IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIBERTARIAN NATIONAL COMMITTEE, INC.,	No. 13-5088
Plaintiff,	OPPOSITION TO SUGGESTION OF MOOTNESS
v.	
FEDERAL ELECTION COMMISSION,	
Defendant.	

PLAINTIFF LIBERTARIAN NATIONAL COMMITTEE'S OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S SUGGESTION OF MOOTNESS

INTRODUCTION

Plaintiff Libertarian National Committee, Inc. ("LNC") brought this case in order to, inter alia, recover immediately and in full a surprising $217,734 bequest from one Raymond Groves Burrington, without being subjected to Defendant Federal Election Commission's ("FEC") annual contribution limits.

But that is not the only testamentary bequest impacted by this litigation. Burrington's was not LNC's last testamentary bequest. Nor was it the only bequest ever received by a political party in an amount

exceeding federal contribution limits. There is every reason to expect that at least one additional LNC bequest will exceed FEC's limits. Indeed, yet more testamentary bequests exceeding federal contribution limits can now be expected today thanks to the FEC's decision to moot a portion of this lawsuit by agreeing not to enforce a statutory prohibition on the solicitation of over-limit bequests.

So long as contribution limits apply to testamentary bequests, FEC requires political parties to leave generous bequests in trust, without directing their investment, and to withdraw the maximum amount allotted each year until the funds' exhaustion. Those rules were applied to Burrington's bequest. *See* Certified Fact No. 35. As cases tend to do, this case took its time winding through the District Court before arriving here on a certified question per 2 U.S.C. § 437h. Weeks ago, while another panel of this Court still faced LNC's appeal regarding the question's scope (No. 13-5094), LNC withdrew the last of Burrington's bequest from trust per FEC's guidelines. On February 7, 2014, the panel in No. 13-5094 summarily affirmed without opinion.

FEC's mootness suggestion follows a simple syllogism: the case concerns only Burrington's bequest; LNC has received the bequest in

full; thus, the case must be dismissed as moot. Q.E.D. The Commission speculates that LNC will never see another bequest of this kind, and argues that in any event, LNC should have brought suit earlier.

FEC correctly states that LNC has fully recovered Burrington's bequest. The rest is error. Even assuming that FEC carries its "heavy burden of establishing mootness," *Honeywell Int'l* v. *NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (quotation omitted), this case provides the classic example of one "capable of repetition, yet evading review," *id.*

SUMMARY OF ARGUMENT

FEC routinely claims that controversies arising from its regulation of First Amendment speech and association must be dismissed as moot. These claims fail because elections and political speech still recur in our country. *Davis* v. *FEC*, 554 U.S. 724, 735-36 (2008); *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007); *see also Citizens United* v. *FEC*, 558 U.S. 310, 334 (2010); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774-75 (1978). FEC's suggestion here is no different.

> The "capable of repetition, yet evading review" exception to mootness has two requirements: (1) the challenged action must be too short to be fully litigated prior to cessation or expiration; and (2) there must be a reasonable expectation that the same complaining party [will] be subject to the same action again.

Honeywell, 628 F.3d at 576 (quotation omitted). The record establishes both factors.

The dispute is not merely capable of repetition. Its repetition is assured. As FEC's discovery revealed, political parties frequently receive bequests exceeding FEC's contribution limits. Burrington's bequest was not the last left LNC, nor will it likely be LNC's only limit-exceeding bequest. It would only be a matter of time before LNC re-litigates the essential question of whether contribution limits may apply to testamentary bequests raising no traditional corruption concerns. Indeed, FEC mooted part of this case by asserting that, statutory language notwithstanding, it would not bar LNC from soliciting bequests in amounts exceeding the contribution limits. By evading a serious First Amendment question regarding solicitation rights, the FEC reassured the persistence of oversized bequests.

The District Court certainly did not understand that the case would be dismissed for mootness upon final fulfillment of Burrington's bequest—an event of whose imminence the District Court was well-aware, both because it understood the math, and because FEC unsuccessfully raised this very argument in seeking reconsideration of

the District Court's decision. Quite simply, the District Court did not ascribe the certified question such limited scope. Nor should it have.

Judge Wilkins' opinion, and statements at the lengthy hearing below, plainly reveal an understanding that over-limit testamentary bequests are a recurring feature of American political discourse requiring the First Amendment clarification that this case will elicit. To be sure, LNC sought a yet-broader certified question, but the District Court did not believe it narrowed the case's impact to the four corners of Burrington's will. The normal rules of as-applied challenges reaching similar situations—which regularly recur—apply.

