.

## I

To frame the relevant inquiries, we must first decide the appropriate level of First Amendment scrutiny. The majority reserves this question, *ante* at 13, 28, but I would decide it.

In 1976, the Supreme Court fixed the level of scrutiny for limits on contributions to candidates for federal elective offices. Those limits "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment" of speech and associational freedoms. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam). Subsequently, the Court has applied this same level

of scrutiny to assess the constitutionality of contribution limits imposed on all kinds of donors and recipients, including candidates for federal and state offices; national, state, and local political parties; and political action committees. *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 196–99 (2014) (plurality opinion); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734–35 (2011); *Davis v. FEC*, 554 U.S. 724, 736–37 (2008); *Randall v. Sorrell*, 548 U.S. 230, 246–48 (2006) (plurality opinion); *McConnell*, 540 U.S. at 134–41; *FEC v. Beaumont*, 539 U.S. 146, 161–62 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446–56 (2001); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000). For shorthand, this level of scrutiny is now referred to (rather clumsily) as "closely drawn scrutiny."

Despite this long line of precedent, the Federal Election Commission urges us to lower the bar, at least with respect to bequests. The FEC asks us to consider only whether the challenged contribution limits prevent the Libertarian National Committee, which received the bequest at issue here, from "amassing the resources necessary for effective advocacy." The FEC plucks that phrase out of *Buckley*, which observed that contribution limits "could have a severe impact" if they prevented recipients from amassing such resources. 424 U.S. at 21. The FEC reasons that bequests implicate neither the donor's speech interests nor anyone's associational interests, and the recipient's speech interests are impaired only if it is prevented from mounting, in the aggregate, some quantum of "effective" advocacy.

This analysis is flawed at every turn. To begin, "effective advocacy" is not a reduced, free-floating level of First Amendment scrutiny. If a contribution limit prevents effective advocacy, then it is insufficiently tailored to satisfy closely drawn scrutiny. *See Randall*, 548 U.S. at 246–62 (plurality opinion); *id.* at 267–73 (Thomas, J., concurring in the judgment). But contribution limits may be insufficiently tailored for other reasons, such as "a substantial mismatch between the Government's stated objective and the means selected to achieve it." *McCutcheon*, 572 U.S. at 199 (plurality opinion). And regardless of any tailoring problems, contribution limits are unconstitutional if the asserted government interest is insufficiently important. *See, e.g.*, *Davis*, 554 U.S. at 740 n.7; *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc).

Likewise, the Supreme Court has never attempted "to parse distinctions between the speech and association standards of scrutiny for contribution limits." *Shrink Mo. Gov't*, 528 U.S. at 388. Rather, it has fashioned what the majority aptly describes as a "single unified test that applies an intermediate level of scrutiny to contribution limits." *Ante* at 13. Thus, in reaffirming the appropriateness of closely drawn scrutiny in *McConnell*, the Court held it immaterial that the challenged provisions restricted the acceptance of contributions by parties rather than the giving of contributions by donors. *See* 540 U.S. at 138. Applying closely drawn scrutiny in *SpeechNow*, this Court held that the challenged contribution limits violated the First Amendment rights of both the donors and the recipient,

without hinting at any distinction between the two. *See* 599 F.3d at 690–96. And the three-judge district court in *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C.) (Kavanaugh, J.), *aff'd*, 561 U.S. 1040 (2010) (mem.), applied closely drawn scrutiny to assess contribution limits challenged only by recipients. *See id.* at 153, 156. Of course, different contribution limits may impact speech and associational interests in different ways, but "we account for [those impacts] in the application, rather than the choice, of the appropriate level of scrutiny." *McConnell*, 540 U.S. at 141.

The FEC's plea for less-than-intermediate scrutiny is also radical. For over four decades, various justices have urged that because contribution limits "operate in an area of the most fundamental First Amendment activities," *Buckley*, 424 U.S. at 14, they should be subjected to strict rather than closely drawn scrutiny. *See, e.g.*, *Shrink Mo. Gov't*, 528 U.S. at 405–10 (Kennedy, J., dissenting); *id.* at 410–30 (Thomas, J., joined by Scalia, J., dissenting); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 635–44 (1996) (*Colorado I*) (Thomas, J., dissenting in part); *Buckley*, 424 U.S. at 241–46 (Burger, C.J., dissenting in part); *id.* at 290 (Blackmun, J., dissenting in part). *McConnell* acknowledged this "significant criticism." 540 U.S. at 137. And in *McCutcheon* —the Court's most recent decision in this area—the plurality sought to minimize the differences between strict and closely drawn scrutiny, *see* 572 U.S. at 196–99, in the face of a continuing call for strict scrutiny, *see id.* at 228–32 (Thomas, J., concurring in the judgment).

Given this longstanding debate over whether closely drawn scrutiny sets the bar too low, it is quite a stretch to posit that, here, it sets the bar too high.

The FEC's proposal would create anomalies in First Amendment law more generally. Effective speech often requires multiple parties—speakers, listeners, and, in the context of mass markets, patrons. The Supreme Court generally treats the rights of these parties as "reciprocal." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) ("the protection afforded is to the communication, to its source and to its recipients both"). So, the right of one party to speak implies the right of another party to listen. *See id.* Likewise, the right of one party to fund speech implies the right of another party to accept the funds. *Cf. McConnell*, 540 U.S. at 138 ("it is irrelevant that Congress chose . . . to regulate contributions on the demand rather than the supply side"). It would be odd enough to isolate one from the other in deciding the merits, much less to do so in fixing an appropriate level of scrutiny.

Finally, in fixing the level of scrutiny, death should make no difference. Of course, living donors have substantial speech and associational interests in contributing money to political parties of their choice. *See, e.g.*, *McCutcheon*, 572 U.S. at 191–92 (plurality opinion); *id.* at 228 (Thomas, J., concurring in the judgment). Yet a contribution is no less speech and expressive association if the donor makes it through a bequest rather than a lifetime transfer. Either way, the donor intends to support the political views of the party, and an

observer would reasonably understand as much. *See Buckley*, 424 U.S. at 16–17; *cf. Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam). Likewise, the speech and associational interests of recipients—in using all available resources to fund political speech—do not vary depending on whether contributions come from living or deceased donors.

In sum, the FEC's attempt to ratchet down the level of scrutiny by separating speech from expressive association, donors from recipients, and the living from the dead is unsupported by precedent and unsound in principle. I would hold what the majority only assumes—that closely drawn scrutiny governs this case.

## II

Under closely drawn scrutiny, limits on political contributions are constitutional "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment" of speech and associational freedoms. *Buckley*, 424 U.S. at 25. In this sensitive area, the only sufficiently important government interests are the prevention of *quid pro quo* corruption—"a direct exchange of an official act for money"—and its appearance. *McCutcheon*, 572 U.S. at 192 (plurality opinion). Interests in equalizing "electoral opportunities," and in preventing donors from acquiring "influence over or access to elected officials or political parties," are insufficient. *Id.* at 207–08 (quotation marks omitted). Moreover, "the Government bears the burden of proving the

constitutionality of its actions," *id.* at 210 (quotation marks omitted), consistent with how intermediate scrutiny works in other First Amendment contexts. *See, e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("the Government . . . must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way" (quotation marks omitted)) (speech restrictions on government employees); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664–68 (1994) (plurality opinion) (same for content-neutral speech restrictions); *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (same for commercial speech restrictions).

In *Buckley*, the Supreme Court applied these principles to reject a facial challenge to limits on contributions made to candidates for federal elective offices. The Court noted "deeply disturbing examples" of "*quid pro quo*" corruption, which proved that the government's asserted interest was "not an illusory one." 424 U.S. at 26–27. The Court cited "a number of the abuses" discussed in our *Buckley* opinion, *id.* at 27 n.28, which explained that the record before Congress was "replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions," 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) (en banc). The Supreme Court further reasoned that, even if most contributors do not improperly seek *quid pro quo* exchanges, "suspect contributions" are "difficult to isolate." 424 U.S. at 30. So, to prevent actual and

apparent corruption, the government may eliminate the "opportunity for abuse" from large contributions. *Id.*

In *McConnell*, the Court rejected a facial challenge to limits on contributions to political parties. Given what it described as the "unity of interest" between parties and elected officials, the Court found "neither novel nor implausible" the supposition that large contributions to a party could corrupt its elected officials. 540 U.S. at 144–45. The Court also discussed at length the supporting evidence: the major political parties annually had been raising hundreds of millions of dollars in previously unregulated soft money, *id.* at 124; these contributions often were solicited by, and used to help, individual candidates, *id.* at 146; wealthy donors made large contributions to both major parties, *id.* at 148; and these contributions impacted a wide range of legislation, *id.* at 150.

## III

### A

This case presents a challenge to limits on contributions to political parties made through bequests. In a prior case, the LNC unsuccessfully sought to enjoin application of the contribution limits to all bequests. *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013) (*LNC I*). Here, the LNC seeks to enjoin application of the limits only to a bequest made by Joseph Shaber.

The facts surrounding this bequest are undisputed. Shaber neither coordinated with the LNC regarding his decision to include the party in his will nor even informed the party of that decision. *Libertarian Nat'l Comm., Inc. v. FEC*, 317 F. Supp. 3d 202, 249 (D.D.C. 2018) (*LNC II*). "Aside from pursuing its ideological and political mission, the LNC has provided nothing of value to Mr. Shaber, or to anyone else, in exchange for his bequest." *Id.* at 251. The bequest imposed no conditions and made no requests, but instead provided for the LNC to take "outright" a contribution ultimately valued at about $235,000. *Id.* at 250 (quotation marks omitted). Over the course of his lifetime, Shaber donated a total of $3,315 to the LNC, made in 46 separate gifts spread out over 24 years. *Id.* at 248–49. Besides making these contributions, Shaber had no other relationship with the LNC. *Id.* at 251.

In its prior cases on contribution limits, the Supreme Court considered no issues specific to bequests. Because the LNC does not rest its claim on "the same factual and legal arguments the Supreme Court expressly considered" in *Buckley* and *McConnell*, those precedents do not foreclose the LNC's as-applied challenge here. *Republican Nat'l Comm.*, 698 F. Supp. 2d at 157 ("*McConnell* permits as-applied challenges"); *see also Doe v. Reed*, 561 U.S. 186, 201 (2010) ("upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one"). Indeed, the Supreme Court has sustained an as-applied challenge to corporate-expenditure limits previously held facially constitutional, *FEC v. Wis. Right to Life, Inc.*,

551 U.S. 449, 476–82 (2007) (*WRTL*) (plurality opinion), and this Court has sustained an as-applied challenge to contribution limits previously held facially constitutional, *SpeechNow*, 599 F.3d at 692–96. Moreover, because the LNC's challenge raises issues not addressed in *Buckley* or *McConnell*, the government retains its burden of proof under heightened scrutiny. *See WRTL*, 551 U.S. at 464–65 (plurality opinion). Of course, we must determine which facts, if any, distinguish this case from *Buckley* and *McConnell*, and the breadth of our reasoning will impact the law going forward. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as applied' cases" (quotation marks omitted)). But regardless of the breadth of our reasoning, the LNC's first claim seeks relief only as to Shaber's individual bequest.

Under these rules for assessing as-applied challenges, I would hold that the challenged contribution limits are unconstitutional as applied to any of three nested categories: bequests, uncoordinated bequests, and Shaber's bequest. I will address the categories from broadest to narrowest.

1

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *McConnell*, 540

U.S. at 144 (quotation marks omitted). Here, that means requiring more evidence rather than less, for there are strong reasons to think that bequests—in contrast to contributions from living donors—do not pose a significant risk of actual or apparent *quid pro quo* corruption. For one thing, politics operates on notoriously "short timeframes," *Citizens United*, 558 U.S. at 334, so gifts deferred until death—perhaps many election cycles down the road—will have relatively little value to political parties or their candidates. For another, there is no easy means for deceased donors or their beneficiaries to enforce any corrupt bargains. In the context of contributions from living donors, such bargains are managed through winks and nods over time, as money flows one way and political favors flow the other. *See McConnell*, 540 U.S. at 147 (quoting lobbyist's testimony that "overt words are rarely exchanged about contributions, but people do have understandings"). Bequests cannot work like that, because the money flows only once, and at death. So, if a corrupt donor seeks political favors during his lifetime, when the bequest is nothing more than a revocable promise, the recipient will have no way to prevent the donor from accepting the favors but then reneging on the promise. Or, if the donor seeks favors for survivors, he will have no way to ensure delivery after death makes the bequest irrevocable and removes him from the picture. Either way, inherent constraints limit the feasibility of any contemplated exchange. Bequests are thus generally "less susceptible . . . to misuse," *Beaumont*, 539 U.S. at 160, than contributions from living donors.

The evidence confirms this point. To justify its concerns about possible corruption through bequests, the FEC could have pointed to anything in any of four records: the legislative record of a select committee established by Congress to investigate fundraising for the 1972 presidential election, *see Buckley*, 519 F.2d at 839 n.35; the 100,000-page record compiled for the three-judge district court in *McConnell, see* 251 F. Supp. 2d 176, 209 (D.D.C. 2003); the district-court record in *LNC I*, where all bequests were at issue; or the district-court record in this case. Yet, despite the massive records in *Buckley* and *McConnell*, and the two records made in the bequest-specific *LNC* cases, the FEC points to nothing substantiating its concerns. In fact, these records undercut its position in three critical respects.

*First*, bequests are rarely used for political contributions. From 1978 through August 2017, bequests accounted for only about $3.7 million in contributions to federal candidates, political parties, and all other entities required to file reports with the FEC. *LNC II*, 317 F. Supp. 3d at 247. To put that number in perspective, the same group of recipients spent $7 billion in the 2012 election cycle alone, *McCutcheon*, 572 U.S. at 219 (plurality opinion), and the major political parties spent nearly $1.2 billion in 2000 alone, *see McConnell*, 540 U.S. at 124. Of course, bequests to political parties might increase if the relevant contribution limits were invalidated. But, from 1978 to 2002, donors could have made unlimited soft-money bequests to political parties. *See id.* at 122–24. And if *McConnell* correctly understood the "unity of interest" between political

parties and elected officials, such bequests would have been almost as enticing as ones made directly to the officials. *See id.* at 144–45. In sum, despite decades of little or no relevant regulation, contributions through bequests have remained a drop in the proverbial bucket.

*Second*, and perhaps most striking, the FEC does not point to even a single *quid pro quo* exchange—at any time in American history—allegedly effected through a bequest. Nor do the careful, extensive findings made by the district courts in the *LNC* cases. *See LNC I*, 930 F. Supp. 2d at 171–90; *LNC II*, 317 F. Supp. 3d at 225–57. In developing the records for those cases, all the FEC could muster up was more evidence of corruption involving contributions from living donors. *See id.* at 236–42. In striking down limits on independent expenditures by corporations, the Supreme Court stressed that "[t]he *McConnell* record was over 100,000 pages long, yet it does not have any direct examples of votes being exchanged for expenditures." *Citizens United*, 558 U.S. at 360 (cleaned up). The FEC's failure of proof here is no less dramatic.

*Third*, there is no evidence of testators trying to play both sides. In *McConnell*, the Court found it "[p]articularly telling" that wealthy individuals "gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology." 540 U.S. at 148. The FEC alleges nothing comparable as to bequests. This should hardly be surprising, for the

possibility of a corrupt donor securing political favors, not by giving large sums to both parties during his lifetime, but by simultaneously remembering both parties in his will, seems almost fantastic.

Against this evidence (or lack thereof), and despite the practical problems with effectuating any *quid pro quo* through a bequest, the majority posits that a corrupt bequest might be possible—in theory—if the donor and the party worked out the exchange in advance. *Ante* at 14–15. With respect, I find that possibility insufficient to discharge the FEC's significant burden of proof under closely drawn scrutiny. The Supreme Court has "'never accepted mere conjecture as adequate to carry a First Amendment burden,'" *McCutcheon*, 572 U.S. at 210 (plurality opinion) (quoting *Shrink Mo. Gov't*, 528 U.S. at 392), and so neither should we.

2

In any event, contribution limits are unconstitutional as applied to uncoordinated bequests. To reiterate, the majority posits that bequests could be corrupt if the testator bargained with the intended beneficiary before his death. *Ante* at 14–15; *see also LNC I*, 930 F. Supp. 2d at 166 ("making one's bequest known before death could be treated just as a contribution is"). But this cannot happen if the testator does not even tell the recipient about the planned bequest during his lifetime. In that circumstance, a *quid pro quo* exchange is impossible.

The only response is that coordinated and uncoordinated bequests may be difficult to distinguish, so both must be regulated together. But this reasoning runs counter to perhaps the most fundamental distinction in campaign-finance law—between contributions and independent expenditures.

In *Buckley*, the Court invalidated a limit on the expenditures that any person could make "relative to a clearly identified candidate." *See* 424 U.S. at 39–51 (quotation marks omitted). The government defended the expenditure limit as necessary to prevent evasion of the limits on contributions to candidates. But the governing statute already treated "controlled or coordinated expenditures" as "contributions rather than expenditures." *Id.* at 46 & n.53. And the Court held that this distinction between coordinated and independent spending also marked a critical constitutional line. Thus, the treatment of "prearranged or coordinated expenditures" as contributions permissibly addressed the government's concern about evading contribution limits. *Id.* at 47. But the limit on independent expenditures did not. As the Court explained: "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* Later decisions have reinforced this "fundamental constitutional difference" between independent expenditures, which are fully protected, and coordinated expenditures, which may be and are

regulated as contributions. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985); *see, e.g.*, *McConnell*, 540 U.S. at 202–03, 219–22; *Colorado I*, 518 U.S. at 613–16 (plurality opinion); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251–63 (1986). Most recently, in *Citizens United*, the Court applied this reasoning to invalidate limits on independent expenditures by corporations and unions. 558 U.S. at 356–60, 365–66.

In *SpeechNow*, this Court recognized that the protection for independent expenditures also constrains the government's ability to regulate contributions. We held that contribution limits are unconstitutional as applied to recipients that engage only in independent expenditures. We noted that, after *Citizens United*, "the government has *no* anti-corruption interest in limiting independent expenditures." 599 F.3d at 693. Then, we reasoned: "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *Id.* at 694. Because no legitimate government interest was implicated, even a modest impairment of speech and associational rights would be unconstitutional. *See id.* at 695 ("something . . . outweighs nothing every time" (quotation marks omitted)).

The line between coordinated and uncoordinated spending thus runs throughout campaign-finance law, and the FEC routinely must police it. Congress has

long defined an expenditure "independent" of a candidate as one that, in pertinent part, was "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17)(B); *see also id.* § 30116(a)(7)(B)(i) (treating expenditures not independent of a candidate as "a contribution to such candidate"); *McConnell*, 540 U.S. at 221–22 & n.99. A parallel definition now distinguishes expenditures "independent" of political parties from contributions to those parties. *See id.* at 219–20 & n.97. The Supreme Court has held that this definition is not impermissibly vague, *id.* at 222–23; the FEC has promulgated a swath of regulations implementing it, *see generally* 11 C.F.R. pt. 109; and the Commission or the courts frequently apply it to determine whether disputed expenditures were in fact independent, *see, e.g.*, *Colorado I*, 518 U.S. at 619–23 (plurality opinion); *AFL-CIO v. FEC*, 333 F.3d 168, 171 (D.C. Cir. 2003). Likewise, other decisions assess whether specific entities make only independent expenditures and thus have a First Amendment right to receive unrestricted contributions under *SpeechNow. See, e.g.*, *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 140–41 (2d Cir. 2014).

Armed with extensive disclosure requirements and enforcement powers, the FEC routinely determines whether disputed expenditures were coordinated or independent. The FEC offers no reason why it cannot make the same determination as to bequests. Because coordinated and uncoordinated bequests can be manageably

distinguished, and because uncoordinated bequests are not even alleged to present any corruption risk, the contribution limits are unconstitutional at least as applied to them.

3

Finally, the contribution limits are unconstitutional as applied to Shaber's individual bequest. Not only was his bequest uncoordinated, but several additional facts make the LNC's challenge even stronger.

*First*, far from coordinating with the LNC, Shaber never even told the LNC of the bequest before his death. *LNC II*, 317 F. Supp. 3d at 249. With the LNC unaware that a testamentary *quid* might be forthcoming, there could be no *quid pro quo* agreement—nor even any debate about whether to infer such an agreement based on winks, implicit understandings, or other ambiguous circumstances.

*Second*, the bequest came with no strings attached. *LNC II*, 317 F. Supp. 3d at 250. It neither demanded nor even asked that the LNC do anything in return. The district court noted that, in one other instance, a trustee had requested that the LNC use the bequest to help defeat specific candidates. *See id.* at 248. There would be nothing wrong with such an agreement, for that *quo* would not involve any "official act" of the government. *See McCutcheon*, 572 U.S. at 192 (plurality opinion). But, here, Shaber never sought any *quo* at all.

*Third*, the LNC "provided nothing of value" in exchange for the bequest, except perhaps for continuing to "pursu[e] its ideological and political mission." *LNC II*, 317 F. Supp. 3d at 251. In *LNC I*, the FEC expressed concern that a political party could grant "preferential access" to testators who (unlike Shaber) tell the party of the intended gift during their lifetime. 930 F. Supp. 2d at 186. However, "[i]ngratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. And, here, Shaber did not seek even that.

*Fourth*, Shaber made only modest contributions to the LNC during his lifetime. As the district court explained, Shaber's total lifetime donation of $3,315, made in 46 separate contributions spread out over 24 years, "is a drop in the bucket relative to current law's annual limit of $33,900 for individuals to contribute for any purpose to national political party committees, and an even smaller drop relative to the limit of $339,000 that individuals may contribute for either general or specialized purposes." *LNC II*, 317 F. Supp. 3d at 216. Likewise, Shaber's contribution history did not qualify him for any of the benefits that the LNC affords to its major donors. *See id.* at 242. So, there is no reason to think that the LNC might have even identified Shaber as someone likely to make a large bequest, much less used that possibility to engineer a secret *quid pro quo* before his death.

*Finally*, besides making his modest gifts, Shaber had no other relationship with the LNC during his lifetime, *LNC II*, 317 F. Supp. 3d at 251, thus making the prospect of corruption even more unlikely.

B

The majority views the LNC's as-applied claim as resting on nothing more than a factual contention that Shaber's individual bequest was not corrupt. *Ante* at 16–17. It then rejects the claim as inconsistent with *Buckley*'s holding that, because corrupt and legitimate contributions are hard to distinguish, "prophylactic" limits may be applied to both. *Ante* at 17–19 (quotation marks omitted). But there is more to the LNC's claim.

As noted above, the fact that the LNC sought relief only as to Shaber's bequest did not prevent it from making substantive arguments that sweep more broadly. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1127–28 (2019); *Citizens United*, 558 U.S. at 331. Although the LNC asks us to assess Shaber's bequest based on a totality of the circumstances, it also makes broader arguments keyed to the general nature of bequests and uncoordinated bequests. *See, e.g.*, LNC Opening Br. at 37 ("[B]arring supernatural intervention, the potential for *quid pro quo* activity is rather more limited than in the case of a living donor, as are prospects for its enforcement. Regardless of what the LNC might do for Shaber now, he will give it nothing more or less than his bequest."); LNC Reply Br. at 14 ("Bequests are different. Until death, they are merely a revocable promise. After death, they are irrevocable, and cannot be policed by the dead for quid pro quo compliance."). In my judgment, that was enough to preserve the broader arguments—and, as to them, to trigger the FEC's burden of proof under closely drawn scrutiny. The FEC did not misapprehend this point; to the contrary, it argued

both that *Buckley* forecloses as-applied challenges based on the facts of individual cases, FEC Br. at 25–28, and that bequests as a category raise the same corruption concerns as other kinds of political contributions, *id.* at 29–32.

On the merits, the LNC's substantive arguments do not threaten the general justification for prophylactic contribution limits. As explained above, contributions made through bequests may be safely distinguished as a category—just like contributions to groups that make only independent expenditures. *See SpeechNow*, 599 F.3d at 692–96. The same is true for the narrower category of contributions made through uncoordinated bequests. And to the extent that additional facts strengthen the LNC's challenge, there is nothing inappropriate about considering them. Successful as-applied challenges often turn on the facts of individual cases. *See, e.g.*, *WRTL*, 551 U.S. at 469–81 (plurality opinion) (expenditure limit impermissibly extended beyond functional equivalent of express advocacy); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (disclosure requirement impermissibly subjected party to threats or harassment). Likewise, case-specific facts would be necessary to determine whether contribution limits prevent individual recipients from "amassing the resources necessary for effective advocacy"—a type of as-applied challenge that *McConnell* repeatedly invited. 540 U.S. at 159 (quotation marks omitted); *see id.* at 173.

The majority also suggests that as-applied challenges to contribution limits may be appropriate in

cases where the burdens imposed on speakers are particularly harsh, but not in cases where the relevant government interests are particularly weak. *Ante* at 19–20. There is no conceptual reason why that should be so, for closely drawn scrutiny requires proof both that an important government interest is implicated and that the challenged restriction does not infringe speech or associational interests unnecessarily. *SpeechNow* confirms this point. There, in striking down contribution limits as applied to recipients that make only independent expenditures, we rested squarely on the premise that "the government ha[d] no anti-corruption interest" in that case, without reaching the question of how severely the challenged limits infringed speech and associational interests. 599 F.3d at 694–95.

