UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	)	Civ. No. 16-121 (BAH)
Plaintiff,	)	
v.	)	
FEDERAL ELECTION COMMISSION	)	MOTION TO DISMISS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendant Federal Election Commission moves this Court for an order dismissing the complaint of plaintiff Libertarian National Committee, Inc. pursuant to Federal Rule of Civil Procedure 12(b)(1). In support of its motion, the Commission has filed the attached Memorandum of Points and Authorities in Support of Its Motion to Dismiss for Lack of Jurisdiction and a Proposed Order.

Respectfully submitted,

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April 6, 2016

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Defendant Federal Election Commission moves this Court to dismiss the complaint of plaintiff Libertarian National Committee, Inc. ("LNC") for lack of standing. For the second time in five years, the LNC challenges the constitutionality of the Federal Election Campaign Act's ("FECA") limit on contributions from individuals to national political parties. Last time, the district court held that the LNC's broad claim that it had a general First Amendment right to accept all bequeathed contributions in excess of that limit was frivolous. The D.C. Circuit summarily affirmed. Later, in 2014, Congress amended FECA to allow national party committees like the LNC to accept contributions into three new accounts, which increased the total amount that the LNC may annually accept from a donor ten-fold — to $334,000. Also that year, another LNC donor bequeathed the LNC approximately $235,000. Rather than accept the entire bequest, the LNC has filed this lawsuit, which renews many of the failed arguments from its previous suit.

The LNC lacks standing because its alleged injuries are self-inflicted. The Supreme Court has held that alleged harm arising from a plaintiff's choice not to accept contributions that FECA permits cannot support standing. The LNC admits that FECA allows it to accept the entire bequest immediately, but the LNC says it has chosen not to because the newly-permitted accounts were established for use on specific types of common political party expenses, rather than campaign advocacy. The LNC's motives for not accepting the entire bequest now are beside the point; its alleged injuries are not caused by FECA. But in any event, the LNC spends large amounts on the very types of activities for which the new accounts exist — like its Alexandria headquarters and the national convention it will hold in Orlando in May. So the LNC could use the entire bequest, or other funds the bequest would free up, to achieve greater electoral success. It simply chooses not to.

Even if not self-inflicted, the competitive disadvantage the LNC claims to suffer against its major party rivals does not grant it standing. First, there is no legal right to compete equally against more wealthy electoral opponents. Second, the LNC's alleged disadvantage results not from FECA, which applies in the same way to all political parties, but from the decisions of private actors in the political marketplace. Finally, a favorable ruling invalidating the contribution limit would likely exacerbate, not redress, the LNC's alleged disadvantage, since the major parties would likely receive far larger amounts, including from the newly unlimited bequests.

I. BACKGROUND

A. FECA and Its Limit on Contributions from Individuals to Political Parties

Defendant Federal Election Commission ("FEC" or "Commission") is an independent federal agency that is responsible for administering, interpreting, and civilly enforcing FECA, 52 U.S.C. §§ 30101-46 (formerly 2 U.S.C. §§ 431-57).[1] In 1974, Congress updated FECA in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure a political quid pro quo." *Buckley v. Valeo*, 424 U.S. 1, 26-27 & n.28 (1976). With FECA, Congress primarily intended to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 26. To that end, FECA has limited contributions to candidates for federal office and political parties for more than 40 years. *See* 52 U.S.C. § 30116(a).

In 1976, FECA first limited the amount that individuals may contribute each calendar year to any national political party committee (the "Party General Account Limit"). *See* FECA

[1] In 2014, FECA was moved from Title 2 to Title 52 of the United States Code. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html (last visited Apr. 4, 2016).

Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475 (May 11, 1976) (codified as amended at 52 U.S.C. § 30116(a)(1)(B)). In 2002, Congress increased the Party General Account Limit from $20,000 to $25,000 and indexed it for inflation. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307(a)(2), (d), 116 Stat. 81 (Mar. 27, 2002) (codified as amended at 52 U.S.C. § 30116(a)(1)(B), (c)). Also in 2002, Congress banned the national political party committees' then-practice of accepting "soft money" donations by requiring that all contributions to such party committees be subject to FECA's limits. *Id.* § 101(a) (codified at 52 U.S.C. § 30125(a)). The following year, the Supreme Court upheld the constitutionality of these and other FECA limits on contributions to political parties. *See McConnell v. FEC*, 540 U.S. 93, 133-89 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310, 366 (2010). Today, the Party General Account Limit stands at an inflation-adjusted $33,400. 52 U.S.C. § 30116(a)(1)(B); *Price Index Adjustments for Contribution and Expenditure Limitations*, 80 Fed. Reg. 5750-02, 5751 (Feb. 3, 2015).