Finally, this dispute would likely evade Supreme Court review in most of its future manifestations. Because any federal case of this nature takes years to complete, adoption of FEC's mootness theory would immunize the law from judicial review in numerous cases where bequests fall in a zone exceeding the contribution limit but falling short of the size necessary to sustain a case through the typical length of litigation. LNC did not fail to take advantage of earlier appellate avenues, nor was there ever any guarantee that this case could have been finally resolved even had the case been filed earlier. On this note,

LNC is constrained to observe that this Court has recently adopted a very expansive vision of how long civil rights cases might reasonably remain pending before the District Court.

The serious constitutional questions this case presents, certified for en banc hearing upon the District Court's careful consideration, are live and recurring. This Court has jurisdiction, and should set the case for briefing and argument.

ARGUMENT

I. REPETITION OF THIS DISPUTE IS GUARANTEED.

A controversy is "capable of repetition" where there exists a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 551 U.S. at 463 (quotations omitted).

Although FEC does not track political contributions received from testamentary bequests, Clark Decl., FEC Exh. 2, Dist. Ct. Dkt. 24-2, ¶ 2, Defendant has identified $2,260,799.70 in funds bequeathed to national political party committees since its database's 1978 inception. *Id.* table 3. Searching FEC's database for testamentary bequests produces underinclusive results. *Id.* ¶¶ 3, 4. For example, the FEC's

largest identified bequeathed political party donation, Martha Huges' $250,000 gift to the Democratic Party, *id.* table 2, is eclipsed by Eleanor Schwartz's $574,332.33 bequest to the Republican Party, discovered in this case. *Id.* ¶ 3. The Burrington bequest, which would rank second on FEC's table of all-time highest bequests to political parties, does not appear in FEC's search-generated top five list.[1]

LNC continues to receive large testamentary bequests of which it has had no prior notice. *See, e.g.,* Dist. Ct. Dkt. Nos. 25-11, 25-12. And the record shows at least one future bequest that would probably exceed FEC's campaign contribution limits. Redpath Decl., Dist. Ct. Dkt. 25-15, ¶ 8 (William Redpath's last will and testament bequeaths LNC 40% of his estate).

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[1]Recent over-limit testamentary bequests also include (but are not limited to): Lola Cameron, $200,000 to RNC, Clark Decl. at 5, table 2; Gwendolyn Williams, $133,829 to DNC, *id.*; Joan Shepard, $80,000 to RNC, *id.*; Michael Buckley, $200,000 to DNC, FEC Exh. 19, Dist. Ct. Dkt. 24-3, at 19; Ron Gabriel, $200,000 to DNC, FEC Exh. 57, Dist. Ct. Dkt. 24-5, at 86-87; Gladis Innerst, $267,595.41 to DNC, FEC Exh. 58, Dist. Ct. Dkt. 24-5, at 90; Margaret Kalackowski, "over $216,000" evenly split between DNC and New Jersey Democratic Party, FEC Exh. 59, Dist. Ct. Dkt. 24-5, at 93; Joseph P. Kramer, III, approximately $194,000 to Democratic Party, FEC Exh. 60, Dist. Ct. Dkt. 24-5, at 96; Harold Schooler, $250,000 to DNC, FEC Exh. 61, Dist. Ct. Dkt. 24-6, at 3-6; and Lakshmi Bulusu, $104,741.50 to DNC, FEC Exh. 62, Dist. Ct. Dkt. 24-6, at 10-16.

It does not matter that LNC cannot now point to a specific will that would leave it over $32,800. "[T]he test is not whether there is in fact a 'future relation' that will be affected, but rather whether 'resolution of an otherwise moot case . . . h[as] a *reasonable chance* of affecting the parties' future relations.'" *Honeywell*, 628 F.3d at 577 (quotation omitted) (alteration in original). With FEC estimating that "the average soft-money donation made by estates to national political party committees from bequeathed funds was $62,117.23," Clark Decl., ¶ 11, well over the current limit—and as LNC continues to receive testamentary bequests—there exists more than a "reasonable chance," *Honeywell*, 628 F.3d at 577, a "reasonable expectation" *and* "a demonstrated probability," *WRTL*, 551 U.S. at 463, that this controversy will recur.