Finally, it is worth remembering that *Buckley* and *McConnell* are themselves exceptions to an overarching First Amendment principle. "Broad prophylactic rules in the area of free expression are suspect," and "[p]recision of regulation must be the touchstone" in this area. *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Buckley* and *McConnell* qualify that principle, by approving "prophylactic" restrictions extending to *some* non-corrupt contributions. *McCutcheon*, 572 U.S. at 221 (plurality opinion). But the "prophylaxis" must also have limits. *See id.* Under closely drawn scrutiny, it cannot properly be extended to bequests that, as a group and individually, may reliably be determined to be legitimate.

## IV

Beyond any question about bequests, the LNC challenges the contribution limits as amended in 2014. The LNC contends that the current limits are unconstitutional, both on their face and as applied. On this point, the LNC does not highlight any facts about Shaber's individual contribution, but instead attacks the statutory scheme itself.

The provisions at issue are structured as one old rule subject to three new exceptions. The rule is that no person may contribute over $25,000 per year to a national political party, 52 U.S.C. § 30116(a)(1)(B), subject to adjustment for inflation, *id.* § 30116(c). It is contained in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), and it was upheld by *McConnell*. *See* Pub. L. No. 107-155, § 307(a)(2), (d), 116 Stat. 81, 102–03; 540 U.S. at 142–61. The exceptions permit individuals to make additional annual contributions of up to $75,000 for presidential nominating conventions, $75,000 for party headquarters, and $75,000 for recounts and other legal proceedings, all subject to the same inflation adjustment. 52 U.S.C. § 30116(a)(1)(B), (a)(9). They were created by a 2014 amendment to FECA. Pub. L. No. 113-235, div. N, § 101, 128 Stat. 2130, 2772–73. The LNC's challenge to this scheme mixes attacks on the new exceptions, attacks on the old rule, and attacks on how the two treat different categories of speech differently. The LNC also combines arguments based on overbreadth and

underbreadth. But once these various arguments are unpacked, none of them succeeds.

Most obviously, the new contribution limits do not themselves restrict too much speech. On this point, *McConnell* controls. If a prohibition on contributing more than $25,000 to a political party for any purpose does not restrict too much speech, then neither do exceptions that permit additional contributions of up to three times that amount. The majority correctly concludes that this much is a matter of "simple mathematics," *ante* at 30, and Judge Griffith agrees, *ante* at 1.

The LNC further attacks the statutory distinction between contributions for nominating conventions, headquarters, and legal proceedings (now governed by the higher 2014 limits) and contributions for all other purposes (still governed by the lower BCRA limit). It contends that there is no anti-corruption justification for treating these categories differently. The majority concludes that there are such justifications, *ante* at 30–32, while Judge Griffith concludes that there may not be, *ante* at 3–7. In my view, Judge Griffith has the better of this argument, so I would join his dissent if the First Amendment required proof of a corruption-based justification for the differential treatment of these speech categories. But I do not think that such proof is necessary in this case.

As a general matter, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387

(1992)). So, for example, if a state may prohibit obscenity across the board, then it may prohibit obscene telephone calls but not obscene telegrams—even if the two raise comparable concerns. *See R.A.V.*, 505 U.S. at 387. Otherwise, laws might "violate[ ] the First Amendment by abridging *too little* speech"—which is highly "counterintuitive." *Williams-Yulee*, 135 S. Ct. at 1668.

In my view, that principle governs this case. Under closely drawn scrutiny, Congress needed an anti-corruption justification both to impose BCRA's original contribution limit and to limit the additional categories of spending permitted by the 2014 amendment. As noted above, *McConnell* found sufficient justification for the former, and the latter follows from it. But Congress did not need a further, corruption-related justification to restrict contributions for nominating conventions, headquarters, and legal expenses less severely than it restricts other contributions. Rather, Congress could have chosen to restrict those contributions less severely for other reasons, such as a desire to make up for the loss of public funds for nominating conventions, or simply to permit more speech rather than less. The First Amendment demands a strong anti-corruption justification when Congress chooses to restrict campaign contributions, not when it chooses to loosen the restrictions.

There are two important qualifications to this analysis, but neither affects the bottom line here.

*First*, distinctions among categories of speech may violate the First Amendment if they are based on

content. *See R.A.V.*, 505 U.S. at 387 ("the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation"). Here, the LNC contends that the more favorable treatment of contributions for nominating conventions, headquarters, and legal expenses is content-based, because it targets speech based on its "function or purpose." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Moreover, if a distinction between "political" and other speech is content-based, *see id.* at 2224–30, then so are the distinctions among the types of political-speech contributions at issue here.

Whatever the force of this argument in the abstract, it cannot carry the day. *Reed* did not involve campaign contribution limits, which the Supreme Court has long treated as content-neutral restrictions subject to intermediate scrutiny. So, while I disagree with the majority's suggestion that *Reed* is inapposite because this case does not involve speech restrictions, *ante* at 26, I agree with its ultimate conclusion, *ante* at 27–28, that a lower court cannot follow the implications of *Reed* as against the holdings of the campaign-finance cases. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

*Second*, underinclusiveness can raise First Amendment concerns for another reason, by suggesting that the government is not pursuing its asserted interests or that the challenged speech restriction will not substantially advance them. *See Williams-Yulee*, 135 S. Ct. at 1668. The majority concludes that the 2014 scheme does not raise these concerns, *ante* at 30–32, while

Judge Griffith concludes that it does, *ante* at 3–9. Were we free to engage this question, I would agree with Judge Griffith. But I believe that *McConnell* forecloses the debate.

An underinclusiveness argument along these lines uses speech-enabling exceptions to attack a speech-restricting rule. If the government allows the sale of violent movies, that casts doubt on its asserted need to restrict the sale of violent video games. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 801–02 (2011). If the government permits newspapers to be distributed through newsracks, that casts doubt on its asserted need to prohibit commercial publications from being similarly distributed. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416–28 (1993). If the government permits electronic media to release names of juvenile offenders, that casts doubt on its asserted need to prohibit newspapers from doing so. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104–05 (1979).

Here, the analogous argument amounts to a direct attack on BCRA itself: If Congress permits annual contributions to political parties of $225,000 (or $300,600, adjusted for inflation) for three specified categories of activity, that casts doubt on its asserted need to prohibit all other annual contributions over $25,000 (or $33,400, adjusted for inflation). As Judge Griffith explains, the argument is compelling: money is fungible, the exceptions dwarf the rule, and there is no plausible anti-corruption rationale to explain the disparate treatment. Nonetheless, *McConnell* held that BCRA's $25,000 contribution limit substantially advances, and

is narrowly tailored to, the important government interest in combatting actual or apparent *quid pro quo* corruption. If we may not revisit that conclusion based on intervening Supreme Court decisions that undermine *McConnell*'s reasoning, *see Agostini*, 521 U.S. at 237, then neither may we revisit it based on intervening statutes that do likewise. On this point, any course correction must come from the Supreme Court itself.

Judge Griffith concludes that *McConnell* is not binding on this point because it did not involve a "regime" with the three new exceptions. *Ante* at 2. True enough, but the upshot of his argument is that "limiting general contributions to $33,400" is now unconstitutional. *Id.* And that general limit, created by section 307(a)(2) of BCRA, and currently codified at 52 U.S.C. § 30116(a)(1)(B), is precisely the one that *McConnell* upheld.

* * *

I join Part II of the majority opinion, which holds that the LNC has standing to raise its various challenges. For the reasons given above, I respectfully dissent from Part III of the opinion, and I concur in the judgment as to Part IV.

**APPENDIX B**

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

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| LIBERTARIAN NATIONAL COMMITTEE, INC.,<br>Petitioner,<br>v.<br>FEDERAL ELECTION COMMISSION,<br>Defendant. | Civil Action No. 16-cv-00121 (BAH)<br>Chief Judge Beryl A. Howell |

**MEMORANDUM OPINION**

(Filed Jun. 29, 2018)

The petitioner, the Libertarian National Committee, Inc. ("LNC"), has challenged for over seven years the constitutionality of certain contribution limits, under the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3, as amended (codified at 52 U.S.C. § 30101 *et seq.*), that regulate how the LNC may accept and use testamentary bequests. In this latest round of litigation, the LNC raises one facial and two as-applied constitutional challenges to the statutory limits on the amount of money a person may contribute per year "to the political committees established and maintained by a national political party." 52 U.S.C. § 30116(a)(1)(B); *see also id.* § 30116(a)(9); Pet.'s Mot. Certify Facts & Questions ("Pet.'s Mot. Cert.") at 1, ECF No. 24. The role of a

district court under FECA's statutory scheme is not to resolve constitutional challenges to the statute in the first instance, but merely to certify to the U.S. Court of Appeals those challenges that are meritorious. *See* 52 U.S.C. § 30110. Now pending before the Court is the LNC's motion to certify for resolution by the U.S. Court of Appeals for the District of Columbia Circuit three questions: whether LNC's First Amendment rights are violated by (1) applying the annual contribution limits to "the bequest of Joseph Shaber," (2) "restricting the purposes for which the [LNC] may spend its money," in general, and (3) "restricting the purposes for which the [LNC] may spend the bequest of Joseph Shaber," in particular. Pet.'s Mot. Cert. at 1.[1] The defendant Federal Election Commission ("FEC"), in opposing certification, has moved to dismiss the case, pursuant Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction. Def.'s Mot. Dismiss ("Def.'s Mot.") at 1, ECF No. 25. For the reasons that follow, the LNC's motion is granted in part and denied in part, and the FEC's motion is denied.

## I. BACKGROUND

The LNC, a nonprofit organization incorporated under District of Columbia law, is the national

[1] The FECA imposes differing contribution limits depending on the source, recipient and use of the contribution. Unless otherwise specified, the phrase "challenged contribution limits" as used in this Memorandum Opinion refers to the limits, under 52 U.S.C. § 30116(a)(1)(B), (a)(9), on the amounts of money that a person may donate per year to a national political party committee.

committee of the Libertarian Party of the United States, which Party has 15,031 active paid sustaining donors, and 137,451 members, in all 50 states and the District of Columbia. App'x, Findings of Fact ¶¶ 1, 3. In addition, forty-eight partisan officeholders and 111 non-partisan officeholders are affiliated with the Libertarian Party nationwide, and over half a million registered voters identify with the Libertarian Party in the states in which voters can register as Libertarians. *Id.* ¶ 3. The LNC describes its purpose "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." *Id.* ¶ 5. This is the second round of litigation brought by the LNC against the FEC regarding the constitutionality of the FECA's limits on monetary contributions to political parties. The details of the prior litigation bear directly on the present dispute and are recounted below, followed by an overview of the underlying facts.

### A. The Previous Litigation

The FECA establishes limits on the amount of money a person may donate per year to national political party committees. *See* 52 U.S.C. § 30116(a)(1)(B). In *Buckley v. Valeo*, the Supreme Court rejected a facial challenge to the FECA's "limitation on total contributions by an individual during any calendar year," describing contribution limits as one of the FECA's "primary weapons against the reality or appearance of improper influence stemming from the dependence of

candidates on large campaign contributions." 424 U.S. 1, 58 (1976). "The contribution ceilings . . . serve the basic governmental interest in safeguarding the integrity of the electoral process," *Buckley* held, "without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion." *Id.* *Buckley* did not address an as-applied challenge to the contribution limits.

Ten years ago, Raymond Burrington died and left the LNC a residuary bequest of $217,734. *See Libertarian Nat'l Comm., Inc. v. FEC* ("*LNC I*"), 930 F. Supp. 2d 154, 156 (D.D.C. 2013) (Wilkins, J.). The FEC, consistent with longstanding policy, determined that the FECA's limits on contributions to national political party committees applied to Mr. Burrington's bequest, and thus, that the Burrington estate could contribute to the LNC, in any year, no more than the contribution limit amount. *Id.* The Burrington estate contributed to the LNC the amount of the annual contribution limit and, in agreement with the LNC, deposited the balance of Mr. Burrington's bequest "into an escrow account, from which the escrow agent . . . would distribute annual contributions from the Estate to the LNC in amounts equal to FECA's contribution limit." *Id.* at 176.

The LNC sued the FEC to "enjoin application of the Party Limit to the contribution, solicitation, acceptance, and spending of decedents' bequests, as said application violates the LNC's First Amendment speech and associational rights and those of its supporters." *Id.* at 156. The LNC moved to certify to the

D.C. Circuit the following question: "Does imposing annual contribution limits against testamentary bequests directed at, or accepted or solicited by political party committees, violate First Amendment speech and associational rights?" *Id.* The Court declined to certify the LNC's question as overbroad, reasoning that the LNC's challenge "would not apply solely to [the LNC], but would extend to other entities not before this Court." *Id.* at 165. The Court further explained that under certain circumstances, "it is possible for a bequest to raise valid anti-corruption concerns." *Id.* at 166. For example, the Court reasoned, "making one's bequest known before death could be treated just as a contribution is." *Id.* Likewise, "[a] bequest may also help friends or family of the deceased have access to political officeholders and candidates." *Id.* These examples were supported by witness testimony and other factual evidence of how political "groups treat such bequests." *Id.* The Court thus recognized that even contributions by the dead may, in certain contexts, raise concerns about actual or apparent corruption justifying a contribution limit's application. *Id.* at 166–67.[2] Furthermore, with the testators being

[2] Independent expenditures likewise might be thought capable of exerting corrupting influence on political officeholders under proper circumstances. In *SpeechNow.org v. FEC*, however, the D.C. Circuit concluded that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption," 599 F.3d 686, 694 (D.C. Cir. 2010), but without any apparent discussion or analysis of the myriad possible factual circumstances under which such contribution may be made. As explained further below, *SpeechNow* does not support a

dead and their estates having no First Amendment rights of association or expression, the Court concluded that the LNC could challenge the contribution limits only as to its own First Amendment rights, not as to testators' rights. *Id.* at 169–171.[3] Given these legal conclusions, the Court then narrowed and certified the following question: "Does imposing annual contribution limits against the bequest of Raymond Groves Burrington violate the First Amendment rights of the Libertarian National Committee?" *Id.* at 171.

The FEC moved, pursuant to Federal Rule of Civil Procedure 59(e), to alter or amend the Court's order, arguing, among other things, that while "as-applied First Amendment challenges seeking *categorical* exceptions to FECA's contribution limits are proper under the statute," a petitioner may not, as a matter of law, raise "a First Amendment challenge to an *individual* contribution" without identifying a categorical basis to exempt an entire class of contributions from the contribution limits' application. *Libertarian Nat'l Comm., Inc. v. FEC* ("*LNC II*"), 950 F. Supp. 2d 58, 60 (D.D.C. 2013) (Wilkins, J.) (emphasis added). In denying the FEC's motion, the Court rejected this

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conclusion that testamentary contributions categorically cannot create actual or apparent corruption. *See infra* Part III.B.2.

[3] The Court also determined that the LNC's proposed question encompassed another issue, namely, whether a separate provision of the FECA prevented the LNC from "solicit[ing] bequests over the maximum even if they were parsed out annually at the legal limit," but the parties' briefs had mooted the issue. *LNC I*, 930 F. Supp. 2d at 167–68. That issue is not relevant to the pending motion for certification.

argument, concluding that § 30110 requires a district court to certify "individualized as-applied challenges to contribution limits." *Id.* at 62.

The D.C. Circuit summarily affirmed *LNC I*'s reformulation and certification of the LNC's question, determining that "[t]he district court properly declined to certify the broad proposed question of law, as framed by appellant." *Libertarian Nat'l Comm., Inc. v. FEC*, No. 13-5094, 2014 WL 590973, at *1 (D.C. Cir. Feb 7, 2014). The escrow account fully distributed Mr. Burrington's bequest to the LNC before the D.C. Circuit could hear the certified question on the merits, however. *See* Pet.'s Mem. Supp. Pet.'s Mot. Certify Facts & Questions ("Pet.'s Mem.") at 2, ECF No. 24-1; Def.'s Mem. Supp. Mot. Dismiss & Opp'n Pet.'s Mot. Certify Facts & Questions ("Def.'s Opp'n") at 9, ECF No. 26. Consequently, the D.C. Circuit dismissed the certification as moot and vacated the district court's order. Order, *Libertarian Nat'l Comm., Inc. v. FEC* ("*LNC* Dismissal Order"), No. 13-5088, 2014 U.S. App. LEXIS 25108, at *1 (D.C. Cir. Mar. 26, 2014).

### B. Joseph Shaber's Bequest

Joseph Shaber, a prior donor to the LNC, died in August 2014. Def.'s Opp'n at 9; Factual Findings ¶¶ 109–10, 117. Upon his death, Mr. Shaber bequeathed, with no restrictions, the LNC an amount determined to be $235,575.20 from a living trust. *Id.* ¶¶ 115, 117, 121. The LNC accepted an amount from the bequest equal to the annual contribution limits,

and placed the remainder of the bequest in an escrow account, to distribute the maximum allowable contribution to the LNC on an annual basis. *Id.* ¶ 128.

The LNC sued to enjoin the FEC from enforcing the contribution limits "either generally or in relation to the Shaber Bequest," and to obtain declaratory relief, costs, attorney's fees, and other "just and appropriate" relief. Compl. at 10–11, ECF No. 1. The FEC moved to dismiss the LNC's complaint for lack of subject matter jurisdiction, Def.'s Mot. Dismiss for Lack of Juris., ECF No. 9, which motion was denied, *see* Order Denying Def.'s Mot. Dismiss, ECF No. 20; *Libertarian Nat'l Comm., Inc. v. FEC* ("*LNC III*"), 228 F. Supp. 3d 19 (D.D.C. 2017) (Howell, C.J.). The LNC now seeks to certify the following three questions of law to the D.C. Circuit:

1. Does imposing annual contribution limits against the bequest of Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?

2. Do 52 U.S.C. §§ 30116(a)(1)(B) and 30125, on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its money?

3. Does restricting the purposes for which the Libertarian National Committee may spend the bequest of Joseph Shaber violate the Committee's First Amendment rights?

Pet.'s Mot. Cert. at 1. The FEC opposes the LNC's motion, and has moved to dismiss for lack of jurisdiction, which motion parrots in substance the FEC's opposition to LNC's certification motion. *See* Def.'s Mot.[4] The parties' motions are now ripe for consideration.

## II. LEGAL STANDARD

Under the FECA, "the national committee of any political party . . . may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act." 52 U.S.C. § 30110.[5] "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." *Id.* A district court's role in the certification process is to (1) "[i]dentify constitutional issues in the complaint, (2) "[t]ake . . . evidence . . . to the extent not controverted in material and substantial degree," (3) "[m]ake findings of fact with reference to those issues," and (4) "[c]ertify to [the D.C. Circuit] constitutional questions arising from steps 1, 2, and 3." *Buckley v.*

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[4] This Memorandum Opinion references both the FEC's opposition and motion to dismiss with citations exclusively to the FEC's motion to dismiss, as these documents are identical in substance.

[5] The term "Act," as used in § 30110, "means the Federal Election Campaign Act of 1971 as amended," 52 U.S.C. § 30101(19), and covers the specialized purpose contribution limit regime that came into existence in 2015.

*Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975). A district court does not certify questions under § 30110 that "are 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit,'" which means that satisfying this standard is "a 'low bar.'" *Holmes v. FEC*, 823 F.3d 69, 71–72 (D.C. Cir. 2016) (quoting *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015)). In applying this standard, the fact that a proposed question presents a legal argument foreclosed by binding precedent does not, in and of itself, "make the question obviously frivolous, or wholly insubstantial, or obviously without merit," at least "so long as the [petitioner] mounts a non-frivolous argument in favor of overturning that precedent." *Id.* at 74 (internal quotation marks omitted).[6]

A district court's discretion under § 30110 is not limited to certifying or dismissing a question exactly as formulated by a petitioner, but allows the court to reformulate a proposed question prior to certification. *See LNC I*, 930 F. Supp. 2d at 168 ("[L]ongstanding precedent supports this Court's discretion in crafting and/or amending any questions certified to the Court

[6] The FEC cites *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976 (D.C. Cir. 2018), for the proposition that "claims 'foreclosed by prior decisions of the Supreme Court deprive the lower courts of jurisdiction to hear the claim." Def.'s Opp'n at 18 (quoting *Johnson*, 869 F.3d at 984 (alterations omitted)). *Johnson* did not, however, address a situation where a petitioner "mounts a non-frivolous argument in favor of overturning that precedent," and so is reconcilable with *Holmes*'s holding that § 30110 allows certification of claims that existing precedent forecloses when a petitioner argues, on some non-frivolous basis, that the precedent should be overruled. 823 F.3d at 74.

of Appeals."). Indeed, before *Buckley v. Valeo* reached the Supreme Court, the D.C. Circuit initially had remanded the case to the district court to "formulat[e] [the] constitutional questions to be certified." *LNC I*, 930 F. Supp. 2d at 168 (citing *Buckley*, 387 F.2d at 835 (emphasis omitted)). "*Buckley*'s history strongly suggests the district court has an active, rather than passive, role in the certification process under [§ 30110]." *Id.* at 168–69; *see also Khachaturian v. FEC*, 980 F.2d 330, 332 (5th Cir. 1992) ("If [the district court] concludes that colorable constitutional issues are raised from the facts, it should certify those questions to us."); *Bread Political Action Comm. v. FEC*, 635 F.2d 621, 625 n.4 (7th Cir. 1980) (noting with approval that "[t]he district court polished plaintiffs' draft questions into their present form"); *Cao v. FEC*, 688 F. Supp. 2d 498, 542 (E.D. La. 2010) ("Although the Court finds the substance of Questions Three and Six non-frivolous, the plaintiffs, in their briefing, put a much finer point on the questions than those originally proposed in the motion to certify. As such, the Court will exercise its discretion in fashioning a question for the Fifth Circuit that more precisely captures the Constitutional difficulty raised by the plaintiffs' arguments."), *dismissal order aff'd, certified questions answered, In re Cao*, 619 F.3d 410, 414 (5th Cir. 2010) ("The district court, abiding by its proper role . . . identified the constitutional issues in the complaint. . . .").

## III. DISCUSSION

The LNC contends the challenged contribution limits violate this national political committee's First Amendment rights by restricting how it may receive and spend the bequest of Mr. Shaber, in particular, and the purposes for which it may spend contributions generally. *See* Pet.'s Mot. Cert. at 1. As noted, the LNC challenges as unconstitutional, in the first question, the contribution limits as applied to Mr. Shaber's bequest; in the second question, the FECA's specialized purpose regime, which permits contributions to a national political party committee over the maximum annual general purpose contribution limit, but only for one of three specific government-approved purposes; and, in the third question, the FECA's specialized purpose regime as applied to Mr. Shaber's bequest. *Id.* A brief overview of the governing statutory and regulatory framework is provided before turning to an analysis of each proposed question's fitness for certification under § 30110.

### A. Legal and Regulatory Framework

The FECA provides that "no person shall make contributions . . . 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." 52 U.S.C. § 30116(a)(1)(B). This amount is indexed for inflation, *id.* § 30116(c), and now stands, under current regulations, at $33,900, *see*

Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10,904, 10,905–06 (Feb. 16, 2017). The FEC has long construed the term "person" in § 30116(a)(1) to encompass a testamentary estate, a construction not challenged here. *See*, *e.g.*, FEC Advisory Op. 2015-05 (Shaber), 2015 WL 4978865, at *2 (Aug. 11, 2015) (citing advisory opinions dating back to 1983); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–46 (1984) (holding that courts shall defer to agencies' reasonable interpretations of ambiguities in statutes they administer); *LNC I*, 930 F. Supp. 2d at 165 ("The FEC's interpretation of the statute to include a testamentary bequest appears reasonable, is not seriously challenged by the LNC in its briefs, and is entitled to deference under *Chevron*.").

Notwithstanding the general limit on contributions to national political party committees, the FECA, as amended, provides that "contributions made to" any "separate, segregated account of a national committee of a political party" established for one of three specialized purposes may "exceed 300 percent of the amount otherwise applicable" in any calendar year. 52 U.S.C. §§ 30116(a)(1), 30116(a)(9)(A)–(C). These specialized purposes are (1) "to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may

make from such account may not exceed $20,000,000 with respect to any single convention;" (2) "to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses;" and (3) "to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings." *Id.* § 30116(a)(9)(A)–(C). In other words, while a person may contribute only $33,900 per year to a national political party's committee for unrestricted use, *see* 82 Fed. Reg. at 10,905–06, an individual may contribute up to $101,700 to each account established by a national political party committee to pay expenses incurred with respect to (1) a presidential nominating convention, (2) a party headquarters building, or (3) an election recount, *see* 52 U.S.C. § 30116(a)(9)(A)–(C). Altogether, then, an individual may contribute $339,000 per year to accounts established and maintained by national political parties—$101,700 to each of three specialized purpose accounts, plus $33,900 for general purposes. *Id.* § 30116(a)(1)(B).

Finally, the FECA provides that "[a] national committee of a political party . . . may not 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 this Act." *Id.* § 30125(a)(1) (emphasis added).

### B. The LNC's Argument That The Contribution Limits Are Unconstitutional As Applied To Mr. Shaber's Bequest Warrants Certification

The LNC's first question—"Does imposing annual contribution limits against the bequest of Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?"—is identical in substance to the question that *LNC I* certified, merely substituting the name "Joseph Shaber" for "Raymond Burrington." Pet.'s Mot. Cert. at 1; *LNC I*, 930 F. Supp. 2d at 171. Collateral estoppel thus would seem to require the instant question's certification. The FEC argues, however, that *LNC I* does not compel certification here, because *LNC I* did not have the benefit of adequate briefing on whether the contribution limits were unconstitutional as applied to Mr. Burrington's particular bequest, as the FEC had expected to litigate only whether the contribution limits constitutionally may apply to bequests in general. *See* Def.'s Opp'n at 30. The FEC acknowledges that the opportunity to address this issue was presented through a post-certification motion to alter or amend, which *LNC II* denied. *See id.* at 30–31; *see also* 950 F. Supp. 2d 58. Nonetheless, the FEC posits that *LNC II* does not compel certification either, since this issue was resolved under the demanding clear error standard of review rather than *de novo*. *See* Def.'s Opp'n at 31; 950 F. Supp. 2d at 60 (reciting applicable standard of review for motions under Fed. R. Civ. P. 59(e), which "need not be granted unless the district court finds

that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." (quoting *Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006))); *see* Def.'s Opp'n at 31. Even indulging the FEC's contention that the collateral estoppel doctrine does not compel certification of the first question here after *LNC I* and *II*, as discussed next, the Court reaches the same result as *LNC I* and *II* that certification of the first question is warranted.