B. FECA's Treatment of Testamentary Estate Distributions

The Commission has determined that FECA's contribution limits apply to testamentary estates just as those limits would have applied to the decedent were he or she still living. *See, e.g.*, FEC Advisory Op. ("AO") 2015-05 (Shaber), 2015 WL 4978865, at *2 (Aug. 11, 2015) (citing AOs). As a result, when an estate distributes a decedent's bequest to a political party, the distribution must comply with the relevant FECA contribution limit. *See LNC v. FEC*, 930 F. Supp. 2d 154, 165 (D.D.C. 2013) ("*LNC I*") ("The FEC's interpretation of the statute to include a testamentary bequest appears reasonable . . . and is entitled to deference under *Chevron*."). In cases where a decedent's will instructs an estate to give an amount that is in excess of the relevant contribution limit, the FEC has advised that the estate or an independent third-party

(such as a trustee or escrow agent) may retain the funds and contribute them to the recipient in subsequent years in amounts that comply with FECA's limits until the bequeathed sum is depleted. *See, e.g.*, AO 2015-05 (Shaber), 2015 WL 4978865, at *2-3.

C. Plaintiff LNC and Its 2011 Lawsuit Challenging FECA's Limit on Contributions from Individuals to Political Parties

Plaintiff LNC is a national committee of the Libertarian Party. (Compl. ¶ 1 (Docket No. 1).) In *LNC I*, filed against the Commission in 2011, the LNC challenged the constitutionality of the Party General Account Limit's application to testamentary bequests. *See LNC I*, Civ. No. 11-562-RLW (D.D.C. filed Mar. 17, 2011). In that case, the LNC invoked a special FECA judicial review provision, *see LNC I*, 930 F. Supp. 2d at 156, that requires a district court to find facts and then certify "non-frivolous constitutional questions" to the court of appeals sitting *en banc*, *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (citing 2 U.S.C. § 437h (recodified at 52 U.S.C. § 30110)), *cert. denied sub nom. Miller v. FEC*, 136 S. Ct. 895 (2016). After the parties compiled a factual record, the LNC moved to have its challenge certified. *LNC I*, 930 F. Supp. 2d at 156. The LNC argued, as it does again in this case, that the Party General Account Limit violates the First Amendment as applied to testamentary bequests because bequeathed contributions allegedly cannot result in *quid pro quo* corruption and because the LNC is a "minor" political party with no federal officeholders. *See id.* at 165-67.

The district court held that the LNC's challenge as stated was "[f]rivolous and/or [i]nsubstantial," and thus the court declined to certify it to the *en banc* D.C. Circuit. *LNC I*, 930 F. Supp. 2d at 165-68. The court explained that the LNC's case "raise[d] issues that the Supreme Court has already addressed." *Id.* at 166. Specifically, the court pointed out that the Supreme Court had previously held, in *Buckley* and *McConnell*, that FECA's contribution limits validly apply to minor political parties. *Id.* at 165. The district court also determined that bequests to

political parties "may very well raise the anti-corruption concerns that motivated the *Buckley* and *McConnell* Courts to dismiss a facial attack on contribution limits." *Id.* at 166-67 (citing the FEC's record evidence). On appeal, the D.C. Circuit summarily affirmed the district court's ruling. *See LNC I*, No. 13-5094, 2014 WL 590973, at *1 (D.C. Cir. Feb. 7, 2014).[2]

D. Congress's 2014 Increase of the Sum of the National Party Committees' Annual Contribution Limits to $334,000

Several months after *LNC I* concluded, Congress amended FECA to increase dramatically the amounts that contributors can give to national party committees for certain uses. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. N, § 101, 128 Stat. 2130, 2772-73 (Dec. 16, 2014) (codified as amended at 52 U.S.C. § 30116(a)(1)(B), (a)(2)(B), (a)(9)). The new law allows a national party committee to create three new accounts that are segregated from its original General Account. *See* 52 U.S.C. § 30116(a)(9). Each of these three new accounts has its own contribution limit, and each one is three times as large as the Party General Account Limit. *Id.* § 30116(a)(1)(B), (a)(2)(B). The three accounts are for particular expenses that national party committees commonly incur:

(1) presidential nominating convention expenses ("Convention Account");

(2) "expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party" ("Building Account"); and

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[2] The district court did certify a much narrower, reframed version of the LNC's challenge, which addressed only whether FECA could constitutionally limit *one particular bequest* made to the LNC by a deceased donor named Raymond Groves Burrington. *LNC I*, 930 F. Supp. 2d at 168-71. That bequestor had made only one $25 contribution to the LNC during his life, had not indicated to the LNC that he "planned to leave money to the organization in his will," and had no known interaction with the party other than the single low-dollar contribution he had made. *Id.* at 170. Once Mr. Burrington's entire bequest had been distributed to the LNC, the *en banc* D.C. Circuit vacated the part of the district court's ruling related to his bequest and dismissed that part of the LNC's case as moot. *See* Order, *LNC I*, No. 13-5088 (D.C. Cir. Mar. 26, 2014) (*en banc*) (Doc. No. 1485531).

(3) "expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings" ("Legal Account").

52 U.S.C. § 30116(a)(9) (collectively, "Segregated Accounts").

As a result, in 2016, any one person (including an individual or decedent's estate) can contribute to a national party committee a total of $334,000: $33,400 to the committee's General Account (under the Party General Account Limit) and $100,200 to *each* of its three new accounts (under the new Segregated Account Limits). 52 U.S.C. § 30116(a)(1)(B), (a)(9).

Amounts That an Individual or Estate May Contribute to a National Party Committee	**To National Party Committees**				
	General Account	**Segregated Convention Account**	**Segregated Building Account**	**Segregated Legal Account**	**(Total)**
From a "Person" (including individuals and decedents' estates)	**$33,400 per yr**	**$100,200 per yr**	**$100,200 per yr**	**$100,200 per yr**	**$334,000 per yr**

Even though the Segregated Accounts are dedicated to the three designated uses, a party may still use funds in its General Account for any purpose, including the convention, building, and legal expenses for which the Segregated Accounts may be used.[3]

E. Joseph Shaber's 2014 Bequest to the LNC of $235,575

Joseph Shaber was a long-time LNC donor who had made many donations to the LNC dating back to 1988. (Compl. ¶ 15.) In August 2014, Shaber died and bequeathed $235,575.20 to the LNC. (*Id.* ¶ 17.) He did not restrict how the LNC may use his bequest, and so, according to the trustee of his trust, it is "entirely up to the LNC how it wishes to apply the distribution." Letter from Michelle M. Lauer, John C. Lincoln Law Offices, to FEC Office of General Counsel

[3] The LNC incorrectly states in its complaint that the Party General Account Limit "only applies where a particular contribution might be used for general communication and party-building." (Compl. p. 2.)

at 2 (June 15, 2015) ("Trustee Letter").[4] The trustee asked the LNC to use its Segregated Accounts to immediately accept the entire bequest. *Id.* The LNC declined. *Id.*

On February 23, 2015, the trustee distributed $33,400 of the Shaber bequest to the LNC's General Account in compliance with the Party General Account Limit. Trustee Letter at 2; Compl. ¶ 19. On May 6, 2015, the trustee asked the FEC for an advisory opinion on whether it could distribute the remainder of the Shaber bequest to an independent third-party escrow agent. Trustee Letter at 3. That escrow agent would then distribute annual amounts to the LNC's General Account in compliance with the Party General Account Limit. *Id.* On August 11, 2015, the Commission approved the trustee's request. *See* AO 2015-05 (Shaber), 2015 WL 4978865, at *2-3. On September 15, 2015, the trustee, the escrow agent, and the LNC entered into an escrow agreement. (Compl. ¶¶ 19-20, Exh. A.) That agreement specifies that the LNC "may challenge the legal validity of the [Party General Account] Limit in federal court." (Compl., Exh. A ¶ 3.)

In January of this year, the LNC accepted another $33,400 into its General Account from the Shaber bequest. (LNC Report of Receipts and Disbursements at 35 (Feb. 18, 2016)[5]; Compl. ¶ 20.) Thus, approximately $168,775.20 of the Shaber bequest remains in escrow.

F. The LNC's Claims and Alleged Injuries

Also in January of this year, the LNC filed its complaint in this case. (*See* Docket No. 1.) The LNC again challenges the constitutionality of the Party General Account Limit and claims that it wants to immediately accept the entire Shaber bequest. (Compl. pp. 1-2.)