Incredibly, FEC claims that LNC has received only three bequests, and then immediately follows that statement by claiming that LNC is unlikely to present another case of this kind because it "typically receives donations with a median-size of only approximately $25." FEC Sugg. at 7 (quotation omitted). FEC should know much better than to try to mislead the Court in this fashion. The issue here is bequests

from people who no longer have any use for money, not regular donations from living people. Indeed, before he left LNC $217,734, Burrington had only given the party, exactly, $25. Kraus Decl., Dist. Dkt. 25-14, ¶ 3. Between them, LNC's other five-figure testators had given only $100 in their lives. *Id.* ¶¶ 6, 7.[2] Based on *FEC*'s data, Clark Decl., table 4, the average sizes of *bequests* per party, inclusive of hard and soft money, are nowhere near $25 or whatever amounts are routinely raised from everyday living people:

Libertarian:	$16,255.39
Republican:	$10,531.93
Democratic:	$18,824.06
Green:	$20,303.84

By the same measure, this case is not "highly dependent upon a series of facts unlikely to be duplicated in the future." *People for the Ethical Treatment of Animals* v. *Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005). All that needs to occur for this case to be duplicated is for people to keep remembering LNC in their wills, and die.

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[2]FEC also claims that the LNC's bequests came over the course of the party's 43 year history, but it is to be expected that the party would receive fewer bequests in its early years. The three bequests in the record amount all came between 2007 and 2010. And as discussed below, FEC's litigation conduct here just greenlighted LNC's solicitation of large bequests.

And if FEC wanted to stop LNC from receiving large bequests, it could have defended 2 U.S.C. § 441i(a)'s solicitation prohibition against LNC's challenge. Instead, "FEC denie[d] that this provision forbids national political parties from soliciting a bequest that exceeds FECA's annual limits," so long as the bequests were subjected to the contribution limits upon receipt. *Libertarian Nat'l Comm., Inc.* v. *FEC*, 930 F. Supp. 2d 154, 168 (D.D.C. 2013). LNC is now free to solicit additional large bequests.

Of course, it might be within the realm of possibility that *some* future bequest, unlike Burrington's, would be made pursuant to a hidden, illicit quid pro quo arrangement. But it would be baseless for FEC to assert that the default condition of testamentary bequests is illicit, such that a "clean" bequest like Burrington's is unlikely to recur. FEC has provided zero evidence that *any* of the numerous testamentary bequests exceeding its contribution limits have implicated corruption concerns. There is, after all, nothing unusual about the fact that when people die, they leave money to organizations that share and further their ideological objectives.

Thus, once again, in suggesting mootness "[t]he FEC asks for too much." *WRTL*, 551 U.S. at 463. "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule" the availability of mootness relief in as-applied cases "by making this exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC." *Id.*

Moreover, respectfully, FEC's suggestion that the certified question implicates nothing beyond Burrington's bequest gives the District Court too little credit. Implicit in FEC's suggestion of mootness is the assertion that Judge Wilkins would have toiled to certify an *en banc* case knowing that his published opinion would be vacated,[3] and the case dismissed for mootness, within months of placement on this Court's docket. The record is otherwise.

The District Court detailed its awareness of exactly how much money was left in the Burrington trust, and the frequency with which payment must be made. *See* Certified Facts Nos. 35, 36, 39, 40. Indeed, as FEC admits, "the Commission informed the district court that the

[3] *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

LNC would be able to receive the entirety of the Burrington bequest in 2014," FEC Sugg. at 6—in a motion to amend or reconsider the judgment, no less—which the District Court denied. *Libertarian Nat'l Comm., Inc.* v. *FEC*, 950 F. Supp. 2d 58 (D.D.C. 2013).

The District Court understood that future lawsuits would question the application of campaign contribution limits to testamentary bequests, and acknowledged that this Court's guidance might be necessary to at least prompt the FEC to reconsider its approach. To the extent the District Court narrowed LNC's proposed question, it sought only to exclude differently-situated political parties, and bequests that might implicate corruption concerns. *See Libertarian Nat'l Comm.*, 930 F. Supp. 2d at 165 ("the relief sought would not apply solely to themselves, but would extend to other entities not before this Court"); *id.* at 166 ("LNC challenges FECA as unconstitutional as applied to *all* bequests . . . . [b]ut bequests other than Burrington's may very well raise . . . anti-corruption concerns"). That still leaves at-issue the universe of non-corrupt (meaning, in the absence of evidence of misconduct, all) LNC bequests.