As noted earlier, *supra*, a constitutional challenge to the FECA under § 30110 warrants certification unless the challenge is "'wholly insubstantial,' 'obviously frivolous,' [or] 'obviously without merit,'" *Holmes*, 823 F.3d at 71 (quoting *Shapiro*, 136 S. Ct. at 456). The FEC makes a convoluted and barely comprehensible argument that the instant question flunks this test because *LNC I* itself forecloses the LNC's claim. *See* Def.'s Opp'n at 25–30.[7] The gist of the FEC's argument

[7] The FEC in essence asks the Court simultaneously to conclude that *LNC I* (1) is binding insofar as *LNC I* held that the contribution limits are constitutional as applied to bequests in general, and (2) must be ignored insofar as *LNC I* recognized that the contribution limits may be unconstitutional as to particular bequests that raise no corruption concerns—all this, despite that the instant question, which is limited to Mr. Shaber's bequest, is more akin to the question *LNC I* did in fact certify than to the question *LNC I* declined to certify. The FEC seeks to have it both ways, citing those aspects of *LNC I* that are helpful to the FEC's position while rejecting those aspects that are inconvenient. Such efforts to treat precedent like a buffet, picking out the tasty bits and ignoring the rest, are rightly viewed with healthy skepticism.

for why *LNC I* bars the first question's certification seems reducible to three points. The FEC argues that (1) *LNC I* held "that it is [ ]constitutional to apply campaign contribution limits to testamentary bequests as a general matter." *Id.* at 24.[8] The FEC further argues that (2) the contribution limits may apply to Mr. Shaber's bequest to combat the mere appearance, rather than only the reality, of corruption. *See id.* at 25, 28. Finally, the FEC argues that (3) Mr. Shaber's bequest evinces sufficiently weighty concerns as to both the reality and appearance of corruption to justify the contribution limits' application. *See id.* at 31–32. For the

[8] One response to this part of the FEC's argument simply would be to assert that *LNC I* was wrongly decided and should be disregarded. A district court, after all, may not "decline to certify a constitutional question simply because the LNC is arguing against . . . precedent so long as the LNC mounts a non-frivolous argument in favor of overturning that precedent." *Holmes*, 823 F.3d at 74. The LNC, however, concedes that collateral estoppel forecloses this argument. *See* Pet.'s Mem. at 11 ("The LNC unfortunately lost that battle in the previous litigation."); Pet.'s Opp'n Def.'s Mot. Dismiss & Reply Supp. Mot. Certify Facts & Questions ("Pet.'s Reply") at 14, ECF No. 27 ("[T]he LNC acknowledges the reality of what has already been won and lost."). The LNC also could go further and say that *Buckley*, which upheld contribution limits' facial constitutionality, itself should be overturned. The LNC, however, declines to advance this argument. *See* Pet.'s Mem. at 17 ("[T]he LNC merely seeks to apply the current state of First Amendment precedent."). Thus, the LNC must argue that *LNC I* does not control.

following reasons, the FEC's argument fails at every turn.[9]

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[9] The FEC does not dispute that the instant question is distinguishable from the question that *LNC I* declined to certify insofar as the LNC challenges the contribution limits only as to the LNC's own First Amendment rights, rather than as to Mr. Shaber's rights as well. The FEC argues, however, that "[t]he LNC's framing of its legal arguments around a supposed First Amendment right to receive campaign contributions cannot save its first proposed certified question" because "any First Amendment interest the LNC has in receiving contributions is already reflected in the constitutional test the Supreme Court has applied to uphold FECA's contribution limits," which "already accounts for the rights of individuals and entities on the receiving end of contributions by asking if contribution limits are so low that they prevent recipients from amassing the resources necessary for effective advocacy." Def.'s Opp'n at 32 (citing *Buckley*, 424 U.S. at 21 (internal quotation marks omitted)). As an initial matter, the instant question requires no "sav[ing]," *id.*, because, as explained further below, the FEC has failed to show that the instant question does not merit certification. More fundamentally, the FEC's argument completely misses the point of the LNC's claim, which is not that applying the contribution limits to Mr. Shaber's bequest would burden the LNC's ability to "amass[] the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21; *see* Pet.'s Mem. at 17 ("The LNC does not claim in this litigation that the current contribution limit . . . is too low."), but rather, that Mr. Shaber's bequest raises no corruption concerns necessary to justify the contribution limits' application in the first place. Even a modest burden on one's ability to raise funds may be undue if such burden serves no corruption concern whatsoever. *See SpeechNow*, 595 F.3d at 695 (concluding, in "weighing the First Amendment interests implicated by contributions . . . against the government's interest in limiting such contributions," that "something outweighs nothing every time." (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) (alterations and internal quotation marks omitted))). That existing doctrine already prohibits contribution limits set too low to enable recipients to amass resources necessary for effective electioneering is simply irrelevant to the issue presented by the LNC.

### 1. *LNC I* Did Not Hold That Contribution Limits Constitutionally May Apply To Bequests As A General Matter.

Based on a fundamental misreading of *LNC I*, the FEC argues that the first question does not merit certification because *LNC I* held that the contribution limits generally may apply to bequests and the LNC has failed to distinguish Mr. Shaber's bequest from any other bequest. *See id.* at 24–30. The FEC characterizes *LNC I* as having concluded that "it is [ ]constitutional to apply contribution limits to bequeathed contributions." *Id.* at 25; *see also id.* at 26 ("Of course, the LNC did lose its claim that the party contribution limit may not be constitutionally applied to testamentary bequests in general."); *id.* at 28 ("[T]he LNC has lost the battle over whether it is unconstitutional to apply any campaign contribution to testamentary bequests." (alterations and internal quotation marks omitted)). *LNC I* did not hold, as the FEC wrongly asserts, "that it is [ ]constitutional to apply campaign contribution limits to testamentary bequests as a general matter." *Id.* at 24. *LNC I*'s actual holding is much more limited: *LNC I* merely held "that it is possible for a bequest to raise valid anti-corruption concerns." 930 F. Supp. 2d at 166. This is a far cry from holding that the contribution limits constitutionally may apply to most bequests or to bequests as a general matter, that a bequest must somehow be unusual for an as-applied challenge to lie, or that a petitioner challenging a contribution limit's application to a particular bequest must identify a "categorical basis to differentiate" a particular

contribution "from any other potential bequeathed contribution." Def.'s Opp'n at 26, 30. Indeed, *LNC I*'s recognition of the mere "possib[ility]" that a bequest may "raise valid anti-corruption concerns," 930 F. Supp. 2d at 166, suggests if anything that most bequests do *not* raise valid corruption concerns, and that bequests only rarely raise the corruption concerns necessary to justify the contribution limits' application. At the very least, *LNC I* did not hold that the contribution limits presumptively are constitutional as to individual bequests. The FEC's argument to the contrary fails to understand what *LNC I* actually said.

### 2. The LNC Makes a Non-Frivolous Argument that Only Evidence of Actual Corruption, Rather Than the Appearance of Corruption, Can Justify the Contribution Limits' Application to Mr. Shaber's Bequest.

The FEC argues that no evidence of actual corruption is needed to justify the contribution limits' application to Mr. Shaber's bequest because contribution limits are designed to combat the appearance as well as the reality of corruption. *See* Def.'s Opp'n at 25–28.[10]

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[10] The parties spill much ink arguing over which side bears the burden "to show evidence of corruption," or a lack thereof, as to a particular contribution to justify the contribution limits' application. Def.'s Opp'n at 27. The FEC argues that the LNC must offer a "categorical" basis to "differentiate the Shaber bequest. . . . from any other potential beque[st]," to which the FEC presumes the contribution limits constitutionally may apply, *id.* at 26–27, 30, but this argument is flawed in at least two ways. First, as

explained above, *LNC I* did not hold that the contribution limits are constitutional as to an ordinary bequest, only that the contribution limits can apply to some bequests, at least in theory. Second, the government bears the burden to show a contribution limit's constitutionality. *See Buckley*, 424 U.S. at 25 (holding that contribution limits "may be sustained *if the State demonstrates* a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms" (emphasis added)). Chief Justice Roberts's opinion, joined by Justice Alito, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), which held that the government bore the burden to show that a facially-valid expenditure limit could apply to a particular expenditure, is instructive. An anti-abortion group raised an as-applied challenge to a statute criminalizing "broadcast, shortly before an election, [of] any communication that names a federal candidate for elected office and is targeted to the electorate." *Id.* at 456. The government argued that because the statute in question had already been held "facially valid," the anti-abortion group "should be required to demonstrate that [the statute] is unconstitutional as applied to the ads" in question. *Id.* at 464. Chief Justice Roberts rejected this argument, reasoning that whether the statute (1) was constitutional as a facial matter and (2) "may constitutionally be applied to these specific ads" were entirely "separate question[s]." *Id.* Chief Justice Roberts determined that "[b]ecause [the statute] burdens political speech,. . . . the *Government* must prove that applying [the statute] to [the anti-abortion group's] ads furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (emphasis in original). The same reasoning applies here. The FEC seeks to apply the contribution limits to Mr. Shaber's specific bequest, and so must bear the burden of showing the contribution limits' constitutionality as to that bequest. That *Wisconsin Right to Life* applied strict scrutiny, rather than "closely drawn" scrutiny, *see Buckley*, 424 U.S. at 25, is of no moment, as the government bears the burden to show a law's constitutionality under either standard. *See id.*; *Wisc. Right to Life*, 551 U.S. at 464. To the extent the FEC suggests that *LNC I* requires a different result, Def.'s Opp'n at 24–30, the FEC, as explained above, fundamentally misreads *LNC I*.

The FEC is correct that existing doctrine recognizes the prevention of apparent corruption, not just of actual corruption, as an interest that justifies contribution limits. *See Citizens United v. FEC*, 558 U.S. 310, 357 (2010) ("[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements. . . . The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption."); *Buckley*, 424 U.S. at 29–30 (1976) (observing that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," but that this "does not undercut the validity of the $1,000 contribution limitation. . . . Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.").

The LNC responds that even if contribution limits may as a general matter "bar many contributions that are not, in fact, tainted by corruption,. . . . the dead are different, and thus raise different indicia of potential corruption and a different level of concern from that raised by the living." Pet.'s Opp'n Def.'s Mot. Dismiss & Reply Supp. Mot. Certify Facts & Questions ("Pet.'s Reply") at 16, ECF No. 27. This is so, the LNC asserts, because "[w]ith a bequest, the corruption inquiry is wholly retrospective, and barring supernatural intervention, the potential for quid pro quo activity is rather more limited, as is its enforcement." *Id.* at 16–17. The

LNC thus seeks to recognize a limited exception, applicable only to bequests, to the general rule that the government's interest in preventing the appearance of corruption justifies contribution limits.

Neither party identifies any authority either recognizing or rejecting such an exception. Thus, whether preventing the appearance, rather than the reality, of corruption may justify a contribution limit's application to a bequest appears to be a question of first impression.[11] The absence of any authority foreclosing the

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[11] In *SpeechNow.org*, the D.C. Circuit concluded that "contributions to groups that make only independent expenditures" as a matter of law "cannot corrupt *or create the appearance of corruption,*" regardless of the factual circumstances under which such contributions are made. 599 F.3d at 694 (emphasis added). The LNC does not argue that *SpeechNow* supports a conclusion that testamentary contributions, like contributions to independent expenditure organizations, categorically cannot corrupt or create the appearance of corruption, regardless of the factual circumstances under which such contributions are made, nor would such an argument be sound. *SpeechNow* rested on *Citizens United*, which the D.C. Circuit read to have held "as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption." 599 F.3d at 694. *Citizens United*, in turn, "conclude[d]" as a matter of law "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," reasoning that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 558 U.S. at 345, 357.

*Citizens United*'s legal conclusion, however, must be understood in the context of the judicial proceedings from which it emerged. In *Citizens United*, the government presented "only scant evidence that independent expenditures even ingratiate,"

LNC's argument persuades the Court that such argument is not frivolous.

### 3. The LNC Makes a Non-Frivolous Argument that Mr. Shaber's Bequest Raises No Corruption Concerns.

Finally, the FEC argues that even if the government bears the burden to show that the contribution limits are constitutional as applied to Mr. Shaber's bequest, and regardless of whether evidence of only

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much less give rise to *quid pro quo* corruption or the appearance thereof. *Id.* at 360. As Justice Stevens observed, however, "Congress and outside experts" had in fact "generated significant evidence" that independent expenditures "give rise to *quid pro quo* corruption or the appearance of corruption." *Id.* at 457 (Stevens, J., dissenting). The "only reason" the Supreme Court did "not have any of the relevant materials before" it was "that the Government had no reason to develop a record at trial for a facial challenge the plaintiff had abandoned" in the district court. *Id.* On appeal, however, the Supreme Court *sua sponte* directed the parties to litigate the independent expenditure limit's constitutionality, without providing the government any opportunity to develop a factual record necessary to support the position that corporate independent expenditures can give rise to *quid pro quo* corruption or the appearance thereof. *Id. Citizens United* did not reject the relevance or value of factual evidence as to corporate independent expenditures' corrupting effect; *Citizens United* simply had little such evidence available to it. Here, in contrast, *LNC I*'s recognition that testamentary contributions can, under certain conditions, create actual or apparent corruption rested on extensive record evidence of the sort unavailable in *Citizens United. See LNC I*, 930 F. Supp. 2d at 166–67. As such, *SpeechNow* and *Citizens United* do not support a conclusion that testamentary contributions cannot corrupt or create the appearance of corruption, at least where evidence that testamentary contributions have an actual or apparent corrupting effect exists.

actual or also apparent corruption may justify the contribution limits' application, Mr. Shaber's bequest evinces sufficient "factual markers of the potential for apparent or actual corruption" to justify applying the contribution limits. Def.'s Opp'n at 31.[12] The LNC, however, raises non-frivolous arguments to the contrary.

*LNC I* identified two circumstances in which "the anti-corruption rationale for limiting contributions from bequests is" beyond "theoretical." 930 F. Supp. 2d at 166 (alterations omitted). First, *LNC I* observed that "making one's bequest known" to a recipient "before death could be treated just as a contribution is," such that "a political committee could feel pressure to continue to ensure that a (potential) donor is happy with the committee's actions lest they revoke the bequest." *Id.* at 166–67. Second, *LNC I* observed that "[a] bequest may also help friends or family of the deceased have access to political officeholders and candidates," such that "political committees could offer access to the donor's heirs or representatives upon the production of a generous will." *Id.* Bequests that do not arise under these circumstances, *LNC I* suggested, thus are unlikely to "raise the anti-corruption concerns that motivated the *Buckley* and *McConnell* [*v. FEC*, 540 U.S. 93 (2003)] Courts to dismiss a facial attack on contribution limits." *Id.* at 166.

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[12] These "factual markers" include that Mr. Shaber "gave 47 times and more than $3,000 to the LNC, was eligible to become a life member of the party, and received regular solicitations and invitations to events from the LNC, including a VIP reception." Def.'s Opp'n at 31 (internal quotation marks omitted).

The LNC asserts that both of the above factors weigh toward concluding that Mr. Shaber's bequest raises no corruption concerns. First, according to the LNC, Mr. Shaber did not make his bequest known to the LNC prior to death. Pet.'s Reply at 16 (citing Pet.'s Proposed Facts ¶ 70). Second, neither Mr. Shaber nor any of his associates and loved ones had any known relationship to the LNC or its board members, officers, or candidates apart from Mr. Shaber's donations themselves. *Id.* (citing Pet.'s Proposed Facts ¶ 84). Moreover, Mr. Shaber gave little to the LNC during his life—only $3,315 over the course of 24 years, an average of $138.13 per year—and the LNC has given nothing tangible of value to Mr. Shaber or his associates and loved ones. *Id.* (citing Pet.'s Proposed Facts ¶ 85; *see* Mot. Cert., Ex. E, Joseph Shaber Gift History, ECF No. 24–7). Thus, the LNC raises a non-frivolous argument that the government cannot meet the burden to show that Mr. Shaber's bequest raises any concerns as to the appearance or reality of corruption to justify the contribution limits' application.

*LNC I* supports the LNC's argument.[13] *LNC I* determined that the LNC had "ma[de] a persuasive argument that the Burrington bequest does not implicate any valid anti-corruption concerns" given that "the only known interaction between Burrington and the LNC occurred in 1998 when the former

[13] While, as discussed above, the Court presumes that *LNC I* has no collateral estoppel effect insofar as it certified a challenge to the contribution limits as to Mr. Burrington's request, *LNC I* remains at least persuasive authority in this regard.

donated $25.00 to the Libertarian Party" and that "the LNC had no idea that Burrington planned to leave any money to the organization in his will." 930 F. Supp. 2d at 170. While the total $3,315 that Mr. Shaber contributed to the LNC in parts on 46 separate occasions during his life, *see* Joseph Shaber Gift History, is nearly 133 times the $25 that Mr. Burrington contributed to the LNC during his life, *see LNC I*, 930 F. Supp. 2d at 170, neither the amount nor frequency of Mr. Shaber's contributions are so great as to make frivolous the claim that Mr. Shaber's contributions do not raise corruption concerns. The amount of $3,315 donated over 24 years is a drop in the bucket relative to current law's annual limit of $33,900 for individuals to contribute for any purpose to national political party committees, and an even smaller drop relative to the limit of $339,000 that individuals may contribute for either general or specialized purposes. *See* 52 U.S.C. § 30116(a)(1)(B), (a)(9); 82 Fed. Reg. at 10,905–06.

* * *

For the reasons explained above, (1) *LNC I* did not hold that the contribution limits constitutionally may apply to bequests as a general matter, and the LNC has raised non-frivolous arguments that (2) the FEC's only interest in applying the contribution limits to Mr. Shaber's bequest is an interest in combatting the reality, as opposed to the mere appearance, of corruption, and (3) Mr. Shaber's bequest does not raise corruption concerns so as to justify the contribution limits' application. As such, the LNC's first question—"Does imposing annual contribution limits against the bequest of

Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?," Pet.'s Mot. Cert. at 1—warrants certification under § 30110.

### C. The LNC's Arguments that the FECA's Specialized Purpose Regime Impermissibly Limits Speech On the Basis of Content is Not Frivolous

The LNC's second question—"Do 52 U.S.C. §§ 30116(a)(1)(B) and 30125, on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its money?," *id.*—asserts that the FECA's specialized purpose regime "directly limit[s] how the LNC may express itself, in preparation for and during political campaigns, based on the subject matter, function, or purpose of the LNC's speech," in violation of the First Amendment. Pet.'s Mem. at 16. The LNC argues that once a donor has contributed to the LNC $33,900, the maximum annual legally-allowed general-purpose contribution, 52 U.S.C. § 20116(a)(1)(B); 82 Fed. Reg. at 10,905–06, any further contributions to the LNC by that donor, and the LNC's use of such contributions, are lawful only if made or used "towards the purposes and in the amounts ordained by Congress." Pet.'s Mem. at 16. These government-approved purposes are presidential nominating conventions, party headquarters buildings, and recount expenses, *see* 52 U.S.C. § 30116(a)(9), "all [of which] convey or enable expression in some way or to some degree." Pet.'s Mem. at 16. Thus, the LNC

argues, "the amount of speech a political party may exercise turns on the content of that speech," creating an impermissible content-based restriction on speech. *Id.*[14]

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); *accord Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 403 (D.C. Cir. 2017). "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989), as "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government," *id.* (quoting *Buckley*, 424 U.S. at 14).

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the

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[14] The LNC asserts that the contribution limits "are especially problematic, because they largely, if not only, disable minor parties," in that larger parties tend to need more money than smaller parties to fund presidential nominating conventions, party headquarter buildings, and recount proceedings. Pet.'s Mem. at 18. The LNC emphasizes that "[t]his is not to say that the LNC' claims sound in equal protection, or are based on some yardstick of competitive ability," but merely to show that the contribution limits are "irrational" and cannot "meet the rigors of strict scrutiny." *Id.*

government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed," meaning that a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 2227 (quoting *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663–2664 (2011)). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* However, "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.*

**1. The Specialized Purpose Regime Should Be Reviewed as a Contribution Limit Rather Than as an Expenditure Limit.**

As a threshold matter, the parties dispute whether the specialized purpose regime should be reviewed as a contribution limit or expenditure limit. *Compare* Pet.'s Mem. at 17 ("[T]he [ ]omnibus expressive purpose restrictions are expenditure limits—content-based restrictions on speech."), *with* Def.'s Opp'n at 15 ("[T]here is no credible argument that the segregated account limits at issue here restrict expenditures."). The distinction between contribution limits and expenditure limits is legally significant, given the more demanding constitutional test to which expenditure limits are

subject. *See*, *e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 242 (recognizing that expenditure limits generally are "constitutionally invalid"). The specialized purpose regime is neither a pure contribution limit nor a pure expenditure limit, but contains elements of both, establishing higher limits on contributions directed toward one of three government-approved purposes than on contributions directed toward other purposes, *see* 52 U.S.C. § 30116(a)(1)(B), (9), and directing that national political parties "may not . . . spend any funds, that are not subject to the limits [and] prohibitions . . . of this Act," *id.* § 30125(a)(1).

Binding precedent forecloses the LNC's argument that the specialized purpose regime should be reviewed as an expenditure limit rather than as a contribution limit. *McConnell* held that provisions of the Bipartisan Campaign Reform Act ("BCRA") prohibiting "national parties from receiving or spending [soft] money" and state parties "from spending [soft] money on federal election activities," in addition to prohibiting persons from making such contributions, were akin to contribution limits rather than expenditure limits because "neither provision in any way limits the total amount of money parties can spend," but "simply limit the source and individual amount of donations." 540 U.S. at 139. "That they do so by prohibiting the spending of soft money," *McConnell* reasoned, "does not render them expenditure limitations." *Id.* The same reasoning applies here.

The specialized purpose regime's characterization as a contribution limit, however, does not necessarily mean that mere "closely drawn," rather than strict, scrutiny applies to the LNC's challenge here. Typically, a challenge to a contribution limit asserts that the limit prevents a person from contributing as much money as the person would like to give, *see*, *e.g.*, *Buckley*, 424 U.S. at 20, but Congress's discretion to set contribution limits' specific dollar amounts is well-established, *see*, *e.g.*, *Randall*, 548 U.S. at 248 ("[T]he legislature is better equipped to make such empirical judgments,. . . . [t]hus ordinarily we have deferred to the legislature's determination of such matters." (quoting *McConnell*, 540 U.S. at 137)), *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 433 (2001) ("[T]he limit's dollar amount need not be fine tuned."); *Buckley*, 424 U.S. at 30 ("Congress' failure to engage in such fine tuning does not invalidate the legislation."). The LNC's argument here is different.

The LNC asserts not "that the current contribution limit . . . to political parties is too low," Pet.'s Mem. at 17; *see also id.* ("This is not a challenge to any contribution limit."), but rather, that the specialized purpose regime unconstitutionally conditions the lawfulness of a contribution on the content of the speech for which the contribution is used, *id.* at 18 ("When a political party can have money, and use it for some expression, but not other expression, that is an expression-restriction, not merely a contribution limit."). In this way, the LNC's second question raises an issue less akin to a traditional challenge to a contribution

limit than to a challenge to a statute alleged to restrict speech on the basis of content. *See*, *e.g.*, *Reed*, 135 S. Ct. at 2226. As such, the appropriate framework for review is that governing content-based restrictions on speech, requiring narrow tailoring to serve a compelling state interest, *see id.*, rather than the contribution limit framework.

### 2. Whether the Specialized Purpose Regime Unconstitutionally Restricts Speech Based On Content.

The FEC makes several arguments as to why the specialized purpose regime does not impermissibly restrict speech on the basis of content. First, the FEC denies that the specialized purpose regime imposes a content-imposed restriction at all. *See* Def.'s Reply Mem. Supp. Mot. Dismiss ("Def.'s Reply") at 7, ECF No. 29. Second, even if the specialized purpose regime amounts to a content-based restriction, the FEC contends this regime is sufficiently tailored to achieve a sufficiently important governmental interest. *See* Def.'s Opp'n at 18-22. Third, the FEC argues that existing authority establishes that Congress may allow contributions to particular recipients and those recipients' expenditure of such contributions for certain purposes but not for others. *See id.* at 20. Each of these arguments are addressed in turn.