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4 *See* http://saos.fec.gov/aodocs/1317218.pdf (last visited Apr. 4, 2016).

5 *See* http://docquery.fec.gov/cgi-bin/fecimg/?201602189008491928 (last visited Apr. 4, 2016).

The LNC acknowledges that given Congress's creation of the Segregated Accounts since *LNC I*, it "could accept the entire balance of the Shaber bequest immediately." (Compl. ¶ 33; *see also id.* p. 2, ¶¶ 19, 29.) The LNC asserts that it nevertheless must accept funds from the Shaber bequest only into its General Account to attempt to remedy its alleged competitive disadvantage in elections against the major political parties. (*Id.* p. 1, ¶¶ 12-14, 26.) The LNC claims that it has "comparatively less use" for Segregated Account funds than the major parties do, and that its "needs in these areas is [*sic*] not commensurate with the needs of the two major political parties whose elected officials were exclusively responsible for enacting the segregated account structure of 52 U.S.C. § 30116(a)(9)." (*Id.* ¶ 13.) The LNC adds that, "[u]nlike its two major competitors," it must spend much of its General Account funds on achieving access to the ballot, which leaves the LNC "comparatively little" to spend on campaigning. (*Id.* ¶ 12.) As a result, the LNC contends, it must accept the Shaber bequest into its General Account to "substantially improve its ability to advocate and achieve electoral success." (*Id.* ¶ 26; *see also id.* p. 1, ¶ 14.)

The complaint asserts three specific claims. In count I, the LNC claims that the Party General Account Limit is invalid under the First Amendment as applied to the Shaber bequest. (Compl. ¶¶ 21-27.) In this count, the LNC renews the arguments it asserted in *LNC I*, including its claim that bequests allegedly cannot cause *quid pro quo* corruption. (*Id.*) In counts II and III, the LNC alleges that Congress's creation of the Segregated Accounts and their increased limits have rendered the Party General Account Limit a content-based speech restriction that violates the First Amendment on its face and as applied to the Shaber bequest. (*Id.* ¶¶ 28-34.) As relief, the LNC requests a declaration and permanent injunction against the enforcement of the Party General Account Limit.[6] (Compl., Prayer for Relief ¶¶ 1-2.)

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[6] It is unclear whether the LNC is asking that the Court completely invalidate the Party General Account Limit as applied to bequests (*see* Compl. p. 2 ("Applying any contribution

II. STANDARD OF REVIEW

Plaintiff LNC bears the burden of invoking this Court's subject matter jurisdiction, including establishing that it has standing. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 900 (2016). To survive the Commission's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the LNC's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Id.* (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although the Court must accept as true all of the plaintiff's well-pled factual allegations and draw all reasonable inferences in favor of the plaintiff, the Court need not accept the plaintiff's legal conclusions as true. *See Alexis v. District of Columbia*, 44 F. Supp. 2d 331, 336-37 (D.D.C. 1999). Also, this Court "may look beyond the allegations contained in the complaint" to "materials outside the pleadings" to determine whether the LNC can carry its burden of proving it has standing. *Flores ex rel. J.F. v. District of Columbia*, 437 F. Supp. 2d 22, 28-29 (D.D.C. 2006) (internal quotation marks omitted).

III. THE COURT SHOULD DISMISS THE LNC'S CLAIMS FOR LACK OF STANDING

This Court lacks jurisdiction over the LNC's claims because the LNC cannot demonstrate that it has Article III standing. To establish standing, the LNC must prove that (1) it has suffered a valid injury in fact; (2) its alleged injury is fairly traceable to FECA; and (3) a decision in the LNC's favor would likely redress its alleged injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A "deficiency on any one of the three prongs suffices to defeat standing."

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limits to Joseph Shaber's bequest is unconstitutional.")) or that the Court simply raise the limit to the same level as the limits for Segregated Accounts (*see id.* ¶ 14 ("LNC would accept and spend such sums in amounts that are otherwise within the limits it could accept and spend for the segregated account purposes.")).

U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). As explained below, the LNC cannot satisfy any of the three standing requirements.

A. The LNC's Alleged Injuries Are Self-Inflicted Because It Could Accept the Entire Shaber Bequest Immediately But Has Chosen Not to

The injury the LNC claims to suffer is entirely its own creation, because it could accept the Shaber bequest in full right now. The D.C. Circuit has "consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing" since it is neither a cognizable injury, nor is it "fairly traceable to the defendant's challenged conduct." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006).

In 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. *See, e.g.*, *McConnell*, 540 U.S. at 226-28; *Sykes v. FEC*, 335 F. Supp. 2d 84, 88-94 (D.D.C. 2004). In *McConnell*, the Supreme Court concluded that a group of candidates lacked standing to challenge the constitutionality of Congress's 2002 increase of FECA's limits on contributions to candidates. 540 U.S. at 226-28. The candidates "d[id] not wish" to accept amounts permitted by the newly increased limits, and they argued that as a result it would be "more difficult for them to compete in elections." *Id.* at 228. The Court rejected their claim of injury, however, since the plaintiffs' "alleged inability to compete stem[med] not from the operation of [FECA's limit increases], but from their own personal 'wish' not to solicit or accept large contributions, i.e., their personal choice." *Id.*

Following *McConnell*, a court in this District has similarly held that a candidate lacked standing to challenge provisions of FECA he claimed allowed Congressional candidates to accept contributions from out-of-state residents. *Sykes*, 335 F. Supp. 2d at 88-94. The plaintiff was a third-party candidate who chose not to accept out-of-state contributions during his race for

U.S. Senate in Alaska. *Id.* at 87. He claimed that such contributions "help[ed] Republican and Democratic senatorial candidates in Alaska to 'drown out' the campaign of third-party candidates," and so the contributions injured his interest in a "fair opportunity to compete." *Id.* at 88 (internal quotation marks omitted). The court found this argument "indistinguishable from that rejected in *McConnell*" and concluded that the plaintiff's alleged competitive injury arose from his own choice not to accept out-of-state contributions, not FECA. *Id.* at 92.

Here, the LNC's alleged injuries are similarly self-inflicted because they arise from the LNC's own choice not to immediately accept the entire Shaber bequest. The LNC acknowledges in its complaint that FECA allows it to use its General and Segregated Accounts to "accept the entire balance of the Shaber bequest immediately." (Compl. ¶ 33; *see also id.* pp. 1-2, ¶¶ 19, 29.) In fact, the LNC could immediately accept the entire $168,775.20 that remains of the Shaber bequest and then some: FECA allows the LNC in 2016 to receive a total of $334,000 from any one donor. *See supra* pp. 5-6. Shaber did not condition how the LNC could accept or use his bequest. *Id.* at 6. The Shaber trustee even asked the LNC to accept the entire bequest using its Segregated Accounts. *Id.* at 7. The LNC declined, *id.*, which is its right, but the LNC cannot now also claim that FECA is responsible for any harm arising from that choice. *See Gonzales*, 468 F.3d at 831 ("As the [plaintiff] has *chosen* to remain in the lurch, it cannot demonstrate an injury sufficient to confer standing.").

The LNC's asserted motivations for its choice are irrelevant because what matters is that it *has* the choice. Thus, the LNC's claim that it must accept the Shaber bequest into its General Account (and not its Segregated Accounts) to improve its ability to advocate and achieve electoral success is beside the point. (*See* Compl. ¶¶ 12-14, 26.) The LNC insists that it does not need Segregated Account funds as much as "the two major political parties whose elected

officials" enacted the Segregated Accounts. (*Id.* ¶ 13.) The LNC also asserts that it has a greater need for General Account funds than "its two major competitors" because it is "forced" to spend most its General Account funds on securing ballot access. (*Id.* ¶ 12.) But the LNC's claimed competitive disadvantage is just like that claimed by the third-party candidate found not to have standing in *Sykes*, who chose not to accept legal out-of-state contributions, which he similarly alleged "help Republican and Democratic" candidates gain a competitive advantage over third-party candidates. 335 F. Supp. 2d at 88. The court nevertheless held that the candidate was "unable to establish a causal connection between his alleged injury and the challenged provisions of FECA." *Id.* at 92; *see also Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (holding that a plaintiff lacked standing even though it claimed it was "'forced' by competitive pressures" to make a choice that exposed it to potential injury).

In any event, even if the LNC's claimed competitive motivations for its choice were relevant, the LNC's alleged injuries would still be self-inflicted: The LNC can in fact aid its electoral efforts against the major parties by immediately accepting the Shaber bequest. The LNC's public disclosure reports show that it actually spends significant amounts on expenses for which Segregated Account funds may be used. It has sufficient expenses meeting the criteria for the accounts and clearly could have spent the entire bequest during this election cycle had it chosen to do so. The LNC has recently spent large amounts of General Account funds — amounts far in excess of the Shaber bequest — on its headquarters building and convention expenses. During the 2014 election cycle the LNC spent in excess of $940,000 on its Alexandria building headquarters alone. *See* FEC Candidate and Committee Viewer[7]; *The LNC has moved*

[7] The LNC's disclosure reports and related data can be found by searching for Committee ID number "C00255695" on the Commission's Candidate and Committee Viewer website. *See* http://www.fec.gov/finance/disclosure/candcmte_info.shtml. On the LNC's page, select the appropriate "two-year period" and then click on "Other Federal Operating Expenditures," which

into its new David F. Nolan Memorial office space!, Libertarian Party Blogs (June 2, 2014).[8] The LNC also spent approximately $120,000 on its 2014 national convention and spent similar six-figure sums on its conventions in 2010 and 2012. *See supra* note 7 (see 2014 cycle expenditure purposes containing "convention"); *see also The 2014 Libertarian Party Annual Report*, LP News, June 2015, at 8.[9] During the 2016 election cycle thus far (from January 1, 2015 through reported activity to April 6, 2016), the LNC has spent approximately $63,000 on its headquarters. *See supra* note 7 (see 2016 cycle expenditure purposes containing "mortgage"). It has established a separate Building Account. *See, e.g.*, LNC Report of Receipts and Disbursements at 66 (June 19, 2015) (noting a disbursement made from the LNC's "Headquarters Account" in entry C)[10]; *The David F. Nolan Memorial Fund*, LNC Blog (June 2, 2014) (soliciting "[m]aximum gifts [of] $100,200 per calendar year" to "pay down the new LP HQ Office").[11] The LNC's 2016 national convention will be held in late May at the 1,334-room Rosen Centre Hotel & Resort in Orlando. *See LP 2016 National Convention*, Libertarian Party Event[13]; *About Us*, Rosen Centre Hotel.[14]

If 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

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can be found under Disbursements. On that page, the user can export the LNC's expenditures into an Excel spreadsheet that can be sorted by the purpose of each expenditure. The purposes of the relevant expenditures include, "Office Building Purchase," "Office Rent," "HQ Office Build-Out," and similar descriptions.

[8] *See* https://www.lp.org/blogs/staff/the-lnc-has-moved-into-its-new-david-f-nolan-memorial-office-space (last visited Apr. 4, 2016).

[9] *See* http://www.lp.org/files/lp_news/2015-2_LP_News.pdf (last visited Apr. 4, 2016).

[10] *See* http://docquery.fec.gov/cgi-bin/fecimg/?15951504805 (last visited Apr. 4, 2016).

[11] *See* http://www.lp.org/office-fund (last visited Apr. 4, 2016).

[13] *See* https://www.lp.org/event/lp-2016-national-convention (last visited Apr. 4, 2016).

[14] *See* http://www.rosencentre.com/about-us (last visited Apr. 4, 2016).

amount from the LNC's General Account would become available for other purposes — including advocacy and elections. Because money is fungible, and the LNC likely has over $170,000 of the expenses permitted for the Segregated Accounts, there is no economic difference between placing the Shaber bequest into Segregated Accounts and placing it into the LNC's General Account. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2293 n.6 (2012) ("[O]ur cases have recognized that a union's money is fungible, so even if the new fee were spent entirely for nonpolitical activities, it would free up other funds to be spent for political purposes.").

If the LNC were to use Segregated Account funds for these types of expenses, its General Account funds would remain available for advocacy and other electoral uses. Indeed, the LNC itself appears to recognize as much. In January 2015, soon after Congress created the new accounts, the LNC started accepting Building Account contributions and used them to pay for approximately $25,000 of its headquarters-related expenses. *See supra* note 7 (see 2016 cycle expenditure purposes containing "Headquarters Account"); *see also supra* note 10. The LNC could do the same with the remaining Shaber bequest and free $168,775.20 of its General Account funds for its desired electoral purposes. But instead, the LNC has filed this lawsuit, demanding (for a second time) that this Court invalidate a 40-year-old federal election law just months prior to an election, even though that would achieve an equivalent economic result. This is not an injury in fact but a mere "self-inflicted budgetary choice." *Envtl. Integrity Project v. McCarthy*, No. CV 13-1306 (RDM), 2015 WL 5730427, at *8 (D.D.C. Sept. 29, 2015) (internal quotation marks omitted); *see also Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) ("But this particular harm is self-inflicted; it results not from any actions taken by BMC, but rather from the Council's own budgetary choices.").

B. Even if Not Self-Inflicted, the LNC's Claimed Competitive Disadvantage Against Its Major Party Rivals Does Not Support Standing

Even if the LNC's choice to forego 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.

1. The LNC's Claimed Competitive Injury Is Not a Valid Injury in Fact

Contrary to the LNC's claims regarding competitive disadvantage, there is no legal right "to compete equally against opponents [in elections] with more money." *Sykes*, 335 F. Supp. 2d at 89 (holding that the plaintiff's alleged "disparity in campaign resources caused by out-of-state contributions" was not a valid injury in fact). In fact, the Supreme Court has instructed that Congress has no legitimate interest in enacting laws aimed at "equalizing the relative ability of individuals and groups to influence the outcome of elections." *Buckley*, 424 U.S. at 48; *see also McConnell*, 540 U.S. at 227 ("[P]olitical free trade does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." (internal quotation marks omitted)). As a result, the 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. The LNC has no legally cognizable right to an increased ability to compete with its major party rivals.

2. Private Actors in the Political Marketplace, Not FECA, Caused the LNC's Claimed Competitive Disadvantage

The LNC's claimed competitive injury also fails to support standing because it results from the decisions of private actors in the political marketplace, not FECA. An alleged injury is not fairly traceable to government action when it is instead "th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted; alterations in original). In the election context, an "alleged inability

meaningfully to participate in and influence elections" fails to support standing where it "is attributable to the conduct and resources of private individuals, not the state." *Ga. State Conference of NAACP Branches v. Cox*, 183 F.3d 1259, 1264 (11th Cir. 1999); *cf. NAACP, L.A. Branch v. Jones*, 131 F.3d 1317, 1323 (9th Cir. 1997) ("Here, there is no state action putting wealthy voters in a better position to contribute to campaigns than nonwealthy voters."). In *Cox*, the Eleventh Circuit held that former and future candidates for office failed to establish the causation element of standing for their claim that the Georgia state campaign finance laws favor wealthy over non-wealthy candidates. 183 F.3d at 1261, 1264. The Court explained that since the laws left candidates "free to rely on their own resources," success at the polls turned not on state action but on "individual efforts" such as "fundraising abilities, name recognition, speaking, organizational, and leadership abilities, as well as popular and easily understood positions on the issues." *Id.* at 1264.

Here, the LNC's electoral success relative to its major party competitors is determined not by FECA but by the innumerable individual decisions of private political actors, such as contributors, voters, and candidates. FECA's limits apply exactly the same to minor parties like the LNC and their candidates as they do to the Democratic and Republican parties and their candidates. *See Buckley*, 424 U.S. at 31 ("[I]t is important at the outset to note that [FECA] applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations."). FECA is therefore not responsible for the LNC's claimed "lack of resources" relative to the major parties or the lack of electoral success that the LNC believes occurs as a result. (Compl. ¶ 12.)

In its complaint, the LNC appears to implicitly acknowledge that its lack of voter support is to blame for its lack of resources. The LNC stresses that its lack of funds discourages

potential voters. (Compl. ¶ 12.) But the LNC also admits that the problem is "self-perpetuating" (*id.*), and so its lack of voter support also causes its lack of resources. In fact, the LNC's lack of voter support is at least in part the reason the LNC is allegedly "forced" to spend most of its resources on ballot access. (*Id.*) In most states, to automatically qualify for the ballot, a political party must receive a specified percentage of the vote in a previous election. *See, e.g.*, Nat'l Conf. of State Legislatures, *Getting on the Ballot: What it Takes*, The Canvass at 1 (Feb. 2012).[16]

3. A Favorable Decision from This Court Is Not Likely to Redress the LNC's Claimed Competitive Disadvantage

Finally, the LNC lacks standing because it cannot show that a favorable decision of this Court would likely redress its claimed competitive disadvantage. On the contrary, the relief the LNC seeks would probably exacerbate that disadvantage.

In addition to injury in fact and causation, the LNC must show that it is "likely, as opposed to merely speculative, that [its] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). But, as courts have held, a decision striking down FECA contribution limits "would do nothing" to give a minor-party candidate "a 'fair opportunity to compete' in [an] upcoming election." *Sykes*, 335 F. Supp. 2d at 92; *see also Albanese v. FEC*, 78 F.3d 66, 67-69 (2d Cir. 1996) (holding that a ruling declaring FECA unconstitutional would not redress a non-wealthy candidate's inability to "raise sufficient funds to conduct an effective campaign" or FECA's alleged favoritism of "candidates backed by wealthy supporters").

In fact, the Supreme Court has observed that FECA's contribution limits "would appear to *benefit* minor-party and independent candidates relative to their major-party opponents

[16] *See* http://www.ncsl.org/documents/legismgt/elect/Canvass_Feb_2012_No_27.pdf (last visited Apr. 4, 2016).

because major-party candidates receive far more money in large contributions." *Buckley*, 424 U.S. at 33 (emphasis added). Following this logic, courts have recognized that eliminating FECA limits would not redress but would aggravate the competitive disadvantage of minor parties: "'[S]ince FECA limits the amounts of contributions that are permissible, the elimination of those ceilings could well place candidates whose constituencies do not include a plethora of wealthy supporters at an even greater disadvantage.'" *Sykes*, 335 F. Supp. 2d at 93 (quoting *Albanese*, 78 F.3d at 69). For example, in *Sykes*, the court explained that if it invalidated FECA's regulation of out-of-state contributions as the plaintiff minor-party candidate requested, it would allow the plaintiff's major-party competitors to accept even larger out-of-state contributions from their more wealthy donors, worsening the plaintiff's disadvantage. *Id.*

The same would occur here if the LNC received the relief it seeks. The LNC requests a declaration and permanent injunction against the enforcement of the Party General Account Limit that would either eliminate the limit or increase it from $33,400 per calendar year to $100,200. (Compl. ¶ 14, Prayer for Relief ¶¶ 1-2.) That relief would apply to the major parties too, given that the LNC asks the Court to enjoin the FEC from enforcing the limit "generally" (*id.*, Prayer for Relief ¶ 1), and count II of the complaint challenges the Party General Account Limit on its face (*id.* ¶¶ 28-31). As for the LNC's as-applied claims, a favorable ruling could also allow major parties to accept unlimited bequests.

This "relief" would seem to greatly disadvantage the LNC against the Republican and Democratic parties, since the major parties raise far more money from far more contributors. During the 2016 election cycle thus far, the LNC has reported receiving less than $1.5 million in contributions and has less than 4,000 itemized individual contributions. *See supra* note 7. Meanwhile, during that same time the Democratic National Committee ("DNC") has reported

receiving more than $62.9 million and has reported in excess of 136,000 itemized individual contributions. *Id.* (data for the DNC can be found using Committee ID "C00010603"). The Republican National Committee ("RNC") has reported receiving more than $96.5 million, and has reported in excess of 122,000 itemized individual contributions. *Id.* (data for the RNC can be found using Committee ID "C00003418"). And, in contrast with the LNC, the major parties have a considerable number of donors capable of giving above the Party General Account Limit. *See, e.g.*, Russ Choma and Ben Jacobs, *GOP Donors Use Cromnibus Changes to Stuff Party Committees' 2016 Coffers; Dem Donors MIA*, OpenSecrets Blog (May 27, 2015) (noting that the "RNC has raised over $36 million with 101 donors giving the old maximum of $33,400" and the DNC had raised "$20 million with 32 donors at the old maximum").[17]

Even if a favorable ruling for the LNC applied only to bequeathed contributions, the major parties would still benefit far more than the LNC would. Discovery during the LNC's previous, failed challenge to the Party General Account Limit revealed similar disparities in the amounts decedents have bequeathed to the parties. As of 2012, the LNC had been bequeathed just $247,065 in its entire 40 year history, *see LNC I*, 930 F. Supp. 2d at 182 (Findings of Fact ¶ 69), while the DNC was bequeathed over $1.2 million from just 2005 to 2009, *id.* at 185 (Findings of Fact ¶¶ 79, 81-85), and the RNC was bequeathed in excess of $574,000 in just one 2008 bequest, *id*. (Findings of Fact ¶ 80). Eliminating FECA's contribution limits would thus appear to harm the LNC's ability to compete with the major parties.

[17] http://www.opensecrets.org/news/2015/05/gop-donors-use-cromnibus-changes-to-stuff-party-committees-2016-coffers-dem-donors-mia/ (last visited Apr. 6, 2016).

IV. CONCLUSION

Because the LNC cannot carry its burden of proving that its claims satisfy all three standing requirements, this Court should dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1).

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