This much, Judge Wilkins made crystal clear at argument. Exploring the value of narrowing the certified question to Burrington's facts, Judge Wilkins offered:

> What would be wrong with me certifying that to the circuit and granting summary judgment for the FEC with respect to everything else? And if the circuit were to find that . . . even with respect to that one bequest, that there's no enforcement problem there, no First Amendment violation, then it seems [that if] Mr. Burrington doesn't win, then nobody will ever win on a bequest.
>
> But if they were to agree that that raised a First Amendment issue, then it's only precedent and only relief with respect to this one bequest, but then at least we would know what the boundaries of the First Amendment issue are, and then to the extent that the FEC wanted to do some further fact finding and determine whether they wanted to promulgate further rules as to bequests generally and how those should be handled, and engage in some sort of rule-making, et cetera, that could all go forward given the guidance from the circuit, and in some future lawsuit we could determine whether there needs to be any further court intervention with respect to other bequests.

T., p. 64, l. 7-25.

In response, FEC conceded that notwithstanding its opposition to any sort of certification, narrowing the question to the Burrington facts would have broader effect. "[O]f course if in Your Honor's discretion, if that is your position, that would be your action, I don't know that there's anything wrong with that, despite the fact that we dispute that that's the right course of action." T., p. 65, l. 4-7.

Indeed, FEC did more than agree with the District Court's assessment of the impact a decision here might have. It urged that very impact as a reason to reconsider the court's judgment, claiming that the ruling would invite a torrent of Section 437h litigation. The District Court correctly dismissed that claim, as "such an argument 'belong[s] in a legislative hearing room, not a brief.'" *Libertarian Nat'l Comm.*, 950 F. Supp. 2d at 63 (quoting *Wagner* v. *FEC*, 717 F.3d 1007, 1016 (D.C. Cir. 2013)).

FEC erred in predicting numerous future disputes. Only one decision may be needed to guide regulation of LNC's next large bequest.

II. THIS DISPUTE WILL LIKELY EVADE REVIEW EACH TIME IT REPEATS.

"As to the 'evading review' requirement . . . the Supreme Court has meant evading Supreme Court review." *Christian Knights of Ku Klux Klan Invisible Empire, Inc.* v. *District of Columbia*, 972 F.2d 365, 369 (D.C. Cir. 1992) (citation omitted).

"The Contribution Limit for 2014 is $32,400 . . . ." FEC Sugg. at 4 (footnote omitted). "[T]he average soft-money donation made by estates to national political party committees from bequeathed funds was $62,117.23." Clark Decl., ¶ 11. Dividing the latter sum by the former

would require future testamentary bequest litigation to proceed from initial pleadings, to discovery, to wrangling about district court certification, to en banc hearing, Supreme Court opinion, and mandate, in under two years. "[A] presumption applies that orders of less than two years' duration ordinarily evade review." *Honeywell*, 628 F.3d at 576 (quotation omitted).

The typical case of this kind would thus evade review, and there the matter should end. But seeking to take advantage of Burrington's generosity, FEC argues that *this* case had more fuel owing to the size of Burrington's bequest. Presumably, LNC should have endeavored to wrap up this litigation, from District to Supreme Court, within seven years (dividing the $217,734 bequest by the $30,800 contribution limit applicable at the case's outset). Claiming that LNC should have brought the case earlier, FEC argues that LNC "ran out of time to fully litigate this case due to its own delay, and a 'litigant cannot credibly claim his case 'evades review' when he himself has delayed its disposition.'" FEC Sugg. at 7 (quoting *Armstrong* v. *FAA*, 515 F.3d 1294, 1296 (D.C. Cir. 2008)).

The argument fails for two reasons. First, *Armstrong* does not extend to normal situations where time simply runs out on a conscientious plaintiff. If it did, *Armstrong* would largely swallow the capable-of-repetition exception, for in nearly every case that becomes moot, it is possible to hypothesize that had the plaintiff only filed earlier, things might have broken differently. Instead, *Armstrong* addresses plaintiffs who delay the "disposition" of their cases by failing to take reasonably available avenues for resolving existing matters.

As this Court explained, "[i]t is clear the principle of *Armstrong* requires a plaintiff to make a full attempt to prevent his case from becoming moot." *Newdow* v. *Roberts*, 603 F.3d 1002, 1009 (D.C. Cir. 2010). In other words, "[t]he capable-of-repetition doctrine is not meant to save mooted cases that may have remained live but for the neglect of the plaintiff." *Id.* In *Newdow*, the plaintiff failed to appeal the denial of a preliminary injunction motion. In *Armstrong*, the plaintiff missed his deadline to petition for review, and subsequently failed to seek a stay of the administrative proceedings.