### *i. Whether The Specialized Purpose Regime Imposes Content-Based Restrictions*

The FEC argues that the specialized purpose regime does not constitute a content-based restriction on speech because "the ability of a national political party committee to use funds contributed to the segregated accounts depends not on the content of any message but rather the category of expenses at issue." Def.'s Reply at 7. This, however, is not so. As the LNC correctly observes, the LNC cannot lawfully spend the entirety of a contribution in an amount above $33,900 "distributing pamphlets about the party's ideology or supporting a non-presidential candidate," but must spend at least some portion of that contribution, if at all, "broadcasting its presidential nominating convention, hanging a sign on its building, or litigating an election contest." Pet.'s Mem. at 16. Thus, the lawfulness of a particular expenditure by the LNC may indeed turn on the message that the expenditure conveys. The FEC argues that the LNC can spend specialized purpose account funds for any purpose so long as the LNC does so at the LNC's presidential nominating convention, *see* Def.'s Reply at 7, but to condition an expenditure's lawfulness on whether the expenditure is made in connection with a convention itself arguably constitutes a content-based restriction on speech. *See Reed*, 135 S. Ct. at 2227 (identifying laws that "defin[e] regulated speech by its function or purpose" as imposing content-based restrictions. At the very least, the LNC's argument to this effect is not frivolous.

### *ii. Whether the Specialized Purpose Regime Is Sufficiently Tailored To Serve A Sufficiently Important Government Interest*

The FEC next argues that any disparate treatment of general purpose and specialized purpose contributions passes constitutional muster given that (1) Congress, having ended public funding of presidential nominating conventions in 2014, sought "to ensure that national parties would maintain access to sufficient funds to continue their [convention] operations after one source of funds was no longer available," (2) party headquarters and recount expenses "tend to be less directly connected to most candidates or campaigns for federal office," and thus to raise lesser corruption concerns than contributions toward expenses more directly connected to individual candidates and campaigns, and (3) "political parties and their candidates tend to place more value on unrestricted contributions than those that may only be used for certain expenses," meaning that general purpose contributions "create a higher risk of corruption or its appearance than" specialized purpose contributions, requiring more restrictive limits to prevent corruption or the appearance thereof. *See* Def.'s Opp'n at 18–20, 22.

The LNC counters, somewhat ironically, that specialized purpose contributions raise corruption concerns at least equal to those that general purpose contributions raise, and thus, that setting higher limits on specialized purpose contributions undermines

the anti-corruption rationale used to justify the general purpose contribution limits. *See* Pet.'s Mem. at 5. "[D]onations received for a segregated purpose potentially free up other money that would have been spent out of a party's general account, to be used for unrestricted purposes," the LNC observes, given that "money is fungible." *Id.* Thus, the LNC posits, "[s]o long as a party would have spent a sufficient amount on a segregated purpose, a segregated purpose donation is effectively an unrestricted donation." *Id.*

Whether the specialized purpose regime is sufficiently tailored, under the circumstances, to achieve a sufficiently important interest under the applicable standard of scrutiny is a question for the D.C. Circuit to resolve in the first instance. At this stage, the LNC's arguments are not so clearly frivolous, and the merits of the FEC's argument so overwhelmingly obvious, as to make certification unwarranted.

#### *iii. Whether Existing Authority Establishes that Congress May Allow Contributions to Particular Recipients, and Those Recipients' Expenditure of Such Contributions, For Certain Purposes But Not For Others*

The FEC further argues that binding precedent establishes "that differing contribution limits may apply to distinct categories of expenses." Def.'s Opp'n at 20. The FEC cites *McConnell*, which upheld a BCRA provision, currently codified at 52 U.S.C. § 30125(b)(1),

that prohibits state, district, and local political party committees from using "soft-money . . . funds for activities that affect federal elections," while allowing soft money "[d]onations made solely for the purpose of influencing state or local elections," as support. 540 U.S. at 122, 133–34, 173.[15] The FEC thus construes *McConnell* to hold that Congress generally may allow contributions to be made for certain purposes but not for others. *See* Def.'s Opp'n at 20–21.

This reading of *McConnell* is too broad. There, the plaintiffs challenged § 30125(b)(1) on the ground that the statute "will prevent them from engaging in effective advocacy." 540 U.S. at 173. The plaintiffs did not raise the argument that § 30125(b)(1) unconstitutionally conditioned a contribution's lawfulness on the

[15] Section 30125(b)(1) provides that "an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." 52 U.S.C. § 30125(b)(1). Although § 30125(b)(1) is framed as a limitation on state and local party "*expend*[*itures*] *or disburse*[*ments*] for Federal election activity," *McConnell* characterized the law as a contribution limit rather than an expenditure limit because the statute does not "limit[ ] the total amount of money parties can spend," but "simply limit[s] the source and individual amount of donations." 540 U.S. at 139. "That [§ 30125(b)(1)] do[es] so by prohibiting the spending of soft money," *McConnell* said, "does not render [it an] expenditure limitation[.]" *Id.* Section 30125(b)(1) also applies to expenditures or disbursements for the purpose of "Federal election activity . . . by an association or similar group of candidates for State or local office or of individuals holding State or local office." 52 U.S.C. § 30125(b)(1). For ease of reference, § 30125(b)(1) is described simply as a limitation on federal electioneering by state, district, or local political committees.

purpose for which the contribution was made, *see id.*, which is the argument the LNC raises here, *see* Pet.'s Mem. at 16. As such, *McConnell* cannot be read to foreclose the LNC's claim. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (internal quotation marks omitted)).

Moreover, even if *McConnell* had expressly held that § 30125(b)(1)'s distinction between contributions to fund "Federal election activity" and contributions to fund state and local election activities were constitutional, such a holding would not foreclose the LNC's claim. Content-based restrictions on speech must be "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. Section 30125(b)(1)'s distinction between contributions to fund federal election activities and contributions to fund state and local activities may be said to (1) reflect Congress's judgment that the federal government has a compelling interest in preventing the reality or appearance of corruption as to federal elections but not as to state or local elections, and (2) be narrowly tailored to serve only the former interest. In other words, § 30125(b)(1) might be understood to reflect the view that any corruption, in fact or appearance, of state and local political processes just is not the federal government's business, not that soft money contributions to fund state and local election activity give rise to no real or apparent corruption.

The FEC also argues that prior to the BCRA, federal law allowed national political parties to accept unlimited soft money contributions to fund state and local election activities, notwithstanding that such activity "could simultaneously influence federal elections." Def.'s Opp'n at 21 (quoting *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 153 (D.D.C. 2010)). The FEC cites no decision of any court affirming this aspect of the pre-BCRA regime's constitutionality, however, *id.*; the issue apparently never arose.[16] The pre-BCRA soft money regime simply does not establish

[16] The FEC cites *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 458 (2001), for the proposition that "the pre-BCRA contribution limits applicable to funds raised by national political parties for use in federal elections remained constitutional even though different rules applied to funds raised for use in those state and local elections." Def.'s Opp'n at 21. The FEC's reliance on *Colorado Republican* is baffling. That decision upheld the constitutionality of limits on the amount of money a national political party may expend in coordination with a political candidate, but did not address any disparity in treatment of funds intended for use in federal or state and local election activity. *See generally Colo. Republican*, 533 U.S. 431. The FEC further argues that *Colorado Republican* shows that restrictions on "how parties may use funds" merit "closely drawn" rather than strict scrutiny. Def.'s Reply at 5. The FEC reads *Colorado Republican* far too broadly. *Colorado Republican* stands for nothing more than the unremarkable proposition that contribution limits are subject to mere closely drawn scrutiny, and that coordinated expenditures, as functional equivalents to contributions, constitutionally may be subject to contribution limits. 533 U.S. at 447, 456. *Colorado Republican* certainly did not hold that Congress may limit the amount that political parties spend toward particular purposes outside the narrow set of circumstances where such spending effectively amounts to a contribution to a political candidate.

that the FECA's current specialized purpose regime passes constitutional muster. Moreover, as with § 30125(b), the pre-BCRA rules allowing national parties to accept unlimited soft money contributions to fund state and local, but not federal, election activities, might be said to be reflect a proper congressional judgment that corruption of state or local elections is not the federal government's concern. As such, any conclusion that the pre-BCRA soft money regime were constitutional would not foreclose the LNC's claim.

The parties debate the relative corruption concerns that various types of contributions raise, but keeping score to determine this debate's winner is a job for the D.C. Circuit, not this Court. For example, pointing to the fact that "an individual may give $2,700 to any candidate committee for each election, $5,000 annually to any political action committee, and $10,000 annually to any state or local party committee," Def.'s Reply at 4 (citing 52 U.S.C. § 30116(a)(1)(A)-(D); 82 Fed. Reg. at 10,905), the FEC argues that "[f]rom such an individual's perspective, those contribution limits apply 'depending on how' the individual wishes to spend money," *id.* Such restrictions on "how much money a donor may contribute to a particular candidate or committee" have been upheld to "serv[e] the permissible objective of combatting corruption." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014). Nevertheless, the LNC argues that limiting the purposes toward which a person may contribute to a political committee serves no anti-corruption interest because money is fungible, meaning that the more specialized

purpose funds available to a committee, the less general purpose funds the committee will need to spend toward specialized purposes, and thus, will have available to spend toward other purposes. *See* Pet.'s Mem. at 20–21. The FEC counters that restricted contributions pose less corruption concern than unrestricted contributions, justifying higher contribution limits for restricted contributions, because "political parties and their candidates tend to place more value on unrestricted contributions than those that may only be used for certain expenses." Def.'s Opp'n at 22. The LNC, in turn, asserts that restricted and unrestricted contributions are more fungible to large parties with large specialized purpose expenses, but less fungible to small parties that spend less toward specialized purposes. *See* Pet.'s Mem. at 20–21. The LNC's argument that the specialized purpose regime serves no anti-corruption interest given money's fungibility, whether correct or not on the merits, plainly is not so frivolous or insubstantial as to be unworthy of certification under § 30110.

* * *

For the reasons given above, the LNC's claim in the second question that the specialized purpose regime unconstitutionally conditions certain speech's lawfulness on that speech's content is not "wholly insubstantial, obviously frivolous, [or] obviously without merit," and so satisfies § 30110's "low bar." *Holmes*, 823 F.3d at 71–72 (quoting *Shapiro*, 136 S. Ct. at 456). Moreover, because the LNC's second question merits certification, it logically follows that the LNC's third

question—"Does restricting the purposes for which the Libertarian National Committee may spend the bequest of Joseph Shaber violate the Committee's First Amendment rights?," Pet.'s Mot. Cert. at 1—challenging the specialized purpose regime as to Mr. Shaber's particular bequest, also warrants certification.

### D. Reformulating The LNC's Proposed Questions

The FEC argues that should the LNC's second and third proposed questions be certified, these questions should be reformulated because, in their current form, they are phrased in argumentative, question-begging, and overbroad terms. *See* Def.'s Opp'n at 33. While the Court declines to adopt the FEC's proposed formulations of these questions, which themselves are argumentative and question-begging, for the reasons that follow, the LNC's questions two and three are reformulated to address the FEC's concerns.

At the outset, the FEC contends that the LNC's second and third proposed questions "go far beyond the claims asserted in the LNC's complaint." *Id.* According to the FEC, "Counts II and III of the LNC's complaint focused on the constitutionality of the segregated account limits," which "appeared to be the only aspect of the limit on contributions to political parties that the [LNC] challenged in its complaint." *Id.* Yet, the FEC continues, "the LNC's proposed questions two and three are not expressly targeted at the segregated account structure, but instead broadly assert that the

contribution limits applicable to national committees 'restrict the purposes for which the LNC may spend' its money." *Id.* at 34 (quoting Pet.'s Mem. at 3 (alterations omitted)). Contrary to the FEC's description, Counts II and III of the LNC's complaint clearly allege that § 30125, which prohibits "[a] national committee of a political party" from "spend[ing] any funds, that are not subject to the limitations [and] prohibitions . . . of this Act," 52 U.S.C. § 30125(a)(1), "violate[s] the First Amendment speech and associational rights of the LNC and its supporters," Compl. ¶ 31; *accord id.* ¶ 34. In short, the FEC's criticism of questions two and three for lack of notice is baseless, as the LNC's complaint targets § 30125's restriction on the LNC's ability to spend specialized purpose account funds.

As to the framing of questions two and three, the FEC deems these questions to be "argumentative because [they] beg[] the question [of] whether the segregated account limits actually restrict the LNC's spending." Def.'s Opp'n at 34. The second question asks whether the specialized purpose regime facially "violate[s] the First Amendment rights of the [LNC] by restricting the purposes for which the [LNC] may spend its money." Pet.'s Mot. Cert. at 1. This question can be understood to ask not only whether restricting the purposes for which the LNC may spend its money violates the First Amendment, but also whether the specialized purpose regime in fact imposes such a restriction. The second question thus requires no reformulation.

The third question asks whether "restricting the purposes for which the [LNC] may spend the bequest

of Joseph Shaber violates the [LNC's] First Amendment Rights." *Id.* The third question, unlike the second question, seemingly presumes that the specialized purpose regime does in fact restrict the purposes for which the LNC may spend its money. The third question's phrasing thus is argumentative and question-begging: whether the specialized purpose regime, in fact, restricts the purposes for which the LNC may spend its money is an issue that must be decided, and may not be presumed. As such, the Court reformulates the third question to mirror the second question, a reformulation to which the LNC hardly can take issue given that the LNC itself formulated the second question's phrasing.

Finally, the FEC argues that the second and third questions "are not limited to the segregated account structure," Def.'s Opp'n at 34, but rather, "implicate whether national party committees may be subject to contribution limits *at all*," Def.'s Reply at 13. To the extent any ambiguity exists as to which aspects of the FECA are subject to challenge here, the second and third questions are reformulated to clarify that only the specialized purpose regime created by § 30116(a)(1)(B), (a)(9), and § 30125(a)(1) are subject to challenge, and only on the ground that the specialized purpose regime conditions the lawfulness of contributions above § 30116(a)(1)(B)'s general purpose contribution limit on whether the contribution is directed toward one of § 30116(a)(9)'s three enumerated specialized purposes.

Accordingly, the second question is reformulated as follows: "Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), and 30125(a)(1), on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its contributions above § 30116(a)(1)(B)'s general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?" The third question is reformulated as follows: "Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), and 30125(a)(1) violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend that portion of the bequest of Joseph Shaber that exceeds § 30116(a)(1)(B)'s general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?"

At the same time, the Court declines to adopt the FEC's proposed formulations of the second and third questions. The FEC would reformulate the [sic] these questions as follows:

> **Question 2**: "Do 52 U.S.C. § 30116(a)(1)(B) and (9) violate the First Amendment rights of the Libertarian National Committee by permitting it to accept 300% of the otherwise applicable contribution limit into segregated accounts used to defray expenses with respect to its presidential nominating conventions, headquarters buildings, and election recounts and contests and other legal proceedings?" Def.'s Opp'n at 34–35;

> **Question 3**: "Do 52 U.S.C. § 30116(a)(1)(B) and (9) violate the First Amendment rights of the Libertarian National Committee by permitting it to accept 300% of the otherwise applicable contribution limit from the bequest of Joseph Shaber into segregated accounts used to defray expenses with respect to its presidential nominating conventions, headquarters buildings, and election recounts and contests and other legal proceedings?" *Id.* at 35.

Framing the specialized purpose regime as one that "permit[s]" the LNC "to accept 300% of the otherwise applicable contribution limit" is argumentative and question-begging. As discussed earlier, the crux of the LNC's challenge is not that the specialized purpose regime restricts the LNC from raising or spending sufficient funds, but that the specialized purpose regime imposes a content-based restriction on speech by conditioning the lawfulness of certain contributions, and of the LNC's acceptance and expenditure of such contributions, on whether the contribution was made for a particular enumerated government-approved purpose.

## IV. CONCLUSION

For the reasons given above, the FEC's motion to dismiss is denied and the LNC's motion to certify is granted in part and denied in part. An appropriate Order accompanies this Memorandum Opinion. Findings of fact are set out in the Appendix.

**Date:** June 29, 2018

/s/ [SEAL] Beryl A. Howell
BERYL A. HOWELL
Chief Judge

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## APPENDIX

## FINDINGS OF FACT[17]

### I. The Parties

1. The Plaintiff, Libertarian National Committee, Inc. ("LNC"), is the national committee of the Libertarian Party of the United States. Pet.'s Mot. Cert., Decl. of Nicholas Sarwark, Chair, LNC, Inc. ("Sarwark Decl.") ¶ 1, ECF No. 24-17; Def.'s Answer & Affirmative Defenses ("Def.'s Answer") ¶ 1, ECF No. 22.

2. The Defendant, Federal Election Committee ("FEC"), is the federal government agency charged with the administration and enforcement of the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq.* Pet.'s

[17] The Court's findings of fact are taken from the parties' proposed findings of fact and responses thereto. *See* Pet.'s Mot. Cert., Ex. A, Pet.'s Facts Submitted for Cert. ("Pet.'s Proposed Facts"), ECF No. 24-3; Def.'s Opp'n, Attach. 2, Def.'s Resps. Pet.'s Proposed Facts, ECF No. 26-2; Def.'s Opp'n, Attach. 3, Def.'s Proposed Findings of Fact ("Def.'s Proposed Facts"), ECF No. 26-3; Pet.'s Reply, Attach. 1, Pet.'s Resps. Def.'s Proposed Facts, ECF No. 27-1. To the extent that objections were lodged to any proposed factual finding, those objections are sustained, denied, or resolved as reflected in the factual findings included in this Appendix.

Complaint ("Compl.") at 3, ECF No. 1. The FEC has exclusive jurisdiction with respect to the civil enforcement of such provisions. *Id.* §§ 30106(b)(1), 30109. The FEC also has the authority to make rules and regulations necessary to carry out the FECA, *id.* §§ 30107(a)(8), 30111(a)(8), 30111(d), and to issue advisory opinions concerning the application of FECA and prescribed regulations, *id.* §§ 30107(a)(7), 30108.

3. The LNC is a "not-for-profit organization incorporated under the laws of the District of Columbia." Sarwark Decl. ¶ 1. "The LNC has 15,031 active paid sustaining donors, and 137,451 members, in all 50 states and the District of Columbia." *Id.* at ¶ 2. "Over half a million registered voters identify with the Libertarian Party in the states in which voters can register as Libertarians." *Id.* "[Forty-eight] partisan officeholders and 111 non-partisan officeholders across the country are affiliated with the Libertarian Party." *Id.*

4. "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." *Libertarian Nat'l Comm., Inc. v. FEC* ("*LNC I*"), 930 F. Supp. 2d 154, 172 (D.D.C. 2013) (Wilkins, J.) (citation omitted).

5. "The 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." *LNC I*, 930 F. Supp. 2d at 172 (citation omitted); Sarwark Decl. ¶ 3.

6. The LNC "facilitates mutual contacts between contributors and federal candidates," and "assists candidates in their efforts to win federal office." Def.'s Opp'n, Ex. 2, Pet.'s Resps. Def.'s First Set Requests for Admissions at 10, ECF No. 26-6.

7. To achieve its political goals, the LNC organizes affiliate parties in all fifty states and runs candidates for public office "with the goal of reducing government control over individuals' lives." Def.'s Opp'n, Ex. 6, Dep. of Nicholas Sarwark ("Sarwark Dep.") at 28:4–10, ECF No. 26-10. The LNC nominates candidates for president and vice president on behalf of the Libertarian Party every four years. *Id.* at 48:2–7, 49:8–11.

8. "Even if a Libertarian Party candidate does not win a federal election, the LNC generally views it as positive if its candidate gets more votes than the margin of victory between the two major-party candidates and thus affects the outcome of the election." *LNC I*, 930 F. Supp. 2d. at 173 (citation omitted). That is because such a result might cause a candidate of a major party to listen to the Libertarian Party's position in the future or reconsider his or her own position, "since the party would have demonstrated that a sizeable percentage of the electorate agrees with

the Libertarian Party and wants to see more Libertarian public policies." *Id.* (internal quotations omitted).

9. In a 2006 letter to prospective donors, the LNC stated that

> [o]ne of the most significant achievements of the year was our candidates being identified as the deciding factor in control of the U.S. Senate. This led to positive press coverage in the *Washington Post* and many other news outlets. Our impact in these important elections even led to an article in *The Economist* titled "Libertarians Emerge as a Force." Clearly, it was a good year for our party.
>
> *Id.* at (citation omitted).

## II. The LNC's Fundraising and Spending On Segregated Account Expenses

10. In some of its fundraising solicitations, the LNC has told potential contributors that their contributions will only be used for specific expenses. Sarwark Dep. at 13:8–14:6, 40:11–21. Some donors have informed the LNC that they will only give money if they are told what the money will be used for. *Id.* at 21:18–22:3. Such project-based fundraising is often more effective for the LNC than asking for "unearmarked" money. *Id.* at 22:18–23:4.

11. The LNC "earmarks" certain contributions to specify that those contributions are only to be used for particular categories of expenses.

*Id.* at 13:20–14:6. Those earmarks include funds for "ballot access." *Id.* at 14:14–15:19. This may include litigation over whether the Libertarian candidate will appear on a ballot in a particular election. *See id.* at 15:7–19.

12. The LNC maintains a "Legal Offense Fund" that is used to finance "proactive litigation" on behalf of the LNC. *Id.* at 40:11–14; *see also* Def.'s Opp'n, Ex. 8, LNC Legal Offense Fund Email, ECF No. 26–12. To raise money for this fund, the LNC has sent solicitations to potential contributors asking them specifically to donate to finance proactive litigation. LNC Legal Offense Fund Email at 2. In one such solicitation, LNC Chair Nicholas Sarwark wrote: "I promise you that every dollar we receive from this fundraiser will be spent on legal offense." *Id.* at 3.

13. The LNC also maintains a segregated account for a "building fund," which it operates pursuant to 52 U.S.C. § 30116(a)(9)(B). Sarwark Dep. at 14:14–15; Sarwark Decl. ¶ 29.

14. The LNC does not place donations into its segregated purpose building account unless the donors specifically earmark their donations for building purposes. *Id.* "Of course, mortgage payments and payments for other expenses related to the building may be made from LNC's general account as circumstances warrant." *Id.*

15. "The Libertarian Party's headquarters building makes an architectural statement that is

consistent with the party's mission. LNC would not occupy a headquarters building that would make an unsuitable architectural statement." *Id.* ¶ 30.

16. "The Libertarian Party occasionally places political signs in its headquarters windows, or on the lawn in front of the building, but is prohibited by city ordinance from placing outdoor signage on its building." *Id.* ¶ 31.

17. News reports indicate that major cities typically bid to host the presidential nominating conventions of the two major legacy parties. *See*, *e.g.*, Chris Brennan, *Democrats to Convene in Philly in 2016*, PHILADELPHIA INQUIRER (Feb. 13, 2015), http://www.philly.com/philly/news/politics/20150213_Source__Philadelphia_to_host_2016_Democratic_Convention.html; Andrew J. Tobias, *Cleveland Chosen to Host 2016 Republican National Convention*, CLEVELAND PLAIN DEALER (July 8, 2014), https://www.cleveland.com/open/index.ssf/2014/07/cleveland_gop_convention_a nnou.html.

18. The LNC solicits directly for the building fund. Def.'s Opp'n, Ex. 30, LNC Building Fund Solicitation Letter, ECF No. 26-34. On April 26, 2014, the LNC sent a solicitation to contributors asking for contributions to this fund, which the LNC has also referred to as the David F. Nolan Memorial Headquarters Office Fund. *Id.* at 1. The solicitation explained that "[a]ll funds raised go into a separate account and are dedicated to the Nolan

Memorial Headquarters Office, and will be restricted for use toward the associated purchase, furnishing, renovation, and moving expenses." *Id.* at 3.

19. On April 4, 2013, the LNC sent an email to potential contributors soliciting contributions to its building fund that explained that "every dollar contributed to the David F. Nolan Memorial Building Fund must, by law, be spent on buying an office or associated expenses – or it must be returned to you, the donor." Def.'s Opp'n, Ex. 32, LNC Building Fund Email at 2, ECF No. 26-36. The email noted "that means your donation is guaranteed to be used only for the Building Fund." *Id.* (emphasis in original).

20. The LNC has offered recognition for people who contributed to the building fund at certain levels. Sarwark Dep. at 20:1–11. Specifically, the LNC offered to allow contributors to the building fund to name certain rooms in the LNC's headquarters or place their name on plaques to be displayed in those rooms. *Id.* at 18:15–19:1.

21. The LNC has accepted money into an account authorized by 52 U.S.C. § 30116(a)(1)(B) and (a)(9) that it could not have accepted prior to the specialized purpose regime's creation because the donor had already contributed the maximum amount in unrestricted funds. *See*, *e.g.*, Sarwark Dep. at 12:10–13:1; Pet.'s Proposed Facts.

22. As of December 31, 2016, the LNC accepted a total of $31,508 in contributions to a segregated account for its headquarters. Def.'s Opp'n, Ex. 1, Decl. of Paul C. Clark II, Federal Election Commission ("Clark Decl.") ¶ 13 tbl.2, ECF No. 26-5; Pet.'s Mot. Cert., Attach. 22, Decl. of Paul C. Clark II ¶ 13 tbl.2, ECF No. 24-22. One donor, Michael Chastain, donated $26,410.01 into the LNC's segregated building fund in 2017. Pet.'s Mot. Cert., Attach. 20, Decl. of Michael Chastain ("Chastain Decl.") ¶ 4, ECF No. 24-20.

23. The purpose of the LNC's headquarters "is to provide full-time, professional support for the on-going political activities of the [p]arty." Def.'s Opp'n, Ex. 11, LNC Policy Manual at 48, ECF No. 26-15. The activities of the LNC's headquarters include record keeping, member services, development activities, external communications, and political action. *Id.* at 48–49.

24. In 2014, the LNC purchased a building to serve as its headquarters. LNC Building Fund Solicitation Letter at 1. The purchase price was $825,000. *Id.* at 2.

25. "Among the LNC's goals is to completely pay off the headquarters building as quickly as possible, and in any case prior to the 2024 due date of a balloon payment. [To] that end, the LNC budgets at least $60,000 in . . . odd-numbered year[s] to pay down the principal, and undertakes fundraising efforts dedicated specifically towards that purpose.

Accordingly, LNC expects that it would pay off the mortgage well before 2024. However, the LNC's goals at times exceed its budget, and budget targets are not always met." Sarwark Decl. ¶ 28.

26. The LNC holds a presidential nominating convention once every four years immediately preceding a presidential election. Sarwark Dep. at 48:2–4. The purpose of these conventions is to conduct party business, including hearing reports from various LNC committees regarding changes to the national party bylaws, changes to the national party platform, election of officers and at-large members of the LNC, the election of the judicial committee, and occasional adoption of public policy resolutions. *See id.* at 48:12–49:7. In addition, Libertarian candidates for president and vice president are nominated at presidential nominating conventions. *Id.* at 49:8–11.

27. The LNC engages in fundraising specific to expenses that would be incurred for presidential nominating conventions. *Id.* at 49:12–50:13.

28. "All, or very nearly all, of the Libertarian Party's expenses for holding its presidential nominating conventions are incurred and paid for in the year in which the convention is held. Occasionally . . . minor expenses related to presidential nominating conventions . . . are pre-paid in the year preceding the presidential nominating conventions. No

expenses related to holding presidential nominating conventions are incurred in the two years following a year in which the [LNC] holds a presidential nominating convention." Sarwark Decl. ¶ 34.

29. During discovery, the LNC provided an expense report for years 2013 through 2016. Def.'s Opp'n, Ex. 7, LNC Account QuickReport, ECF No. 26-11. While the description of costs were not specifically tailored to the exact language of the segregated account provision in FECA, in general, the LNC spent roughly $467,251.58 on 52 U.S.C. § 30116(a)(9)-sanctioned expenses in 2016. *Id.* at 30.

30. The LNC's total budget for program expenses and cost of support and revenue, including fundraising, was $1,406,400 in 2014, Def.'s Opp'n, Ex. 22, LNC 2014 Budget, ECF No. 26-26, $1,304,246.33 in 2015, Def.'s Opp'n, Ex. 9, LNC 2015 Budget, ECF No. 26-13, and $2,263,183 in 2016, Def.'s Opp'n, Ex. 10, LNC 2016 Budget, ECF No. 26-14.

31. Between December 16, 2014, and December 31, 2016, national party committees have accepted a total of $129,997,590 into their specialized purpose accounts. Clark Decl. ¶ 13 tbl.2. The national party committees affiliated with the Democratic Party have accepted a total of $41,510,551; the national party committees affiliated with the Republican Party have accepted a total of $88,455,532; and the LNC has accepted

$31,508. *Id.* No other national committee of any political party reported segregated account contributions as of December 31, 2016. *Id.* ¶ 14.

## III. The FECA's Specialized Purpose Regime

32. Potential donors may forego making a contribution to the national committee of a political party, or reduce the amount of their contribution, if the uses of that contribution are restricted. *See* Sarwark Decl. ¶ 10; *see*, *e.g.*, Pet.'s Mot. Cert., Attach. 19, Decl. of Chris Rufer ("Rufer Decl.") ¶¶ 5–7, ECF No. 24-19; Chastain Decl. ¶¶ 5–7; Pet.'s Mot. Cert., Attach. 21, Decl. of William Redpath ("Redpath Decl.") ¶ 5, ECF No. 24-21.

33. "LNC is unaware of any documentary evidence comparing the corrupting potential of restricted, [specialized-purpose] contributions with the corrupting potential of unrestricted, general purpose contributions." Sarwark Decl. ¶ 11.

34. During discovery in this litigation, the LNC posed the following interrogatory to the FEC: "[P]lease describe in detail all evidence tending to support the proposition that a maximum allowable contribution to one of the separate, segregated accounts provided for in 52 U.S.C. § 30116(a)(9) is less corrupting than a contribution that exceeds the unrestricted, general purpose contribution limits by one dollar." Pet.'s Mot. Cert., Ex. B, Def.'s Objections & Resps. Pet. LNC's First

Discovery Requests ("Def.'s First Objections & Resps.") at 15, ECF 24-4. The FEC responded: "The FEC cannot respond to this interrogatory because it rejects the premise that a contribution of any particular dollar value is 'corrupting' but that lower values are not 'corrupting.' Moreover, the FEC cannot completely answer this interrogatory, as discovery is ongoing. Nevertheless, the FEC is aware of case law, publicly available secondary material, and simple logic which dictates that parties may prefer unrestricted contributions to those that may only be used in connection with particular expenses. The FEC is also aware of LNC's allegations that 'the LNC has comparatively less use for funds intended to support national conventions, a headquarters building, or attorney fees' and therefore 'needs' unrestricted funds 'in order to directly speak to the electorate.' Compl. ¶ 13. Additional evidence may be uncovered through continuing discovery in this case." *Id.* at 15–16.[18]

35. During discovery in this litigation, the LNC posed the following interrogatory to the FEC: "Please describe the likelihood that an

[18] The LNC proposed to certify only the following fact: "The FEC . . . rejects the premise that a contribution of any particular dollar value is 'corrupting' but that lower values are not 'corrupting.'" Pet.'s Proposed Facts ¶ 30 (citation omitted). The FEC noted that the LNC's proposed fact excerpted from a longer interrogatory response, and argued that "[t]o the extent this proposed fact is certified . . . the FEC's full response should in fairness be included. *See* FED. R. EVID. 106." Def.'s Resps. Pet.'s Proposed Facts at 15.

individual's contribution of $101,700 to the national committee of a political party, restricted for the purpose of funding a headquarters building, election contests, or a presidential nominating convention, would create the same or greater appearance of corruption as an unrestricted contribution in the amount of $33,901 by that individual to the same national committee of a political party." Pet.'s Mot. Cert., Ex. C, Def.'s Objections & Resps. Pet.'s Second Discovery Requests ("Def.'s Second Objections & Resps.") at 6, ECF 24-5. The FEC responded: "[L]arger contributions [to political parties] are generally more likely to lead to actual or apparent quid pro quo arrangements and can do so regardless of how the funds are ultimately used, but unrestricted funds contributed to a political party may be used for activities that maximally benefit federal candidates and thus may pose a relatively more acute danger of actual and apparent corruption." *Id.* at 7.[19]

36. During discovery in this litigation, the LNC posed the following interrogatory to the FEC:

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[19] The LNC proposed to certify only the following fact: " '[L]arger contributions [to political parties] are generally more likely to lead to actual or apparent *quid pro quo* arrangements and can do so regardless of how the funds are ultimately used. . . ." Pet.'s Proposed Facts ¶ 31 (alteration in original) (citation omitted). The FEC objected that the proposed fact "omits the context of the FEC's interrogatory response," and argued that "[t]o the extent this proposed fact is certified, the FEC's full response should in fairness be included. *See* FED. R. EVID. 106." Def.'s Resps. Pet.'s Proposed Facts at 15–16.

"Please explain why a maximum allowable contribution to one of the separate, segregated accounts provided for in 52 U.S.C. § 30116(a)(9) may be less corrupting than a contribution that exceeds the unrestricted, general purpose contribution limits by one dollar." Def.'s First Objections & Resps. at 17. The FEC responded in part: "Although *all* contributions to political parties can create the risk of corruption or its appearance regardless of the way that money is ultimately spent, Congress could have permissibly concluded that contributions to a political party that directly benefit a particular candidate or can be spent directly on a particular election contest pose an especially acute risk warranting a lower dollar limit." *Id.*[20]

37. The FEC takes the position that "Congress could have permissibly concluded" that unrestricted donations to a political party pose greater risk than restricted donations, Def.'s First Objections & Resps. at 17, as it believes that "unrestricted funds contributed to a political party may be used for activities that maximally benefit federal candidates and thus may pose a relatively more acute

[20] The LNC proposed to certify only the following fact: "[*A*]*ll* contributions to political parties can create the risk of corruption or its appearance regardless of the way that money is ultimately spent." Pet.'s Proposed Facts ¶ 32 (emphasis in original) (citation omitted). The FEC objected that the proposed fact "omits the context of the FEC's interrogatory response," and argued that "[t]o the extent this proposed fact is certified, the FEC's full response should in fairness be included. *See* FED. R. EVID. 106." Def.'s Resps. Pet.'s Proposed Facts at 16.

danger of actual and apparent corruption," Def.'s Second Objections & Resps. at 7.

38. "Every dollar received through the separate, segregated accounts provided for in 52 U.S.C. § 30116(a)(9) potentially frees up another dollar in the recipient's general account for unrestricted spending." Def.'s First Objections & Resps. at 12; Sarwark Decl. ¶ 12.

39. "[A] political party may in some circumstances value a contribution with use restrictions more highly than a smaller contribution without such restrictions." Sarwark Decl. ¶ 13; *see also* Def.'s Second Objections & Resps. at 4.

40. During discovery in this litigation, the LNC posed the following interrogatory to the FEC: "Please describe the likelihood that a political party would value a contribution with use restrictions more highly than a smaller contribution without such restrictions." Def.'s Second Objections & Resps. at 7. The FEC responded in part: "[U]nrestricted funds contributed to a political party may be used for activities that maximally benefit federal candidates and thus will generally be more highly valued. A political party may value a higher contribution with use restrictions in some circumstances, however, such as in the case of a contribution that the party may use to defray expenses for which it knows it must pay and for which it would otherwise have trouble raising funds. The party may value that contribution more than a smaller

contribution that comes with no use restrictions but is easier to replicate through other fundraising efforts."[21] *Id.* at 8.

41. During discovery in this litigation, the LNC requested that the FEC admit the following: "An individual's contribution of $101,700 to the national committee of a political party, even if restricted for the purpose of funding a headquarters building, election contests, or a presidential nominating convention, may create the same or greater appearance of corruption as an unrestricted contribution in the amount of $33,901 by that individual to the same national committee of a political party." Def.'s Second Objections & Resps. at 5. The FEC "denie[d] that the requested admission is true as a general matter but admit[ted] that the hypothetical scenario described in the request may occur in some circumstances, for the reasons provided and subject to the general caveats in the response

[21] The LNC proposed to certify only the following fact: "A political party may value a higher contribution with use restrictions in some circumstances . . . such as in the case of a contribution that the party may use to defray expenses for which it knows it must pay and for which it would otherwise have trouble raising funds. The party may value that contribution more than a smaller contribution that comes with no use restrictions but is easier to replicate through other fundraising efforts." Pet.'s Proposed Facts ¶ 39 (alteration in original) (citation omitted). The FEC "object[ed] to this proposed fact to the extent that it omits the full context of the FEC's interrogatory response," and argued that "[t]o the extent this proposed fact is certified, the FEC's full response should in fairness be included. *See* FED. R. EVID. 106." Def.'s Resps. Pet.'s Proposed Facts at 20.

to Request 27." *Id.* In responding to the LNC's Request 27, the FEC asserted:

> Given the close connection and alignment of interests between national party committees and federal officeholders, larger contributions are generally more likely to lead to actual or apparent *quid pro quo* arrangements and can do so regardless of how the funds are ultimately used. *See*, *e.g.*, *Republican Party of La. v. FEC*, 219 F. Supp. 3d 86, 97 (2016) (citing *McConnell v. FEC*, 540 U.S. 93, 154-55 (2003)), *aff'd* 137 S. Ct. 2178 (2017). The danger of actual and apparent quid pro quo corruption can, however, be relatively more acute when funds are used for activities that provide direct benefits to federal candidates. *Id.* at 96 (citing *McConnell*, 540 U.S. at 166–71). Because unrestricted funds contributed to a political party may be used for activities that maximally benefit federal candidates, including campaign advertisements in coordination with candidate campaigns, political parties will generally value them higher and such contributions pose a relatively more acute danger of quid pro quo corruption. Subject to those general caveats, the Commission admits that a political party may in some circumstances value a contribution with use restrictions more highly than a smaller contribution without such restrictions."

Def.'s Second Objections & Resps. at 3–4.[22]

42. During discovery in this litigation, the LNC requested that the FEC admit the following: "Were a national committee of a political party planning to spend at least $101,700 from its general account in a given year for any of the purposes for which separate, segregated accounts are provided in 52 U.S.C. § 30116(a)(9), a $101,700 contribution received in one of the separate, segregated accounts would have the same effect as an unrestricted $101,700 contribution." Def.'s Second Objections & Resps. at 5. The FEC "object[ed] to this request for admission as vague and ambiguous insofar as it does not define the 'effect' to which the request alludes." *Id.*

43. During discovery in this litigation, the LNC posed the following interrogatories to the FEC: (1) "Please describe the likelihood that an individual's contribution of $101,700 to the national committee of a political party, restricted for the purpose of funding a

[22] The LNC proposed to certify only the following fact: "An individual's contribution of $101,700 to the national committee of a political party, even if restricted for the purpose of funding a headquarters building, election contests, or a presidential nominating convention, may create the same or greater appearance of corruption as an unrestricted contribution in the amount of $33,901 by that individual to the same national committee of a political party." Pet.'s Proposed Facts ¶ 40. The FEC objected that the proposed fact "omits the full context of the FEC's [ ] response," and argued that "[t]o the extent this proposed fact is certified, the FEC's full response should in fairness be included. *See* FED. R. EVID. 106." Def.'s Resps. Pet.'s Proposed Facts at 20.

headquarters building, election contests, or a presidential nominating convention, would create the same or greater appearance of corruption as an unrestricted contribution in the amount of $33,901 by that individual to the same national committee of a political party," Def.'s Second Objections & Resps. at 6; and (2) "Please describe the circumstances under which an individual's contribution of $101,700 to the national committee of a political party, restricted for the purpose of funding a headquarters building, election contests, or a presidential nominating convention, would create the same or greater appearance of corruption as an unrestricted contribution in the amount of $33,901 by that individual to the same national committee of a political party." *Id.* at 8. The FEC responded to both interrogatories, in part, "that a particular within-limit contribution to the segregated account of a national committee of a political party could appear as corrupt as or more corrupt than a lower contribution to that committee's general account that exceeds the general account limit, depending on circumstances such as the identity of the contributor and the receiver, the policy interests of the contributor, the current status of relevant policies, the financial needs and goals of the receiver including as to the types of spending for which segregated account funds might be used and the public knowledge of those matters, the receiver's relative ability to raise funds for different proposed uses, and whether any

relevant policy changes happen close in time to the contribution." *Id.* at 7, 9.[23]

44. No parties, apart from the Libertarian, Democratic, and Republican Parties, have reported any segregated purpose accounts to the FEC. Clark Decl. ¶ 14.

45. Between 2014 and 2016, the Democratic National Committee ("DNC") reported receiving $12,255,964 for its segregated convention account, $3,901,490 for its segregated headquarters account, and $6,764,189 for its segregated recount account. Clark Decl. at 5 tbl.2.

46. Between 2014 and 2016, the Republican National Committee ("RNC") reported receiving $23,817,038 for its segregated convention account, $26,367,459 for its segregated headquarters account, and $5,992,015 for its segregated recount account. Clark Decl. at 5 tbl.2.

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[23] The LNC proposed to certify only the following facts: (1) "[A] particular within-limit contribution to the segregated account of a national committee of a political party could appear as corrupt as or more corrupt than a lower contribution to that committee's general account that exceeds the general account limit," and (2) "[I]t is . . . possible that a particular contribution below the general account limit may have an appearance of corruption that exceeds that of a higher contribution to a segregated account." Pet.'s Proposed Facts ¶¶ 42, 43 (alterations in original) (citations omitted). The FEC objected to both proposed facts on the ground that they "omit[ ] needed context from the cited FEC discovery response." Def.'s Resps. Pet.'s Proposed Facts at 21,22.

47. Between 2014 and 2016, the DNC's individual contributions, not including many contributions accepted in the segregated purpose accounts, totaled $189,112,962.62. *See* DNC Year-End FEC Reports at 3, line 11(a)(iii), http://docquery.fec.gov/cgi-bin/fecimg/?_15951133010+0(last visited June 28, 2018) (for 2014), http://docquery.fec.gov/cgi-bin/fecimg/?_201601299 004933424+0 (last visited June 28, 2018) (for 2015), http://docquery.fec.gov/cgi-bin/fecimg/\?_201706019055202873+0 (last visited June 28, 2018) (for 2016).

48. Between 2014 and 2016, the RNC's individual contributions, not including many contributions accepted in the segregated purpose accounts, *see supra* ¶ 46, totaled $266,758,900.34. RNC Year-End FEC Reports at 3, line 11(a)(iii), http://docquery.fec.gov/cgi-bin/fecimg/?_15970244221+0 (last visited June 28, 2018) (for 2014), http://docquery.fec.gov/cgi-bin/fecimg/?_201603229011936493+0 (last visited June 28, 2018) (for 2015); http://docquery.fec.gov/cgi-bin/fecimg/?_201701319042260933+0 (last visited June 28, 2018) (for 2016).

49. In 2016, the RNC's individual contributions, not including many contributions accepted in the segregated purpose accounts, *supra* ¶ 46, totaled $89,643,729.23. 2016 RNC Year-End FEC Report at 3, line 11(a)(iii), http://docquery.fec.gov/cgi-bin/fecimg/?_20170131 9042260933+0 (last visited June 28, 2018).

50. "Unrestricted funds are more valuable to national party committees and their candidates than funds that may only be used for particular categories of expenses." FEC's Proposed Facts at 9.

51. The RNC and Donald J. Trump for President, Inc., entered a joint fundraising agreement during the 2016 presidential election. *See* Def.'s Opp'n, Ex. 34, Excerpt of Production from Republican National Committee to the Def.'s Subpoena to Produce Documents, ECF No. 26-38. According to that agreement, any donations to the joint fundraising committee that exceeded the maximum that could be donated to Trump's campaign would be allocated first to RNC's general operating account up to the General Party Limit. *Id.* at 8. Only after the contributor reached the General Party Limit would contributions be allocated to RNC's segregated accounts pursuant to the Segregated Account Limit. *Id.*

52. The specialized purpose limit applicable to national party committees' legal expenses allows parties to engage in litigation without having to reduce their general political advocacy. For example, RNC spokeswoman Cassie Smedile recently explained that paying for legal expenses "with funds from a pre-existing legal proceedings account [] [did] not reduce by a dime the resources we can put towards our political work." Def.'s Opp'n, Ex. 35, Matea Gold, *RNC Taps Legal Account to Help Pay for Lawyers for President Trump*

*and Son Donald Jr. in Russia Probes*, WASH. POST. (Sept. 20, 2017), ECF No. 26-39.

## IV. Political Parties and Quid Pro Quo Corruption

53. Because of the close relationship between parties and candidates, contributions to parties can lead to the actuality and appearance of quid pro quo corruption. National political parties are "inextricably intertwined" with their federal officeholders and candidates, with whom they "enjoy a special relationship and unity of interest." *McConnell v. FEC*, 540 U.S. 93, 145, 155 (2003) (internal quotation marks and citation omitted), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010). In fact, "[t]here is no meaningful separation between the national party committees and the public officials who control them." *Id.* at 155 (citations omitted).

54. "Once elected to legislative office, public officials enter an environment in which political parties-in-government control the resources crucial to subsequent electoral success and legislative power. Political parties organize the legislative caucuses that make committee assignments." *Id.* at 156 (internal quotation marks and citation omitted). Thus, "officeholders' reelection prospects are significantly influenced by attitudes of party leadership," *id.* (citing Krasno & Sorauf Expert Report), and an individual Member's stature

and responsibilities vary dramatically depending on whether his party is in the majority or in the minority.

55. Parties are not like regular political committees. Non-connected committees "do not select slates of candidates for elections," "determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses," but these activities count among the parties' core responsibilities. *Id.* at 188 ("Political parties have influence and power in the Legislature that vastly exceeds that of any interest group. . . . [P]arty affiliation is the primary way . . . voters identify candidates," and therefore parties have special relationships with those who hold public office.). "A primary goal of all the major political parties is to win elections." *Cao v. FEC*, 688 F. Supp. 2d 498, 527 (E.D. La.), *aff'd sub nom. In re Cao*, 619 F.3d 410 (5th Cir. 2010); *see also id.* ("The ultimate goal of a political party is to get as many party members as possible into elective office, and in doing so to increase voting and party activity by average party members." (quoting declaration of former Representative Meehan)).

56. This overriding purpose makes political parties particularly susceptible to contributors who want to create a quid pro quo relationship with an officeholder. As the Supreme Court has explained:

> Parties are [ ]necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but ratherto [sic] support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.

*FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431, 451–52 (2001); *see also id.* at 452 ("[W]hether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders."); *id.* at 455 ("In reality, parties . . . function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape. Indeed, parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players.").

57. The national committees of the two major parties—the Democratic Party and the Republican Party—are "both run by, and largely composed of, federal officeholders and candidates." *McConnell*, 540 U.S. at 155. "The President typically controls his party's national committee, and once a favorite has emerged for the presidential nomination of the other party, that candidate and his party's national committee typically work closely together." *McConnell v. FEC*, 251

F. Supp. 2d 176, 697 (D.D.C. 2003) (Kollar-Kotelly, J.). The leaders of the two major parties are also the parties' federal candidates, officeholders, and important Congressional leaders. *Id.* at 469 ("[T]he internal structure of parties permits, for example, former U.S. Senator D'Amato, who chaired the [RSCC] from 1995–97, to at the same time serve as chair of the Senate Banking, Housing, and Urban Affairs Committee.") (alterations in original) (citation omitted).

58. Similarly, LNC officials have run for federal office as Libertarian Party candidates while holding their offices with the LNC. For example, William Redpath is currently an at-large member of the LNC, and he previously served as the LNC's national chair from July 2006 through May 2010 and as the LNC's treasurer three times. Redpath Decl. ¶ 1. Redpath ran as a Libertarian Party candidate for United States Senate in 2008 and for United States House of Representatives in 2010 and 2014. *Id.* As national chair, Redpath was the LNC's "chief executive officer . . . with full authority to direct [the LNC's] business and affairs." *LNC I*, 930 F. Supp. 2d at 178 (citation omitted). The LNC's rules do not bar its leaders from also running for federal office. *Id.*

59. The public record contains significant evidence of actual and apparent quid pro quos involving contributions to national, state, and local parties. In the 1930s, Congress enacted restrictions on contributions to

national political parties in light of the notorious "Democratic campaign book" scandal, in which federal contractors were forced to buy books at hyper-inflated prices from the Democratic party to assure that they would continue to receive government business. 84 CONG. REC. 9598-99 (1939) (statement of Rep. Taylor); *see also Wagner v. FEC*, 793 F.3d 1, 11–12 (D.C. Cir. 2015) (en banc) ("Congressman J. Will Taylor pointed to the coercion of contractors in the celebrated Democratic campaign book scandal as a prime example of political immorality and skullduggery that should not be tolerated. 84 CONG. REC. 9598-99 (1939). Representative Taylor recounted that, at the behest of the Democratic National Committee, party representatives paid visits to government contractors, reminding each one of the business he had received from the Government and explaining that the contractor was expected to buy a number of the party's souvenir convention books—at $250 each—in proportion to the amount of Government business he had enjoyed." (internal quotation marks omitted)).

60. In 1976, Armand Hammer was fined and placed on probation after pleading guilty to making an illegal contribution to President Nixon's reelection campaign. David Rampe, *Armand Hammer Pardoned by Bush*, N.Y. TIMES (Aug. 15, 1989), http://www.nytimes.com/1989/08/15/us/armand-hammer-pardoned-by-bush.html. Mr. Hammer contributed $54,000 to the Nixon re-election campaign in

the names of others, friends of a subordinate at Occidental Petroleum. *Id.* The subordinate was convicted of concealing the source of the contribution. *Id.* In 1989, Mr. Hammer made contributions exceeding $100,000 to the Republican Party and another $100,000 to the Bush-Quayle Inaugural Committee. Marc Lacey, *Political Memo; Resurrecting Ghosts of Pardons Past*, N.Y. TIMES (Mar. 4, 2001), http://www.nytimes.com/2001/03/04/us/political-memo-resurrecting-ghosts-of-pardons-past.html. Shortly afterward, on August 14, 1989, President George H.W. Bush pardoned Mr. Hammer for his illegal contribution to President Nixon's reelection campaign. *Id.*; David Hoffman, *Bush Signs Pardon for Armand Hammer*, WASH. POST (Aug. 15, 1989), https://www.washingtonpost.com/archive/politics/1989/08/15/bush-signs-pardon-for-armand-hammer/b6cb4260-bbb1-40ae-a9d6-7f67ef4a7226/. In comparing the pardon to President Bill Clinton's later pardon of Marc Rich, Representative Henry Waxman observed that "'[t]he appearance of a quid pro quo is just as strong in the Hammer case as in the Rich case, if not stronger, since Mr. Hammer himself gave the contribution.'" Lacey, *supra.*

61. In 1988, Edwin Cox, Jr. pled guilty to bank fraud by falsifying collateral on an $80 million loan. *Bank Fraud Guilty Plea*, N.Y. TIMES (June 17, 1988), http://www.nytimes.com/1988/06/17/business/bank-fraud-guilty-plea.html. According to CNN's matching of Cox family members with contribution records, from

1980 to 2000 that family contributed approximately $200,000 to campaigns of President George H.W. Bush, his relatives, and Republican campaign committees. Kelly Wallace, *Former President Bush Granted Last Minute Pardon to Contributor's Son*, CNN (Mar. 7, 2001, 1:57 PM), http://www.cnn.com/2001/ALLPOLITICS/03/07/bush.pardon/. In addition to contributing to these various campaigns, Cox's father, Texas oilman Edwin L. Cox, Sr., coordinated political support for the pardon. *See id.* On November 24, 1992, former White House chief of staff James Baker wrote to the White House counsel, copying the president, that "[f]ormer Texas Gov. Bill Clements called me and asked me whether or not the president would consider a pardon for Edwin Cox, son of Ed Cox, who is a longtime supporter of the president's." *Id.* On January 18, 1993, two days before leaving the White House, President Bush pardoned Mr. Cox for his bank fraud conviction. *Id.* After the pardon, Edwin Cox, Sr. donated at least $100,000 to the George Bush Presidential Library. *Id.*; Michael Weisskopf, *A Pardon, a Presidential Library, a Big Donation*, TIME (Mar. 6, 2001), http://content.time.com/time/nation/article/0,8599,101652,00.html (noting that Edwin Cox, Sr.'s "name is etched in gold as a 'benefactor,' those whose donations amount to between $100,000 to $250,000").

62. In *McConnell*, the record documented that, as one former senator described, "'[l]arge soft money contributions in fact distort the

legislative process. They affect what gets done and how it gets done. . . . [M]ake no mistake about it—this money affects outcomes.'" 251 F. Supp. 2d at 496 (quoting Sen. Rudman).

63. As another Senator testified:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee. . . . This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do

> not think there is any question that this is the reason it passed.

*McConnell*, 251 F. Supp. 2d at 482 (quoting former Sen. Simon); *see also Colo. Republican*, 533 U.S. at 451 n.12 (quoting Senator Simon's statement that "I believe people contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively.").

64. In July 1995, the Department of Interior denied an application by three bands of Wisconsin Indian tribes to open a casino in Hudson, Wisconsin. S. REP. NO. 105-167, pt. 1, at 44–45 (1998). Initially, the application was approved by a branch office of the Bureau of Indian Affairs ("BIA"). *Id.* at 44. A wealthy group of neighboring tribes in Minnesota, who operated a competing casino, hired a prominent lobbyist and former DNC treasurer, who spoke personally with President Clinton and officials of the DNC. *Id.* Following their meeting, DNC officials promised to talk to the White House and have them contact Secretary of the Interior Bruce Babbitt. *Id.* at 45. Meanwhile, a career BIA employee had drafted "a 17-page analysis recommending approval of the Hudson application." *Id.* According to testimony provided to a Senate Committee, Secretary Babbitt felt pressure from the White House to make a determination quickly on the application and was aware of tribal "political

contributions" to the DNC and state Democratic parties. *Id.* (recalling that Secretary Babbitt remarked to the applicant tribes' attorney, "Do you have any idea how much these Indians, Indians with gaming contracts . . . have given to Democrats? . . . [H]alf a million dollars."). Ultimately, the application was denied. *Id.* In the four months following the application's denial, "the opposition tribes contributed $53,000 to the DNC and the DSCC . . . an additional $230,000 to the DNC and the DSCC during 1996, and . . . more than $50,000 in additional money to the Minnesota Democratic Party." *Id.* "There is strong circumstantial evidence that the Interior Department's decision to deny the Hudson application was caused in large part by improper political considerations, including the promise of political contributions from opposition tribes." *Id.*, pt. 2, at 3168; *see also id.* at 3193 ("From all the circumstances, there appears to be a direct relationship between the activities of the Department of the Interior and contributions received by the DNC and DSCC from the opposition tribes."). Political donations to the DNC and the Minnesota Democratic Party "apparently *succeeded* in purchasing government policy concessions." *Id.*, pt. 1, at 45 (emphasis in original); *see also McConnell*, 540 U.S. at 164–65,165 n.61 (discussing the episode in connection with of the governmental interests underlying § 30125(b)).

65. Between 1995 and 1996, Roger Tamraz contributed approximately $300,000 to the DNC

and various state Democratic parties to gain support for an oil-pipeline project in the Caucuses, which was opposed by the National Security Council ("NSC") and other executive branch agencies. *See generally* S. REP. NO. 105-167, pt. 2, at 2907–31. NSC staff developed a policy of denying Mr. Tamraz "high-level U.S. Government access" to discuss the pipeline. *Id.* at 2911. To circumvent this policy, Mr. Tamraz met with DNC officials and began contributing to the DNC and state Democratic parties. *See id.* at 2912–13. All told, "by the end of March 1996 Tamraz had made contributions totaling $100,000 to the Virginia Democratic Party, $25,000 to the Virginia Legislative Conference, $20,000 to [Richard] Molpus['s] campaign [for governor of Mississippi], $25,000 to the Louisiana Democratic Party, and $130,000 to the DNC." *Id.* at 2913–14. In addition, Mr. Tamraz contributed "'10 [or] 20' thousand dollars either to Senator [Ted] Kennedy's campaign or to the Massachusetts Democratic Party." *Id.* at 2915. DNC officials "went to great lengths in an attempt to provide Tamraz the 'political leverage' he sought in his Caspian ventures." *Id.* at 2913. Their efforts included providing pressure from White House and Department of Energy officials to change the U.S. Government's position on the pipeline. *See id.* at 2928–30. While Mr. Tamraz was not ultimately successful "in persuading the U.S. Government to support his pipeline," the Committee Report notes he "succeeded through his political contributions, and

apparently the promise of additional donations, in enlisting senior United States officials in his attempt to change the working group's policy on Caspian energy issues." *Id.* at 2930. Undeterred by his White House rebuke, Mr. Tamraz also approached officials at the Overseas Private Investment Corporation, an independent U.S. Government agency whose president was Ruth Harkin. *Id.* at 2929. Mr. Tamraz contributed "$35,000 to the Iowa Democratic Party at the request of Ruth Harkin's husband, Senator Tom Harkin of Iowa." *Id.*

66. As explained by the D.C. Circuit in *Wagner v. FEC*, there were a "series of quid pro quos" made by the former lobbyist Jack Abramoff and former Representative Bob Ney. 793 F.3d 1, 15 (D.C. Cir. 2015).

67. Abramoff, who pled guilty in 2006 to corruption charges and served time in prison, has written a book about how he and fellow lobbyists made campaign contributions to a range of political committees as part of a strategy to obtain political favors. *See generally* JACK ABRAMOFF, CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST (2011).

*68.* Abramoff's book describes a 1995 meeting involving former House Majority Whip Tom DeLay and executives from Microsoft. *Id.* at 64–65. The issue being discussed was "software program encryption export." *Id.* Once

"DeLay expressed his general support for their positions and reminded [the executives] that it was likely to be the Republicans who would defend the freedom they required to develop their company," he made a "soft appeal for political contributions from the company." *Id.* at 65. When one of the executives "firmly brushed off" the solicitation, DeLay delivered a "stern message": he told the executives a story about an earlier time when Walmart had suffered by refusing to "'sully their hands'" by making a contribution. *Id.* That refusal backfired a year later when Walmart could not get DeLay to "'sully his hands'" with a request to get a highway ramp near one of their stores. *Id.* Once DeLay related this story, the "quivering executives" "finally got the joke." *Id.* "A $100,000 check was soon delivered to the [National] Republican Congressional Committee, and Microsoft's relationship with the American right commenced." *Id.*

69. In 2002, in exchange for former Representative Ney's commitment to add to the Help America Vote Act ("HAVA") language to reopen a casino owned by the Tiguas, a Texas Indian tribe that Abramoff represented, Abramoff arranged for lavish contributions to be made by tribal officials to or on Ney's behalf, including at least $32,000 in contributions "to Ney's campaign and political . . . committees." James V. Grimaldi & Susan Schmidt, *Lawmaker From Ohio Subpoenaed in Abramoff Case*, WASH. POST (Nov. 5, 2005),

http://www.washingtonpost.com/wp-dyn/content/article/2005/11/04/AR2005110401197.html; FEC Opp'n, Ex. 38, Factual Basis for Plea of Robert W. Ney ("Ney Factual Proffer") ¶ 10(a)(ii), ECF No. 26-42; *see* FEC Opp'n, Ex. 37, Factual Basis for Plea of Jack A. Abramoff ("Abramoff Factual Proffer") ¶¶ 20, 22, ECF No. 26-41. On March 20, 2002, Ney agreed to "move forward" with the plan to slip into the HAVA an "abstruse" sentence drafted by Abramoff's office that "would magically open the doors to the Tigua casino." ABRAMOFF, *supra*, at 197–198, 205–06; *id.* at 198 (referencing the abstruse sentence: "Public Law 100-89 is amended by striking section 207 (101 Stat. 668, 672)"); *see also* Ney Factual Proffer ¶ 10(a)(ii). Abramoff had the Tiguas make "substantial campaign contributions." Ney Factual Proffer ¶ 9(d) (admitting receipt of substantial campaign contributions from Abramoff's clients in exchange for performing official acts). Furthermore, on March 22, 2002, two days after the agreement, the Tiguas donated another $30,000 to the National Republic [sic] Senatorial Committee ("NRSC"). NRSC Report of Receipts and Disbursements at 871, http://docquery.fec.gov/cgi-bin/fecimg/?22020272668 (last visited June 28, 2018); *see also* ABRAMOFF, *supra*, at 197 (noting a strategy to prepare for a "backlash" through a strategy of "Tigua contributions to the Republican Party," which would help "construct a cadre of supporters"). According to Abramoff, Senator Christopher Dodd gave his "assent" in

mid-April 2002 to the plan "and a request for a $50,000 contribution to the Democrats in Dodd's name." ABRAMOFF, *supra*, at 206; *see also id.* at 206, 210 (explaining that Abramoff's associate assured Abramoff that he would cover the requested contribution "from the budget the Tiguas had provided him," and that neither of them considered that this "'contribution' was, in fact, merely a bribe;" according to Abramoff, Senator Dodd reneged when he later got "cold feet").

70. In his book, Abramoff described his approach to lobbying:

> As a lobbyist, I thought it only natural and right that my clients should reward those members who saved them such substantial sums with generous contributions. This quid pro quo became one of the hallmarks of our lobbying efforts. . . . Since the tribes I represented lived and died by what the Congress did to and for them, and since they had comparatively unlimited funds, we were in the position to deliver millions of dollars in legal political contributions, and did.

ABRAMOFF, *supra*, at 90; *see also McConnell*, 251 F. Supp. 2d at 495 (quoting an affidavit of the lobbyist Daniel Murray: "I advise my clients as to which federal office-holders (or candidates) they should contribute and in what amounts, in order to best use the resources they are able to allocate to such efforts to advance their legislative agenda.

Such plans also would include soft money contributions to political parties and interest groups associated with political issues."); *id.* ("To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important." (quoting lobbyist Wright Andrews)).

71. Abramoff also explained:

> The regularity with which my staff would return from congressional offices with request for funds, on the heels of our asking for help should have disturbed me, but it didn't. It was illegal and wrong, but it didn't register as abnormal in any way. I was so used to hearing senator so-and-so wants $25,000 for his charity, or representative X wants $50,000 for the Congressional Campaign Committee, that I would actually double check with my staff when they didn't request lucre for the legislators. The whole process became so perfunctory it actually seemed natural.

ABRAMOFF, *supra*, at 206.

## V. The LNC's Major Donor Network

72. "Just like the major parties, the LNC offers its donors membership in various major-donor groups that provide 'certain perks' and benefits. For example, an LNC donor can become a member of the 'Chairman's Circle' for $25,000 annually or $2,500 monthly, and in

return, receive '[d]irect contact with [the] National Chair, POTUS [President of the United States] nominee, or significant L[ibertarian] P[arty] candidate during [the] campaign season.' Chairman's Circle members also receive 'VIP Seating . . . with [the] National Chair, LNC officer, special guest, or POTUS nominee at [the] National Convention banquet or other events.' The LNC also offers membership in major-donor groups for annual donors of $15,000 ('Select Benefactor'), $5,000 ('Beacon of Liberty'), $2,500 ('Pioneer of Freedom'), or $1,500 ('Lifetime Founder'). In addition to predetermined benefits, LNC staff has the 'discretion to create and bestow additional benefits' upon its major-donor group members." *LNC I*, 930 F. Supp. 2d at 179–80 (citations omitted); *see also* LNC Policy Manual at 36–38.

73. "The LNC offers a monthly pledge program in which donors can agree to give a recurring monthly contribution to the LNC, and the LNC will automatically charge the donor's credit card or checking account. The monthly pledges continue indefinitely until the donor decides to end the donations." *LNC I*, 930 F. Supp. 2d at 180 (citations omitted).

74. "Members of the LNC's top five major-donor groups are also granted membership in the LNC's 'Torch Club,' which entitles members to attend a special Torch Club event at the LNC's national convention. The Libertarian Party's federal candidates can attend this special event so long as they are also Torch

Club members, and William Redpath attended the event while serving as the LNC's national chair and running as a Libertarian Party candidate for federal office." *LNC I*, 930 F. Supp. 2d at 180 (citations omitted); *see also* LNC Policy Manual at 38.

75. "The LNC offers the benefits of major-donor-group membership as an inducement to hopefully have people increase their contributions. And the inducement has worked, as the groups have been effective in attracting larger donations for the LNC. Donations from the relatively small group of donors who are members of the LNC's major-donor groups account for a substantial percentage of LNC revenue." *LNC I*, F. Supp. 2d at 181 (internal quotations and citations omitted).

76. "The LNC could potentially grant someone membership in one of its major-donor groups, such as the Chairman's Circle, if the person showed the LNC his or her will providing for a bequest large enough to qualify for membership or if the person threatened to revoke such a bequest." *Id.* at 187 (citation omitted).

77. "If individuals informed the LNC that they intended to leave the LNC a bequest upon death, the LNC would be thankful to them for possibly leaving a gift for the LNC someday, since the LNC needs more money. And the LNC would be grateful to these potential future donors for the possible contributions even though the donors could revoke their

bequests before death." *Id.* (internal quotations omitted and citation omitted).

78. "[I]ndividuals have bequeathed very large amounts of money to non-profit organizations. For example, in 2005, the National Rifle Association received a $1 million bequest from a member and donor. And in 2003, philanthropist Joan Kroc bequeathed more than $200 million to National Public Radio, an amount almost double its then-annual budget." *Id.* at 182 (citations omitted).

79. "Philanthropists recognize that there is potential to raise great sums of money via bequests. For example, in 2009, Bill Gates and Warren Buffet started an effort to convince the 400 wealthiest Americans to pledge 'at least 50% of their net worth to charity during their lifetimes or at death.'" *Id.* (citation omitted). In 2015, Facebook founder Mark Zuckerberg and his wife committed to giving 99% of their Facebook shares—then valued at more than $45 billion—to charity during their lives. Vindu Goel & Nick Wingfield, *Mark Zuckerberg Vows to Donate 99% of His Facebook Shares for Charity*, N.Y. TIMES (Dec. 1, 2015), https://www.nytimes.com/2015/12/02/technology/mark-zuckerberg-facebook-charity.html.

80. "Many non-profit organizations have sophisticated planned-giving programs that solicit bequests and other forms of planned giving, such as the National Rifle Association, the Nature Conservancy, the American Civil

Liberties Union, and the NAACP Legal Defense Fund. Planned-giving consultants advise groups looking to increase their fundraising on how to more effectively solicit bequests." *LNC I*, F. Supp. 2d at 182–83 (citations omitted).

81. "Political parties are 'primarily concerned with electing their candidates' to office." *Id.* at 178 (quoting *McConnell*, 251 F. Supp. 2d at 469 (Kollar-Kotelly, J.)). "They have no economic interests apart from this ultimate goal, and thus 'the money they raise is spent assisting their candidates' campaigns.'" *Id.* (quoting *McConnell*, 251 F. Supp. 2d at 469–70 (Kollar-Kotelly, J.)). As a former member of Congress explained:

> The ultimate goal of a political party such as the Democratic Party is to get as many Party members as possible into elective office, and in doing so to increase voting and Party activity by average Party members. The Party does this by developing principles on public policy matters the Party stands for, and then by finding candidates to run for the various political offices who represent those principles for the Party. When the Party finds its candidates, it tries to raise money to help get like-minded people to participate in the elections, and to try to get the Party's candidates the resources they need to get their message out to voters.

*Id.* at 178–79.

82. "Similarly, it is the LNC's mission to move public policy in a Libertarian direction by . . . nominating candidates for political office that are Libertarian and trying to get them elected. It is the LNC's goal to have a Libertarian president and a Libertarian Congress and Libertarians elected to governorships and state general assemblies, state legislatures. As the LNC told a donor in 2003, the LNC is in the business of winning elections and the donor's gift goes towards making that happen." *LNC I*, 530 F. Supp. 2d at 179 (internal quotations and citations omitted).

83. "The LNC spends the bulk of its resources on obtaining access to the ballot for its candidates. Obtaining ballot access is probably the most important thing the [LNC] does, since the LNC's role in this electoral system is to field as many candidates . . . as possible for federal and state and local offices[.]" *Id.* (internal quotations and citations omitted). "Thus, the LNC funds petition drives for the party's federal candidates and works closely with its presidential candidate's campaign on ballot-access issues." *Id.* (citations omitted).

84. "In order to receive financial support from the LNC, Libertarian Party candidates must be certified as Libertarian candidates by the governing board of the party in their state and must not support any Presidential ticket other than the Libertarian Party's presidential ticket. The LNC has the power to take the Libertarian Party nomination away from

a presidential ticket that fails to conduct its campaign in accordance with the party's platform." *LNC I*, 930 F. Supp. 2d at 179 (citations omitted); *see also* LNC Policy Manual at 43.

85. "Individuals have bequeathed contributions directly to federal candidates and their authorized political committees." *LNC I*, 930 F. Supp. 2d at 190 (citation omitted). "Such contributions are subject to FECA's limit on contributions to 'any candidate and his authorized political committees.'" *Id.* (quoting 52 U.S.C. § 30116(a)(1)(A)).

86. For example, the Estate of Louise Welch made a $2,600 contribution to Yarmuth for Congress in 2013. Clark Decl., Ex. B, FEC Form 3X, ECF No. 24-22. In 2007, the Estate of Shirley Bogs made a $2,100 contribution to Kucinich for President 2008. Clark Decl. ¶ 15, tbl.6. And in 2006, the Estate of William G. Helis made a $2,100 contribution to Committee to Re-Elect Bobby Jindal. *Id.*

87. "Before BCRA banned soft-money donations to national party committees in 2002, the committees could accept the full amount of a bequest from an estate so long as the committees designated the amount in excess of FECA's contribution limit as soft money—that is, funds purportedly to be used for non-federal-election purposes." *LNC I*, 930 F. Supp. 2d at 183.

88. "As a result, when soft-money donations to national party committees were legal,

estates were able to donate the entire amount of a large bequest in one lump sum. For example, in 2002, the Estate of Martha Huges donated $390,000 from a bequest to the DNC. In 1999, the Estate of Lola Cameron donated $141,988 from a bequest to the RNC. In 1997, the Estate of Gwendolyn Williams donated $133,829 from a bequest to the DNC. And in 2002, the Estate of Joan Shepard donated $80,000 to the RNC." *Id.* at 183 (citations omitted).

## VI. The Specialized Purpose Regime's Impact on the LNC

89. "The Libertarian Party's ability to influence elections is in some measure related to its ability to raise and expend money." Sarwark Decl. ¶ 53. "The LNC needs, and would prefer, to spend its funds in order to directly speak to the electorate about its ideology and political mission, to support its candidates, and to build its institutional capability, including its ability to regularly qualify for the ballot in various states." *Id.*

90. "LNC's ability to solicit donations depends in part on having adequate financial resources on hand." *Id.* at ¶ 54. "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." *Id.*

91. Absent the annual contribution limit, the LNC would utilize donations exceeding such

limit for political expression, including improving the party's access to ballots, promoting awareness of the party and its ideology, and supporting candidates for state and federal office. *Id.* ¶ 56.

92. "The LNC is confident that it could identify and develop additional donors who would give beyond the base annual contribution limit (currently $33,900), but refrain from doing so because it is illegal to give larger amounts without restriction and they do not perceive sufficient value in donations that carry the government's purpose restrictions." *Id.* ¶ 58. "The LNC would also be better able to attract larger testamentary bequests if the donors would know that a larger portion of their bequest would be immediately effective." *Id.*

## VII. Testamentary Contributions

93. "[I]t is possible for a bequest to raise valid anti-corruption concerns," as the LNC has "concede[d]." *LNC I*, 930 F. Supp. 2d at 166.

94. As a general matter, nothing prevents a living person from informing the beneficiary of a planned bequest about that bequest. FEC's Proposed Facts at 8.

95. In the past, "associates of a decedent who has left a bequest for a national party committee [have] inform[ed] specific federal officeholders or candidates of the bequest." *LNC I*, 930 F. Supp. 2d at 188. "In 2009, an attorney

representing the co-trustees of a trust holding a bequest of over $100,000 for the Democratic Party wrote a letter to United States Senator Frank Lautenberg informing him of the bequest." *Id.* "The attorney stated that his 'good friend and accountant' who 'had interactions with [the Senator] in his role as a director of Holy Name Hospital' suggested that he alert the Senator to the bequest." *Id.* at 189 (alteration in original) (citations omitted). "The attorney sent Senator Lautenberg a copy of the trust documents and in doing so highlighted the fact that the bequest was for more than $100,000." *Id.*

96. "In April 2009, the LNC learned that it was to receive a $10,000 bequest from the estate of James Kelleher." *Id.* "Upon learning of the bequest in an e-mail, the LNC's then-national chair asked, 'Whom do we thank?,' even though Kelleher was deceased." *Id.* (citations omitted). "According to the LNC, in the case of a bequest it 'would be reasonable to thank anybody who was helping to [e]ffect the donation' to the LNC, including '[p]ossibly the executor. Possibly the estate administrator or the estate attorney.'" *Id.* (alterations in original) (citations omitted). "As the LNC sees it, '[s]omebody is doing something to give $10,000 to the [LNC], even if a penny is not coming out of their pocket, it is not inappropriate and mighty inexpensive to say thank you.'" *Id.* (alterations in original) (citations omitted). "For the Kelleher bequest, the LNC's director of operations directed a colleague to send a thank you note

to the executor of the Kelleher estate." *Id.* (citations omitted).

97. The LNC has been informed by living persons that those persons planned to make large bequests to the LNC. Those persons include Michael Chastain (value of bequest estimated to be between $500,000 and $1,000,000) and Dominick Frollini (value of bequest estimated to be between $25,000 and $75,000). Chastain Decl. ¶ 8; Def.'s Opp'n, Ex. 12, Frollini LNC Estate Planning Email, ECF No. 26-16.

98. Another living person, William Redpath, has informed the LNC that he would leave a large bequest, with a value estimated at $1.1 million, to fund a trust charged with furthering ballot access and electoral reform, but that he would prefer to leave an unrestricted contribution if it would not be subject to the current FECA contribution limits. Redpath Decl. ¶¶ 3–5.

99. "If a national party committee discovered that an individual planned to bequeath it a contribution or donation, the national party committee, its candidates, or officeholders could, in exchange, grant that individual political favors." *LNC I*, 930 F. Supp. 2d at 186. "A bequest may also help friends or family of the deceased in securing meetings with federal officeholders and candidates." *Id.* at 166.

100. "An individual can revoke a request before death, and . . . this possibility creates an incentive for a national party committee to

limit the risk that a planned bequest will be revoked." *Id.* at 186. "An individual's revocable promise to bequeath a contribution" in the future "could cause that political party, its candidates, or its office holders to grant political favors to the individual in the hopes of preventing the individual from revoking his or her promise." FEC's Proposed Facts at 7. Political committees "could feel pressure to . . . ensure that a (potential) donor is happy with the committee's actions lest [that donor] revoke the bequest." *LNC I*, 930 F. Supp. 2d at 167.

101. "A living person may alter his or her estate planning documents at any time before death for any reason, including that a candidate, office holder, or political party votes or takes a political position contrary to the person's wishes." FEC's Proposed Facts at 8.

102. Estates have contributed more than $3.7 million in bequeathed funds to recipients that must file reports with the FEC, according to FEC records dating from 1978 through August 2, 2017. Clark Decl. ¶¶ 1–4. The actual amount of bequeathed funds is likely even higher, because reporting entities are not required to inform the FEC that a particular contribution they received came from a bequest, and if they choose to do so anyway, they are not required to report this information in any standardized manner. *Id.* ¶ 5. For example, the LNC's disclosures regarding the Shaber bequest at issue in this litigation do not indicate that the contributions

are the result of a bequest. *Id.* "As a result, Shaber's bequest to the LNC is not reflected in the totals described above." *Id.* Bequests, therefore, are likely underreported to the FEC. *See id.*

103. National political party committees have reported bequeathed contributions that exceeded the General Party Limit. Clark Decl. ¶ 6 & tbl.1. For example, the Democratic Congressional Campaign Committee ("DCCC") received $206,955.46 between 2014 and 2016 in bequeathed contributions from Robert Bohna. *Id.* at tbl.1. The DCCC "accepted $167,992.06 of the total bequest on December 31, 2014, with $32,400 of that amount going to the DCCC's general account, and the remainder going to the type of segregated accounts described in 52 U.S.C. § 30116(a)(9): $38,392.06 of the contribution went into the DCCC's building fund, and $97,200 went to the DCCC's recount fund." *Id.* ¶ 7. "In 2015, the DCCC accepted an additional $32,400 of the bequest into its general fund." *Id.* "In 2016, the DCCC accepted an additional $6,563.40 into its general fund." *Id.*

104. "On January 13, 2017, the [RNC] accepted a total of $100,000 from the Estate of Richard Peter Belden by accepting $33,400 into its general account and $66,600 into its headquarters account." Clark Decl. ¶ 8.

105. "The [DNC] accepted $32,400 from the Ronald L. Gabriel Trust in 2013 and again in 2014." Clark Decl. ¶ 9. "In 2015, DNC

accepted $45,243.96 from the same trust by accepting $32,400 into its general account and an additional $12,843.96 into its convention account." *Id.*

106. The "DNC also accepted $50,000 from the Sarah Weatherbee Trust on April 4, 2015, with $33,400 of that amount going to the DNC's general account and $16,600 going to its convention account." *Id.* ¶ 10. "The next year, DNC accepted an additional $9,723.30 into its convention account." *Id.*

107. The "LNC accepted $30,800 from the Estate of Raymond Groves Burrington in 2012 and again 2013. In 2014, the LNC accepted $15,744.75 from the same estate." *Id.* ¶ 11.

108. In 2010, the trustee of a trust holding a $200,000 bequest to the DNC wrote a letter to the then-chair of the DNC stating:

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

> heartfelt belief that he would want this year's money going towards defeating Carly Fiorina and Meg Whitman in California. Buckley was a former employee of Hewlett Packard under the reigns [sic] of Carly Fiorina and he was not silent with regard to how he felt about her. I think he would be actively campaigning against her and Meg Whitman, if he were alive today.
>
> *LNC I*, 930 F. Supp. 2d at 188 (alteration in the original) (citation omitted). "The trustee then asked the DNC to let her know if the money would in fact be used to help defeat Fiorina and Whitman, because the decedent's 'friends would be pleased to know.'" *Id.*

**VIII. Joseph Shaber's Bequest**

109. Between 1988 and 2011, Joseph Shaber made donations to the LNC in amounts ranging from $10 to $300. Pet.'s Mot. Cert., Ex. E, Joseph Shaber Gift History, ECF 24-7. The most that Mr. Shaber donated to the LNC at any time during that period was $300 in March 1997. *Id.* Between June 2011 and November 2012, Shaber donated $100 per month to the LNC. *Id.* In May 2012, he donated an additional $100. *Id.*

110. In total, Mr. Shaber made 46 donations totaling $3,315 to the LNC. *Id.*

111. Mr. Shaber's contributions to the LNC made him eligible to be a life member of the LNC in 2012. Sarwark Dep. at 78:12–18.

112. "On May 20, 2013, LNC sent Joseph Shaber an invitation to attend a VIP reception to be held on July 12, 2013, to raise money for the David F. Nolan Building Fund." Def.'s Opp'n, Ex. 5, Joint Stipulation ¶ 3, ECF No. 26-9; *see also* Def.'s Opp'n, Ex. 14, LNC Invitation, ECF No. 26-18. This event was held in conjunction with FreedomFest, a large, annual convention for conservatives and libertarians. *See* Sarwark Dep. at 81:11–19; LNC Invitation at 3. The LNC typically participates in FreedomFest by having a table at the event and organizing breakout sessions to attempt to recruit and solicit donors. Sarwark Dep. at 82:1–10. Libertarian candidates frequently attend the event. *Id.* at 82:11–13.

113. Mr. Shaber was included on LNC in-house mailing lists, Def.'s Opp'n, Ex. 3, Pet.'s Resps. Def.'s Interrogatories at 1, ECF No. 26-7, to which the LNC sends communications soliciting contributions, Sarwark Dep. at 17:7–21, 70:14–73:12. Mr. Shaber responded to some of these solicitations with contributions to the LNC. *See* Joseph Shaber Gift History.

114. By April 2012, Mr. Shaber had contributed $750 to Ron Paul's campaign in the Republican presidential primary. *See* Def.'s Opp'n, Ex. 21, Shaber Contribution Receipt, ECF No. 26-25. Although Ron Paul was then

running for the Republican nomination, he later switched to the Libertarian Party after leaving federal office. *LNC I*, 930 F. Supp. 2d at 173.

115. Without the LNC's knowledge, the LNC was made a beneficiary of the Joseph Shaber Revocable Trust under a trust dated February 11, 2010. Sarwark Decl. ¶ 35.

116. The size of Mr. Shaber's gift to the LNC was contingent upon a variety of factors, including the value of Mr. Shaber's property and whether he would have grandchildren at the time of his passing. *See* Pet.'s Mot. Cert., Ex. G, Notice of Irrevocable Trust, ECF No. 24-9.

117. Mr. Shaber died on August 23, 2014, rendering the trust irrevocable. *Id.*; Pet.'s Mot. Cert., Ex. F, Escrow Agreement at 1, ECF No. 24-8; Pet,'s Mot. Cert., Ex. H, FEC Advisory Opinion 2015-05, ECF No. 24-10.

118. Mr. Shaber's death prevents him from engaging in political expression, association, or support. Def.'s First Objections & Resps. at 4; Sarwark Decl. ¶ 43.

119. The LNC first had access to money from Shaber's bequest in 2015, and took the maximum $33,400 allowed for unrestricted purposes, in compliance with the FECA's general purpose limit, in February of that year. Decl. of Robert Kraus, Operations Director, LNC ("Kraus Decl.") ¶¶ 2, 4, ECF No. 12-4; FEC Advisory Opinion 2015-05 at 1–2.

120. By the terms of the trust, the LNC was named as the specific beneficiary of a $50,000 monetary gift, plus a residual beneficiary of 25% of the remaining trust estate after specific distributions were made. Notice of Irrevocable Trust at 4–5. The LNC was also a contingent beneficiary of an additional 25% of the residue of Mr. Shaber's trust estate, which it would receive if Mr. Shaber died with no grandchildren. *Id.* Mr. Shaber did not have any grandchildren at the time of his death. Def.'s Opp'n, Ex. 29, Email from Michelle Lauer to William Hall at 1, ECF No. 26-33.

121. It was finally determined in September 2015, that The LNC's share of the Shaber trust was $235,575.20. Escrow Agreement at 1.[24]

122. The LNC had sent Mr. Shaber a fundraising appeal related directly to its headquarters building. Sarwark Decl. ¶ 36.

123. Mr. Shaber specified that the LNC should take his bequest "outright." Notice of Irrevocable Trust at 5.

124. The FEC is unaware of any condition or limitation attached by Mr. Shaber to his bequest to the LNC. Def.'s First Objections & Resps. at 5.

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[24] Other aspects of the record suggest that the LNC's share of the Shaber trust was $225,000. *See* FEC Advisory Opinion 2015-05 at 1–2. The parties seem to agree that the LNC's share of the trust was $235,575.20, however, *see* Def.'s Resps. Pet.'s Proposed Facts at 33, and thus the Court so finds.

125. The FEC is unaware at this time of any quid pro quo arrangement related to Mr. Shaber's bequest to the LNC. Def.'s First Objections & Resps. at 3.

126. The Trustee of Shaber's Trust could not impose restrictions on Mr. Shaber's bequest that Mr. Shaber did not himself place. FEC Advisory Opinion 2015-05 at 2.[25]

127. The LNC would accept and spend the entire amount of the Shaber bequest for its general expressive purposes, including expression in aid of its federal election efforts. Sarwark Decl. ¶ 38.

128. On September 15, 2015, the Trust and the LNC agreed to deposit the remaining $202,175.20 due to the LNC into an escrow account. Def.'s Opp'n, Ex. 27, Escrow Agreement at 10, ECF No. 26-31. The escrow agent, First International Bank & Trust, has control over the annual distributions to the LNC in amounts equal to the limitations of federal campaign finance law, 52 U.S.C § 30116(a)(1)(B). *Id.* at 1. The Escrow Agreement instructs the Escrow Agent to invest the funds in the escrow account in bank accounts or certificates of deposit, with all interest accruing to the benefit of the national Libertarian Party, and to annually disburse

[25] The FEC Advisory Opinion notes that "[t]he request [for an advisory opinion] states that Ms. Shaber, as trustee, has no power to require that the [LNC] accept its share in a way not required by the Settlor," though does not present this assertion as a fact. FEC Advisory Opinion 2015-05 at 2 (alterations omitted).

the funds to LP at the maximum allowed permitted by contribution limits. *Id.*; Sarwark Dep. at 93:15-19. The agreement explicitly provides that LP may challenge the legal validity of the contribution limit, and demand payment of the full amount remaining in the account should its challenge succeed. Escrow Agreement at 2.

129. To LNC's knowledge, neither Mr. Shaber nor anyone related to him or acting on his behalf has had any relationship with the LNC, its officers, board members, or candidates, apart from Mr. Shaber's contribution history. Sarwark Decl. ¶ 41.

130. The LNC received a contribution of $33,400 on behalf of Mr. Shaber from the escrow account on January 29, 2016. Def.'s Opp'n, Ex. 19, 2016 Itemized Receipts, ECF No. 26-23.

131. The LNC has also received its maximum contribution from the Shaber trust for 2017. Def.'s Opp'n, Ex. 18, 2017 Itemized Receipts, ECF No. 26-22.

132. The LNC is prohibited from pledging, assigning, or otherwise obligating the anticipated contributions before they are disbursed. FEC Advisory Opinion 2015-05 at 4 n.5 (citing FEC Advisory Opinion 2004-02).

133. Aside from pursuing its ideological and political mission, the LNC has provided nothing of value to Mr. Shaber, or to anyone else, in exchange for his bequest to the LNC. Sarwark Decl. ¶ 42.

134. Upon learning of the Shaber bequest, the LNC removed Mr. Shaber from the membership rolls. Sarwark Decl. ¶ 44.

## IX. Other Potential Donors To The LNC

135. The LNC solicits potential contributors to include the LNC as a beneficiary in donors' estate planning materials. *See* Def.'s Opp'n, Ex. 25, LNC Legacy Libertarians Email, ECF No. 26-29. On March 27, 2017, the LNC sent an email to 140,322 people on its contact list informing them that the party had started a planned giving program for people who want to designate the Libertarian Party as a beneficiary in their will. Pet.'s Resps. Def.'s Interrogatories at 4. The email noted that the "Libertarian Party will honor these generous supporters by listing their names on a permanent plaque at our headquarters." *Id.*

136. In response to this email, Nick Frollini wrote to the LNC to explain that he had designated the LNC as a beneficiary in his will and that he estimated his bequest would be worth "between $25,000 and $75,000 at the time of [his] passing." Frollini LNC Estate Planning Email at 1. The LNC's Head of Development, Lauren Daugherty, responded to the email with an invitation to have dinner with the LNC's national chair. *Id.* Frollini did not ultimately attend the dinner. Sarwark Dep. at 68:2–4.

137. "If contribution limits did not apply to bequests, the LNC would increase its outreach

about its planned giving program to its members who have a high capacity for giving." Pet.'s Resps. Def.'s Interrogatories at 4. "Planned giving would take a more prominent place in the LNC's donor cultivation via in person meetings, online correspondence, and traditional mail." *Id.*

138. "Among the donations that the LNC would solicit and accept in excess of the base annual contribution limit (currently $33,900) would be donations from donors who have already given the base annual contribution limit but stand ready to give more for unrestricted purposes if it were legal to do so, including Chris Rufer, Michael Chastain, the Shaber escrow, the forthcoming Clinard escrow, and, at some point, the Redpath and Chastain estates." Sarwark Decl. ¶ 57.

**a. Chris Rufer**

139. Chris Rufer is a Libertarian who desires "to maximize the ideals of the Libertarian Party and to see them implemented through political action." Rufer Decl. ¶ 1.

140. Rufer believes that "the Libertarian Party is the only organization that seeks to directly participate in and control the government, with the aim of steering its functions according to libertarian principles." *Id.* ¶ 1. Therefore, he "regularly donate[s] money to the [LNC], and to Libertarian candidates." *Id.* In 2016 alone, Rufer "donated over $900,000 to

directly support the election of the LNC's candidates." *Id.*

141. Rufer "trust[s] the LNC to effectively spend funds advancing its mission, which [he] support[s]." *Id.* ¶ 2. He wishes to "maximize LNC's unrestrained ability to advocate its message, and further [his] participation in the LNC's mission, by donating as much as [he is] comfortably able to the LNC to be spent freely in the LNC's judgment." *Id.* "The government's contribution limitations are below the amount [Rufer] would freely give the LNC this year, and in future years, to be spent as the LNC sees fit." *Id.*

142. Rufer says he wishes "to donate money to the [LNC] to advance its mission, not to obtain access to or the gratitude of any candidates or officeholders." *Id.* ¶ 3. Rufer has "no expectation of receiving any special access to candidates or officeholders if [he] were to donate over $33,900 to the [LNC] in any given year, to be spent for a particular purpose or without restriction." *Id.*

143. Rufer has "donated over $280,000 directly to the LNC over the years, including the maximum amounts allowed by law for unrestricted purposes this year, and in 2012, 2013, and 2016." *Id.* ¶ 4.

144. Rufer "understand[s] that the government now allows [him] to donate up to $339,000 to the LNC per year, but not if the money would be spent as the LNC wishes." *Id.* ¶ 5. "Any additional money [Rufer] would donate this

year beyond the $33,900 he has already donated would come with government-imposed strings." *Id.* Accordingly, Rufer is "not giving the LNC any additional money for the year." *Id.*

145. Rufer does "not want any part of [his] contribution this year restricted to spending on a headquarters building, fees for election contests and other legal proceedings, and presidential nominating conventions." *Id.* Rufer does "not believe that the LNC has much use for those spending purposes this year, and any money spent for those purposes may not communicate the same messages that the LNC would otherwise communicate with [his] donation." *Id.*

146. Rufer "would donate funds to the [LNC] in excess of the annual contribution limits for general, non-segregated purposes and the party's spending for segregated account purposes, this year and . . . in future years, but refrain[s] from doing so owing to the contribution limits and restrictions imposed by the government." *Id.* ¶ 6. Rufer understands that he "face[s] a real threat of prosecution if [he] were to violate the federal laws restricting [his] ability to donate money to the [LNC], and [he is] not willing to risk prosecution." *Id.*

147. "If it is determined that the [LNC] is not subject to the limitation for general, non-segregated purposes, currently $33,900 per year, such that donations exceeding that

amount per year need not be dedicated to the segregated purpose accounts, [Rufer] would expect to donate to the Libertarian National Committee in excess of that amount, this year and in future years." *Id.* ¶ 7.

**b. Michael Chastain**

148. Michael Chastain is a Libertarian who "desire[s] to maximize the ideals of the Libertarian Party and see them implemented through political action." Chastain Decl. ¶ 1.

149. Chastain believes that the "Libertarian Party is the only organization that seeks to directly participate in and control the government, with the aim of steering its functions according to libertarian principles." *Id.* ¶ 1. Therefore, Chastain "regularly donate[s] money to the [LNC] and to Libertarian candidates." *Id.*

150. Chastain "trust[s] the LNC to effectively spend funds advancing its mission, which [he] support[s]." *Id.* ¶ 2. He "wish[es] to maximize LNC's unrestrained ability to advocate its message, and further [his] participation in the LNC's mission, by donating as much as [he is] comfortably able to the LNC to be spent freely in the LNC's judgment." *Id.* "The government's contribution limitations are below the amount [Chastain] would freely give the LNC this year, and in future years, to be spent as the LNC sees fit." *Id.*

151. Chastain "wish[es] to donate money to the [LNC] to advance its mission, not to obtain access to or the gratitude of any candidates or officeholders." *Id.* ¶ 3. Chastain has "no expectation of receiving any special access to candidates or officeholders if [he] were to donate over $33,900 to the [LNC] in any given year, to be spent for a particular purpose or without restriction." *Id.*

152. "Thus far in 2017, [Chastain has] donated a total of $60,310.01 to the [LNC]." *Id.* ¶ 4. Chastain has "donated the maximum $33,900 in unrestricted funds, and an additional $26,410.01 to the building fund." *Id.*

153. Chastain "understand[s] that the government now allows him to donate up to $339,000 to the LNC per year, but not if the money would be spent as the LNC wishes." *Id.* ¶ 5. "Any additional money [Chastain] would donate this year beyond the $33,900 he has already donated for unrestricted purposes would come with government-imposed strings." *Id.* Accordingly, Chastain is "not giving the LNC any additional money for the year." *Id.*

154. Chastain does "not want any additional part of his contribution this year restricted to spending on a headquarters building, fees for election contests and other legal proceedings, and presidential nominating conventions." *Id.* Chastain does "not believe that the LNC has much use for those spending purposes this year, and any money spent for those

purposes may not communicate the same messages that the LNC would otherwise communicate with [his] donation." *Id.*

155. Chastain "would donate funds to the [LNC] in excess of the annual contribution limits for general, non-segregated purposes and the party's spending for segregated account purposes, this year and in future years, but refrain[s] from doing so owing to the contribution limits and restrictions imposed by the government." *Id.* ¶ 6. Chastain "understand[s] that he face[s] a real threat of prosecution if [he] were to violate the federal laws restricting [his] ability to donate money to the [LNC], and [he is] not willing to risk prosecution." *Id.*

156. "If it is determined that the [LNC]is not subject to the limitation for general, non-segregated purposes, currently $33,900 per year, such that donations exceeding that amount per year need not be dedicated to the segregated purpose accounts, [Chastain] would donate to the [LNC] in excess of that amount, this year and in future years. *Id.* ¶ 7.

157. Chastain is "in the process of revising [his] estate plan," and "plan[s] to make the LNC a contingent beneficiary in the amount of $500,000-$1,000,000." *Id.* ¶ 8.

158. Chastain "would not want the government to impose any strings on how the LNC would spend [his] bequest." *Id.* Chastain "would not want any part of his bequest to LNC restricted to spending on a headquarters

building, fees for election contests and other legal proceedings, and presidential nominating conventions." *Id.* Chastain "would want the LNC to have [his] bequest entirely without restriction." *Id.*

159. Chastain "would not bequeath money to LNC in an attempt to remain affiliated with the party after [he is] dead." *Id.* ¶ 9. "The party does not have deceased members." *Id.*

160. Chastain has "no idea who would be running as a Libertarian Party candidate for any office at the time [his] estate would disburse his assets to the Libertarian Party." *Id.* ¶ 10. Chastain "cannot predict who will run for office under the Libertarian banner in the future, and [he] hope[s] and expects to live beyond the time through which the party's candidates, and the likely issues they would espouse, may be currently foreseen." *Id.*

161. Chastain has "not received any sort of benefit whatsoever for promising to remember the Libertarian Party in [his] will should the contribution limits change." *Id.* ¶ 11. "The Party does not offer any benefits in exchange for being remembered in an individual's will, apart from perhaps a simple expression of gratitude." *Id.*

**c. William Redpath**

162. William Redpath is "currently an at-large member of the [LNC]." Redpath Decl. ¶ 1. He

has "served as the Treasurer of the Libertarian Party three times, and served as the National Chair of the Libertarian Party from July, 2006 through May, 2010." *Id.* He has also repeatedly "run for public office as a Libertarian." *Id.*

163. Redpath is a Libertarian who "desire[s] to maximize the ideals of the Libertarian Party and see them implemented through political action." *Id.* ¶ 2. Redpath believes that "the Libertarian Party is the only organization that seeks to directly participate in and control the government, with the aim of steering its functions according to libertarian principles." *Id.* "Therefore, [Redpath] regularly donate[s] money to the [LNC] and to Libertarian candidates." *Id.* "Apart from [his] time, over the years, [he has] contributed over $100,000 to the LNC." *Id.*

164. Redpath's "last will and testament provides that upon [his] death, 40% of his estate—a portion of his anticipated estate that is currently valued at over $1.1 million—would fund a trust charged with furthering ballot access and electoral reform to benefit the Libertarian Party." *Id.* ¶ 3.

165. Redpath "would prefer, however, to leave this seven-figure amount to the LNC as an unrestricted bequest." *Id.* ¶ 4. Redpath "would want [his] death to give expression to the LNC cause that [he has] so steadfastly endorsed and advocated throughout [his] life, and to assist in the LNC's expression of its

ideals and political program." *Id.* Redpath "trust[s] the LNC to effectively use [his] bequest for these expressive purposes, and want[s] to maximize the LNC's expression by seeing that [his] bequest is given to the LNC without restriction." *Id.*

166. "But for the current contribution limits, which limit the purposes for which the LNC could spend [Redpath's] bequest, [Redpath] would immediately alter [his] last will and testament to replace the current ballot access and electoral reform trust with an unrestricted donation of that same 40% of [his] estate to the LNC." *Id.* ¶ 5. Redpath "do[es] not want any part of his bequest restricted to spending on a headquarters building, fees for election contests and other legal proceedings, and presidential nominating conventions, and [he] will not leave a sizable gift to the LNC so long as these strings are attached to the LNC's ability to access [his] gift." *Id.* Redpath "do[es] not believe that the LNC has much use for those spending purposes in any given year, and any money spent for those purposes may not communicate the same messages that the LNC might otherwise communicate with [his] donation." *Id.*

167. Redpath "would not bequeath money to LNC in an attempt to remain affiliated with the party after he is dead." *Id.* ¶ 6. "The party does not have deceased members." *Id.*

168. Redpath has "no idea who would be running as a Libertarian Party candidate for any

office at the time his estate would disburse assets to the Libertarian Party." *Id.* ¶ 7. Redpath "cannot predict who will run for office under the Libertarian banner in the future, and [he] hope[s] and expect[s] to live beyond the time through which the party's candidates, and the likely issues they would espouse, may be currently foreseen." *Id.*

169. Redpath has "not received any sort of benefit whatsoever for promising to remember the Libertarian Party in [his] will should the contribution limits change." *Id.* ¶ 8. "The Party does not offer any benefits in exchange for being remembered in an individual's will, apart from perhaps a simple expression of gratitude." *Id.*

**d. Frank Welch Clinard, Jr.**

170. "LNC has been left a testamentary bequest by one Frank Welch Clinard, Jr. The bequest does not specify any use restriction. Sarwark Decl. ¶ 45; *see also* Pet.'s Mot. Cert., Ex. L, Last Will and Testament of Frank Welch Clinard, Jr. at 3–4, ECF No. 24–14.

171. Between 1988 and 2008, Clinard had sporadically donated to the LNC, in small amounts that totaled $1,625.30 throughout the time period. *See* Pet.'s Mot. Cert., Ex. M, Donor Clinard Gift History, ECF No. 24-15. Only three times did his donations meet or exceed

$100, with the highest donation amounting to $159. *See id.*[26]

172. "To LNC's knowledge, neither Clinard nor anyone related to him or acting on his behalf has had any relationship with the LNC, its officers, board members, or candidates, apart from Clinard's contribution history." Sarwark Decl. ¶ 47.

173. Clinard's bequest to LNC totals $111,863.52. Pet.'s Mot. Cert., Ex. N, Estate of Frank W. Clinard, Jr. at 12, ECF No. 24-16.

174. "LNC would accept and spend the entire amount of the Clinard bequest for its general expressive purposes, including expression in aid of its federal election efforts." Sarwark Decl. ¶ 48.

175. "LNC is in the process of establishing an escrow account so that it may receive the entirety of Clinard's bequest for general expressive purposes, without restriction." *Id.* ¶ 49.

176. "Aside from pursuing its ideological and political mission, LNC has provided nothing of value to Frank Clinard, or to anyone else, in

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[26] The Sarwark Declaration asserts that Clinard donated $1,625.30 to the petitioner between 1996 (rather than 1988) and 2008. Sarwark Decl. ¶ 46. This appears to be a typographical error, which the parties inadvertently repeat, *see* Def.'s Resps. Pet.'s Proposed Facts at 49, as Exhibit M to the petitioner's memorandum shows that Clinard donated $1,625.30 to the petitioner between 1988 and 2008. *See* Donor Clinard Gift History.

exchange for his bequest to the LNC." *Id.* ¶ 50.

177. "Frank Clinard's death prevents him from engaging in political expression, association, or support." *Id.* ¶ 51.

178. "The LNC has removed Frank Clinard from its membership rolls on account of his death." *Id.* ¶ 52.

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## APPENDIX C

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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| LIBERTARIAN NATIONAL COMMITTEE, INC.,<br>Plaintiff,<br>v.<br>FEDERAL ELECTION COMMISSION,<br>Defendant. | Civil Action No. 16-121 (BAH)<br>Chief Judge Beryl A. Howell |

**ORDER**

(Filed Jun. 29, 2018)

Upon consideration of the petitioner Libertarian National Committee, Inc.'s Motion to Certify Facts & Questions, ECF No. 24, the defendant Federal Election Commission's Motion to Dismiss for Lack of Jurisdiction, ECF No. 25, the related legal memoranda in support and in opposition, the exhibits and declarations related thereto, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that the defendant's Motion to Dismiss is DENIED; and it is further

**ORDERED** that the petitioner's Motion to Certify is GRANTED IN PART and DENIED IN PART; specifically, the petitioner's motion is granted with respect to

the petitioner's first question and with respect to the petitioner's second and third questions as reformulated below, and denied with respect to the petitioner's second and third questions as originally formulated; and it is further

**ORDERED** that the following questions of law, as well as the findings of fact contained in the Appendix to the accompanying Memorandum Opinion, are certified to the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 52 U.S.C. § 30110:

1. Does imposing annual contribution limits against the bequest of Joseph Shaber violate the First Amendment rights of the Libertarian National Committee?

2. Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), and 30125(a)(1), on their face, violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend its contributions above § 30116(a)(1)(B)'s general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?

3. Do 52 U.S.C. §§ 30116(a)(1)(B), (a)(9), and 30125(a)(1) violate the First Amendment rights of the Libertarian National Committee by restricting the purposes for which the Committee may spend that portion of the bequest of Joseph Shaber that exceeds § 30116(a)(1)(B)'s general purpose contribution limit to those specialized purposes enumerated in § 30116(a)(9)?

**SO ORDERED.**

Date: June 29, 2018

[SEAL] [Beryl A. Howell]
BERYL A. HOWELL
Chief Judge

## APPENDIX D

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| LIBERTARIAN NATIONAL COMMITTEE, INC.,<br>Plaintiff,<br>v.<br>FEDERAL ELECTION COMMISSION,<br>Defendant. | Civil Action No. 16-121 (BAH)<br>Chief Judge Beryl A. Howell |

**MEMORANDUM OPINION**

(Filed Jan. 3, 2017)

The plaintiff, the Libertarian National Committee ("LNC"), was left a testamentary bequest by Joseph Shaber in 2015 in the amount of $235,575.20 but was allegedly unable to accept the bequest in full due to restrictions imposed by the Federal Election Commission Act ("FECA"), *see* 52 U.S.C. §§ 30116 and 30125. The LNC challenges certain aspects of the statutory scheme as unconstitutional and seeks certification of the constitutional issues it raises to the D.C. Circuit *en banc*, pursuant to 52 U.S.C. § 30110.[1] The defendant,

[1] Pursuant to 52 U.S.C. § 30110, "the national committee of any political party" may bring an action "in the appropriate district court" challenging the constitutionality of a FECA provision. Section 30110 further provides that the district court "immediately shall certify" any non-frivolous constitutional challenge to

the Federal Election Commission ("FEC"), has moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that LNC lacks standing to bring this suit. This potential Article III issue must be addressed before certifying any question to the D.C. Circuit under § 30110. *See Holmes*, 823 F.3d at 70 ("If the requirements of Article III of the Constitution are satisfied, the district court must 'immediately' 'certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved . . . sitting *en banc*.'"); *see also Republican Party of La. v. FEC*, 146 F. Supp. 3d 1, 8 (D.D.C. 2015) ("This Court may properly dismiss [the plaintiffs'] claims [under analogous Bipartisan Campaign Reform Act] without convening a three-judge panel if [the plaintiffs] lack standing to bring those claims."); *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012) (describing standing as a "threshold jurisdictional question" (quoting *Byrd v. EPA*, 174 F.3d 239, 243 (D.C. Cir. 1999)). For the reasons set out below, the FEC's motion will be denied.

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FECA to the court of appeals *en banc. Id.*; *see also Holmes v. FEC*, 823 F.3d 69, 71 (D.C. Cir. 2016) ("[D]istrict courts do not certify 'frivolous' constitutional questions to the *en banc* court of appeals." (quoting *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.4 (1981))).

## I. BACKGROUND

The challenged statutory framework is summarized before discussing the particular facts underlying this suit and the LNC's claims.

### A. FECA's Limits on Contributions to Political Committees

Under FECA, "no person," including, *inter alia*, a testamentary estate,[2] "shall make contributions . . . 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." 52 U.S.C. § 30116(a)(1). FECA was amended in 2014 to allow individuals to make additional donations of up to three hundred percent of the annual contribution limit set out in § 30116(a)(1) for each of three specified purposes: (1) "expenses incurred with respect to a presidential nominating convention;" (2) "expenses incurred with respect to the construction, purchase,

[2] The FEC has interpreted the word "person" as used in § 30116(a)(1) to include an individual's testamentary estate, *see*, *e.g.*, Pl.'s Opp'n, Ex. C ("FEC Advisory Op. 2015-05"), ECF No. 12-3. The LNC does not challenge this interpretation of the statute, and, in a recent case involving these same parties, this Court explained that the FEC's interpretation is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). *See LNC v. FEC* ("*LNC I*"), 930 F. Supp. 2d 154, 165 (D.D.C. 2013) ("The FEC's interpretation of the statute to include a testamentary bequest appears reasonable, is not seriously challenged by the LNC in its briefs, and is entitled to deference under *Chevron*. . . .").

renovation, operation, and furnishing of one or more headquarters buildings of the party;" and (3) "expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings." *Id.* § 30116(a)(9)(A)–(C). Donations accepted for the three enumerated purposes under § 30116(a)(9) must be funneled into a "separate, segregated account" and not comingled with other funds. *Id.*

The contribution limits set forth in § 30116(a)(1) are adjusted for inflation in odd-numbered years such that, at the time this Complaint was filed, the annual limit on a general account contribution was $33,400, and the annual limit on a segregated account contribution for each of the three segregated accounts was $100,200. *See id.* § 30116(c). Accordingly, in 2015, the total amount that a party's political committee could accept from any person, including a testamentary estate, was $334,000.

### B. Bequest to the LNC by Joseph Shaber

The LNC is "the national committee of the Libertarian Party of the United States." Compl. ¶ 1. Its mission is "to field national [p]residential 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." *Id.* From 1988 to 2011, Mr. Shaber made small, periodic donations to the LNC. *Id.* ¶ 15. "Unbeknown to the LNC, it was made a beneficiary of the Joseph Shaber Revocable Living Trust U/T/D

February 11, 2010." *Id.* ¶ 16. Upon his death on August 23, 2014, Mr. Shaber's trust became irrevocable, with the LNC's share amounting to $235,575.20. *Id.* ¶ 17. No restrictions were placed on how the LNC could utilize the bequest, and the trustee maintains that it is "entirely up to the LNC how it wishes to apply the distribution." *See* Def.'s Mot. Dismiss at 6–7, ECF No. 9 (quoting Letter from Trustee's Counsel to FEC (dated June 15, 2015), available online at http://saos.fec.gov/aodocs/1317218.pdf (last visited Dec. 27, 2016)).

On February 23, 2015, the trustee distributed $33,400 of the bequest to the LNC's general account. *Id.* ¶ 19. LNC asserts that it "would [have] accept[ed] and spen[t] the entire amount of the Shaber bequest for its general expressive purposes" but for FECA's contribution limits. *Id.* ¶¶ 18–19. On May 6, 2015, the trustee requested an advisory opinion from the FEC as to whether the remainder of the bequest could be placed in a third-party escrow account for annual disbursements pursuant to § 30116(a)(1). The FEC approved the trustee's request on August 11, 2015. *See generally* FEC Advisory Op. 2015-05. In January 2016, the LNC accepted another $33,400 of the Shaber bequest from escrow for deposit into the party's general purpose account. Compl. ¶ 20. Thus, as of the filing of the complaint, approximately $168,775.20 of the bequest remained in escrow. *See* Def.'s Mot. Dismiss at 7; Pl.'s Opp'n Def.'s Mot. Dismiss ("Pl.'s Opp'n") at 20, ECF No. 12 (referencing $168,000 in escrow).

### C. The LNC's Claims

The LNC's complaint alleges in three counts that application of the § 30116 contribution limits to the Shaber bequest "violates the First Amendment speech and associational rights of the LNC and its supporters," *id.* ¶ 27 (Count I), and that the segregated accounts scheme, which allows parties to accept larger donations for three specified purposes only, amounts to a content-based restriction on speech, both on its face and as applied to the Shaber bequest *id.* ¶¶ 31, 34 (Counts II and III); *see also* Pl.'s Opp'n at 8 ("[P]rivileging large donations based on their purposes—as if a party would be corrupted by a $33,401 donation for general purposes, but not a $312,000 donation for conventions, buildings, and lawyers[—]is an irrational content-based speech restriction."). The LNC seeks "[a]n order permanently enjoining [the FEC] . . . from enforcing 52 U.S.C. §§ 30116 and 30125, either generally or in relation to the Shaber [b]equest," in addition to "[d]eclaratory relief consistent with the injunction." *Id.*, Prayer for Relief ¶¶ 1–2.

## II. LEGAL STANDARD

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Indeed, federal courts are "forbidden . . . from acting beyond our authority," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir.

2008), and, therefore, have "an affirmative obligation 'to consider whether the constitutional and statutory authority exist for us to hear each dispute,'" *James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (quoting *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 196 (D.C. Cir. 1992)).

Federal Rule of Civil Procedure 12(b)(1) is the proper vehicle for moving to dismiss a complaint due to lack of subject matter jurisdiction. Absent subject-matter jurisdiction over a case, the court must dismiss it, Fed. R. Civ. P. 12(h)(3); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506–07 (2006), and the burden of establishing any jurisdictional facts to support the exercise of the subject matter jurisdiction rests on the plaintiff, *see Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007). A court "may consider materials outside the pleadings" in determining whether jurisdiction exists. *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *see also Belhas v. Ya'Alon*, 515 F.3d 1279, 1281 (D.C. Cir. 2008) (examining materials outside the pleadings in ruling on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction).

With regard to standing, Article III of the Constitution restricts the power of federal courts to hear only "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (alterations in original)

(quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997))). As the Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Defs. of Wildlife*, 504 U.S. at 560. First, the plaintiff must have suffered an "injury in fact," *i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted). Second, there must be "a causal connection between the injury and the conduct complained of," *i.e.*, the injury alleged must be fairly traceable to the challenged action of the defendant. *Id.* Finally, it must be likely that the injury will be redressed by a favorable decision. *Id.* at 561. In analyzing whether a party has standing, the Court "must be 'careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiff[] would be successful in [its] claims.'" *In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)).

## III. DISCUSSION

In considering the FEC's motion to dismiss the LNC's complaint for lack of standing, a recent case in this Court involving the same parties is instructive

since, in that case, the LNC was found to have standing to challenge the predecessor provision to § 30116(a). *See LNC v. FEC ("LNC I")*, 930 F. Supp. 2d 154, 163 (D.D.C. 2013) (Wilkins, J.).[3] The *LNC I* Court explained that "[t]he LNC satisfies the core elements of Article III's case-or-controversy requirement, because it alleges an injury connected to the FEC's conduct—the prevention of obtaining immediate control of the entire . . . bequest—that would be redressed by a favorable decision." *Id.*

The FEC advances two arguments in an apparent effort to show why *LNC I*'s standing analysis does not apply here, but neither argument is persuasive.[4] First, relying on the 2014 amendment to § 30116, which established the segregated accounts scheme and therefore increased the total amount a person may donate to a political committee in a given year, the FEC asserts that the LNC's injury is self-inflicted because the LNC *could* accept the full bequest but has chosen not to. Second, and in the alternative, the FEC argues that even if not self-inflicted, the alleged injury, which the FEC construes as a competitive disadvantage vis-à-vis the two major political parties, is not a valid injury in fact under binding precedent, that actors in the political marketplace, not FECA, caused LNC's claimed

[3] FECA was transferred from Title 2 to Title 52 on September 1, 2014. Thus, *LNC I* refers to 2 U.S.C. § 441a(a)(1), which is currently codified at 52 U.S.C. § 30116(a)(1).

[4] Notably, while referencing *LNC I* for various propositions, the FEC fails to engage with *LNC I*'s most pertinent holding that the LNC had standing to challenge the contribution limits applicable to testamentary estates.

competitive disadvantage, and that a favorable decision from this Court is not likely to redress the claimed injury. The FEC's arguments are addressed *seriatim*.

### A. Self-Inflicted Injury

"[S]elf-inflicted harm doesn't satisfy the basic requirements for standing" since it is neither a "cognizable" injury nor "fairly traceable to the defendant's challenged conduct." *Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Gonzalez*, 468 F.3d 826, 831 (D.C. Cir. 2006); *accord Afifi v. Lynch*, 101 F. Supp. 3d 90, 110 (D.D.C. 2015); *Ellis v. Comm'r of IRS*, 67 F. Supp. 3d 325, 336–37 (D.D.C. 2014), *aff'd sub nom. Ellis v. C.I.R.*, 622 Fed. App'x 2 (D.C. Cir. 2015). According to the FEC, the LNC has *chosen* not to accept the entire Shaber bequest even though it could and, consequently, any injury suffered by the LNC is self-inflicted and thereby insufficient to establish standing. Def.'s Mot. Dismiss at 10–14. As support, the FEC points out that § 30116(a) permits the LNC to accept immediately the entire balance of the bequest by funneling funds beyond the general spending account into the special-purpose segregated accounts. *See id.* at 11. Indeed, FECA allows a committee of a national party to accept, in addition to $33,400 for general spending, $100,200 for the party's presidential nominating convention, $100,200 for work on the party headquarters, and $100,200 for legal fees, which, when combined, far exceeds the balance in the escrow account. *See id.* ("FECA allows the LNC in 2016 to receive a total of $334,000 from any one donor."). Accordingly, the FEC

contends that the alleged harm flows from the LNC's choice not to deposit the funds into segregated accounts.[5]

The FEC's argument papers over the nuance in the LNC's claims. The LNC does not argue that the amended statutory scheme allowing a party to accept a contribution as large as $334,000 prohibits the LNC from accepting the entire Shaber bequest in one lump sum. Rather, the LNC alleges that the harm is due to the restriction on the political committee's inability to accept the entire bequest for *general expressive purposes* when the bequest became available in 2015. *See* Compl. ¶¶ 18–19; Pl.'s Opp'n at 8 ("LNC's injury is that it cannot accept money—from Shaber's bequest *and*

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[5] The FEC's reliance on *Sykes v. FEC*, 335 F. Supp. 2d 84, 87 (D.D.C. 2004), *see* Def.'s Mot. Dismiss at 10–11; Def.'s Reply at 7, is misplaced. According to the FEC, "[i]n the campaign finance context, any harm allegedly arising from a political actor's voluntary choice not to accept contributions that FECA allows it to accept is a self-inflicted injury that cannot support standing." Def.'s Mot. Dismiss at 10. In *Sykes*, the plaintiff, a Green Party candidate for Senate, challenged FECA's tacit authorization of out-of-state campaign contributions. *Sykes*, 335 F. Supp. 2d at 85. He argued that FECA's silence as to out-of-state contributions injured his opportunity to compete in the Senate race, *id.* at 88–89, even though he had not actually received any out-of-state contributions, *id.* at 87. This Court held, *inter alia*, that the plaintiff had not established an injury in fact and therefore lacked standing to sue because he had challenged FECA's "*failure to restrict* out-of-state contributions" as opposed to "[a] portion[ ] of FECA which *directly restricted* his own campaign activity." *Id.* at 89 (emphasis in original). Here, § 30116 "directly restrict[s]" the LNC's ability to accept the Shaber bequest. Accordingly, the discussion in *Sykes* about the standard for asserting an injury in fact does not support the FEC's position.

*from other donors*—for spending *as it wishes*.") (emphasis in original). Thus, the fact that the LNC could accept the entire bequest by utilizing its segregated accounts does not eliminate the alleged harm. The precise harm alleged confers a sufficient injury in fact to sustain standing. *See Wagner v. FEC*, 717 F.3d 1007, 1010 n.1 (D.C. Cir. 2013) ("Our constitutional jurisdiction is clear. Because Appellants declare that they would make political contributions but for section 441c [52 U.S.C. § 30119's predecessor provision], they have Article III standing. Section 441c allegedly deprives them of a legally protected interest (making a political contribution) that an order of this court declaring section 441c unenforceable would remedy."); *Republican Party of La. v. FEC*, ___ F. Supp. 3d ___, No. 15-cv-1241, 2016 WL 6601420, at *4 (D.D.C. Nov. 7, 2016) (three-judge panel) ("The state party's inability to use corporate funds in its possession for additional [federal election activity] in which it would like to engage qualifies as a concrete injury.").

The FEC, however, advances an additional theory as to why the LNC's injury is self-inflicted. *See* Def.'s Mot. Dismiss at 12. The FEC suggests that "LNC's public disclosure reports show that it actually spends significant amounts on expenses for which Segregated Account funds may be used" and, therefore, the LNC "could have spent the entire bequest during this election cycle had it chosen to do so." *Id.* According to the FEC, "the LNC spent in excess of $940,000 on its Alexandria building headquarters" during the 2014 election cycle, *id.*, and spent $120,000 on its 2014 national

convention, *id.* at 12–13. At the time the FEC moved to dismiss this case, "the LNC has spent approximately $63,000 on its headquarters" during the 2016 election cycle. *Id.* at 13; *see also* Def.'s Notice Supplemental Jurisdictional Facts at 2, ECF No. 18 ("Since the parties completed briefing, the LNC has filed public disclosure reports with the FEC confirming that it has in fact spent at least as much money on segregated account purposes in 2016 as it would have received from the bequest."). Based on these spending sums, the FEC posits that "[i]f the LNC were to accept the remaining $168,775.20 of the Shaber bequest into its Segregated Accounts and spend it on its convention, building, or legal expenses, that same amount from the LNC's General Account would become available for other purposes—including advocacy and elections." *Id.* at 13–14. The FEC thus contends that the LNC's alleged injury "is not an injury in fact but a mere 'self-inflicted budgetary choice.'" *Id.* at 14 (quoting *Envtl. Integrity Project v. McCarthy*, 13-cv-1306, 2015 WL 5730427, at *8 (D.D.C. Sept. 29, 2015)).

The FEC's argument has some surface-level appeal, but does not stand up to scrutiny. The LNC's precise injury is that it was not permitted to accept the Shaber bequest in full, when it became available, to spend on federal election activities. *See* Compl. ¶ 18 ("LNC would accept and spend the entire amount of the Shaber bequest for its general expressive purposes, including expression in aid of its federal election efforts."). Since the bequest became available in 2015, the LNC's 2014 and 2016 expenditures are of no

moment.[6] Likewise, as the LNC points out, "FECA's limits apply per annum," Pl.'s Opp'n at 13, so the LNC's total spending in a given election cycle is a red herring. What matters is that in 2015, LNC spent no money on a presidential nominating convention, $72,827.11 on its headquarters, and $7,260.61 on legal proceedings, totaling $80,872.72 in segregated purpose spending. Decl. of Robert Kraus, Operations Director, Libertarian National Committee, Inc. ¶¶ 5–7, ECF No. 13. On these undisputed attestations, if the LNC had accepted the entire bequest when it became available by taking $33,400 of the bequest into its general account and the remainder (approximately $168,000, *see* Def.'s Mot. Dismiss at 7; Pl.'s Opp'n at 20) into segregated purpose accounts, the LNC would have accepted more into its segregated purpose accounts than it spent on its building, presidential nominating convention, and legal expenses in 2015. Due to this overage, accepting the entire bequest would not have freed up

[6] The LNC contends that even if the entire bequest has been accepted into segregated accounts, it still would not have freed up the same amount of money for expressive purposes. *See* Pl.'s Resp. Notice of Supplemental Jurisdictional Facts at 2, ECF No. 19 ("Worse still, the FEC's math doesn't add up."). The Court need not resolve this factual dispute given that the LNC's 2016 expenditures are irrelevant for standing purposes. The Court also need not address the LNC's argument that "the FEC bars political parties from making strategic withdrawals from testamentary bequest trusts," Pl.'s Opp'n at 9, and thus would not permit the LNC to accept the bequest into segregated accounts in order to free up funds in the general account for other purposes. Even if the FEC did prohibit this, the dispositive and undisputed allegation here is that the LNC did not spend an amount equivalent to the remaining bequest funds on segregated account purposes in 2015.

the full value of the Shaber bequest for engaging in federal election activities and resulted in the alleged injury in 2015. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The FEC's argument that the LNC's injury was self-inflicted thus fails.

### B. Competitive Disadvantage

The FEC argues that "[e]ven if the LNC's choice to forego [sic] immediate acceptance of the Shaber bequest is not to blame for its claimed competitive injury, that alleged injury cannot support the LNC's standing for three independent reasons." Def.'s Mot. Dismiss at 15. First, under *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) and *McConnell v. FEC*, 540 U.S. 93, 227 (2003), "LNC's claim that it is competitively disadvantaged and so must use the Shaber bequest to achieve electoral success fails to allege a valid injury in fact." *See* Def.'s Mot. Dismiss at 15. Second, the LNC's alleged competitive disadvantage is not caused by FECA but by decisions of private actors in the political marketplace. *Id.* at 15–17. Finally, a favorable decision by this Court would not remedy the alleged injury but instead would exacerbate the injury by giving the major parties access to more money. *Id.* at 17–19.

These arguments are predicated on the FEC's characterization of the LNC's alleged injury as stemming from a "competitive disadvantage . . . against its major party rivals." *Id.* at 2. In suggesting that the

LNC's alleged injury is a competitive disadvantage, the FEC cherry-picks certain phrases from the LNC's complaint referencing the party's interest in competing with other parties. *See* Def.'s Mot. Dismiss at 8 (citing Compl. ¶¶ 12–14, 26). The Complaint does allege that, "[u]nlike 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." Compl. ¶ 12; *see also id.* ¶ 13 ("[T]he LNC has comparatively less use for funds intended to support national conventions, a headquarters building, or attorney fees."). Further, the Complaint alleges that "[i]n the absence of the Party Limit's application to the Shaber bequest, the LNC would substantially improve its ability to advocate and achieve electoral success by taking immediate control over the balance of the Shaber funds." *Id.* ¶ 26.

The Court agrees with the LNC that "the Commission does not afford the Complaint a fair reading." Pl.'s Opp'n at 18; *see also id.* at 19 ("The Libertarian Party certainly does *not* argue that the First Amendment requires a level electoral playing field, free of the advantages that speakers may have owing to their resources." (emphasis in original)). The phrases the FEC relies on are included in the Complaint to explain why the LNC sought to accept the entire bequest into its general purpose account when the bequest became available and why accepting the bequest into the segregated accounts was not an adequate substitute. *See id.* at 19. As noted above, the LNC clearly articulates

the injury suffered to be the inability to accept the entire Shaber bequest, when it became available in 2015 to engage in election activities, including various forms of expressive conduct. *See* Compl. ¶¶ 14, 18–19. Accordingly, the FEC's arguments that the LNC's alleged injury is not cognizable, not caused by the FEC, and not redressable are premised on a mischaracterization of the alleged injury and therefore fail.[7]

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[7] The LNC suggests that the FEC's arguments sound more in mootness than standing and then proceeds to argue that the claims asserted here fall within the "capable of repetition, yet evading review" exception to mootness. *See id.* at 14–18 (citing *Honeywell Int'l v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010)). The FEC argues in reply that "[b]ecause the LNC lacks standing, its assertion that its claims are capable of repetition yet evading review is beside the point." Def.'s Reply at 9 n.4. Mootness has been an issue in past litigation between these two parties concerning FECA's contribution limits. *See generally LNC v. FEC*, No. 13-5088, Order (D.C. Cir. Mar. 26, 2014), ECF No. 1485531 (en banc) (unpublished). In the earlier case, however, the LNC had accepted or was able to accept the entire bequest—into its general account—by the time the case reached the D.C. Circuit. *See* FEC's Suggestion of Mootness at 1, *LNC I*, No. 13-5088 (D.C. Cir. Feb. 3, 2014) ("As of January 1, 2014, however, the LNC has either already received, or can immediately accept the entire bequest."). Here, thousands of dollars remain in escrow, waiting to be distributed into the LNC's general account. Accordingly, the LNC's claims are not moot, *see Judicial Watch, Inc. v. Kerry*, No. 16-5015, 2016 WL 7439010, at *2 (D.C. Cir. Dec. 27, 2016) (reversing the district court's dismissal on mootness grounds because the plaintiff "ha[d] not 'been given everything [they] asked for' " (quoting *Noble v. Sombrotto*, 525 F.3d 1230, 1241 (D.C. Cir. 2008))), and the Court need not address the LNC's arguments concerning the capable of repetition yet evading review exception to mootness.

## IV. CONCLUSION

The LNC has standing to challenge FECA provisions that restricted immediate access to the full amount of a bequest for expressive activities. That the LNC could accept the entire bequest by depositing the funds into segregated accounts does not alter this analysis because the LNC alleges that it wishes to use the funds for expressive activities. Accordingly, the FEC's motion to dismiss is denied. The parties shall submit jointly, within twenty days, a schedule to govern further proceedings in this matter.

Date: January 3, 2017

[SEAL] [Digitally signed]
BERYL A. HOWELL
Chief Judge

## APPENDIX E

**U.S. Const. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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**52 U.S.C. § 30110**

Judicial review

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 enbanc.

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**52 U.S.C. § 30116**

Limitations on contributions and expenditures

(a) Dollar limits on contributions.

(1) Except as provided in subsection (i) and section 315A [52 USCS § 30117], no person shall make contributions–

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(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, or, in the case of contributions made to any of the accounts described in paragraph (9), exceed 300 percent of the amount otherwise applicable under this subparagraph with respect to such calendar year;

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(9) An account described in this paragraph is any of the following accounts:

(A) A separate, segregated account of a national committee of a political party (other than a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay loans the proceeds of which were used to defray

such expenses, or otherwise to restore funds used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may make from such account may not exceed $ 20,000,000 with respect to any single convention.

(B) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses (including expenses for obligations incurred during the 2-year period which ends on the date of the enactment of this paragraph).

(C) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.

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(c) Increases on limits based on increases in price index.

(1) (A) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period.

(B) Except as provided in subparagraph (C), in any calendar year after 2002 –

(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of $ 100, such amount shall be rounded to the nearest multiple of $ 100.

(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the

date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election.

(2) For purposes of paragraph (1) –

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items – United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means –

(i) for purposes of subsections (b) and (d), calendar year 1974; and

(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h), calendar year 2001.

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2), (3), and (4) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds –

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of –

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e)); or

(ii) $ 20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $ 10,000.

(4) Independent versus coordinated expenditures by party.

(A) In general. On or after the date on which a political party nominates a candidate, no committee of the political party may make –

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 301(17) [52 USCS § 30101(17)]) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 301(17) [52 USCS § 30101(17)]) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) Application. For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) Transfers. A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle,

transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

(5) The limitations contained in paragraphs (2), (3), and (4) of this subsection shall not apply to expenditures made from any of the accounts described in subsection (a)(9).

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**52 U.S.C. § 30125**

Soft money of Political Parties

(a) National committees.

(1) In general. A national committee of a political party (including a national congressional campaign committee of a political party) may not 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 this Act.

(2) Applicability. The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

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