These cases do not create a vague laches-type concept whereby plaintiffs must predict how long major, complex constitutional litigation

must last, and hope to squeeze through to the ultimate end before the monetary sand in the contribution limit hourglass runs out, with all the attendant squabbles regarding who, if anyone, was responsible for what portion of an alleged delay.

And for good reason. Because were FEC correct, the Court would have to authoritatively predict that: (1) a given testamentary bequest case *would* have taken no more than X days to litigate from filing to Supreme Court conclusion; (2) plaintiff should have investigated, identified and retained counsel, and brought suit in Y days; (3) the money, divided by the (ever-changing) indexed contribution limit, would have sustained Z days of litigation, and (4) X+Y cannot exceed Z.

Of these, the first variable is most problematic. It is regrettably the case that plaintiffs—even plaintiffs claiming an on-going deprivation of a fundamental, enumerated right—cannot expect *district court* decision, let alone Supreme Court resolution in their case, within seven (or any number of) years.

One of undersigned counsel represents District residents who brought suit in the court below on August 6, 2009, challenging the District of Columbia's total ban on the carrying of handguns for self-

defense. *Palmer* v. *District of Columbia*, D.D.C. No. 09-1482-FJS. The case plainly comes within 28 U.S.C. § 1657(a)'s designation for expedited disposition, as it alleges a serious violation of a fundamental constitutional right, indeed, a right that the Supreme Court held secures an interest in self-defense. The essential facts are undisputed, and the parties have had cross-motions for summary judgment complete and ready for ruling since *October 6, 2009*.

The case remains undecided, while various later-filed cases throughout the country raising similar issues have already reached the Supreme Court. In July, 2011, Chief Justice Roberts assigned a judge from another district to assist with the delays in *Palmer* and other cases, but still the plaintiffs wait. When a consent motion to expedite the proceedings was apparently ignored, plaintiffs turned to this Court, as "[t]he peremptory writ of mandamus has traditionally been used in the federal courts . . . 'to compel [the district court] to exercise its authority when it is its duty to do so." *In re United States*, 598 F.2d 233, 236 (D.C. Cir. 1979) (quotation omitted); *see, e.g.*, *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978).

This Court denied relief, stating that "[p]etitioners have not shown that the district court's delay in ruling on the pending cross-motions for summary judgment is so egregious or unreasonable as to warrant the extraordinary remedy of mandamus at this time." *In re Palmer*, No. 13-5317 (D.C. Cir. Dec. 16, 2013) (citations omitted).[4]

Had LNC filed this case four years earlier, as the FEC would apparently prefer, Burrington's money *might* have sustained a run clear to the Supreme Court. Or, perhaps LNC might still be stuck in the District Court. No one can say for certain. And were LNC, like the long-suffering *Palmer* plaintiffs, in its fifth year of waiting for resolution below, there would be no guarantee that it could conclude the Supreme Court phase within the remaining two years, or obtain this Court's assistance in moving the matter faster.

In any event, since LNC has not failed to take any step to prevent mootness, FEC's unfounded and untrue assumption that *all* important constitutional cases must perforce be resolved by the District Court within four years is irrelevant. The question is whether the dispute is

[4]Per D.C. Cir. R. 32.1(b)(3), this unpublished disposition is attached in an addendum.

likely to evade review when it recurs. Since the average soft-money bequest, per FEC's data, would provide for less than two years of litigation given the current contribution limits, the dispute would almost assuredly continue to evade review.

CONCLUSION

FEC's suggestion of mootness is unpersuasive. The case should be set for briefing and argument.

Dated: February 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this, the 18th day of February, 2014, I served a copy of the foregoing Opposition to Suggestion of Mootness upon the following by electronic service, as the document was filed electronically, generating a Notice of Electronic Filing:

Kevin Hancock
Federal Election Commission
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I declare under penalty of perjury that the foregoing is true and correct.

This the 18th day of February, 2014.

/s/ Alan Gura
Alan Gura

Attorney for Appellant

Addendum

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5317 **September Term, 2013**

1:09-cv-01482-FJS

Filed On: December 16, 2013

In re: Tom G. Palmer, et al.,

Petitioners

BEFORE: Henderson, Brown, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition for a writ of mandamus be denied without prejudice to renewal. Petitioners have not shown that the district court's delay in ruling on the pending cross-motions for summary judgment is so egregious or unreasonable as to warrant the extraordinary remedy of mandamus at this time. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); cf. Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 79-81 (D.C. Cir. 1984). We are confident that the district court will act on the motions as promptly as its docket permits.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam