

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

REPUBLICAN NATIONAL COMMITTEE,
et al.,

Plaintiffs,

V.

FEDERAL ELECTION COMMISSION,
et al.,

Defendants.

Civ. No. 08-1953 (BMK, RJL, RMC)

MOTION FOR SUMMARY JUDGMENT

**DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT**

Defendant Federal Election Commission respectfully moves the Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure. A memorandum in support of this motion, a statement of material facts not in genuine dispute, and a proposed order are attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

**DEFENDANT FEDERAL ELECTION COMMISSION'S
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Federal Election Commission (“Commission”) hereby submits this memorandum in support of the Commission’s motion for summary judgment. To reduce the burden on the Court, the Commission incorporates by reference its opposition to Plaintiffs’ motion for summary judgment (Docket No. 39 (“FEC S.J. Opp.”)), rather than repeating the arguments from that memorandum in their entirety. As the Commission demonstrated in its prior brief:

- (a) Title I of the Bipartisan Campaign Reform Act (“BCRA”), Pub. L. No. 107-155, is a contribution limit and therefore subject to intermediate scrutiny (FEC S.J. Opp. at 7-10);
- (b) The specific activities that Plaintiffs wish to fund with soft money are irrelevant to the constitutionality of BCRA’s contribution limits (*id.* at 10-13);
- (c) The unique relationship between federal officeholders and their parties produces obligations on the part of the officeholders towards their parties’ biggest donors (*id.* at 13-24);

- (d) BCRA provides political parties with advantages not granted to any other political organizations (*id.* at 24-26);
- (e) Plaintiffs' claims regarding how they would go about soliciting soft money in the future are contrary to the massive factual record developed in *McConnell v. FEC*, 540 U.S. 93 (2003), and these claims lack any constitutional significance under the plain terms of *McConnell*'s holding (*id.* at 26-32);
- (f) The phrase "unambiguously campaign related" is not a constitutional test and has no bearing on this case (*id.* at 32-36); and
- (g) Even if their proposed spending were relevant, most of the activities that Plaintiffs wish to fund with soft money affect federal elections (*id.* at 36-44).

In addition to the foregoing, summary judgment should be granted to the Commission for the reasons set forth below.¹

I. SINCE BCRA'S ENACTMENT, NATIONAL POLITICAL PARTY COMMITTEES HAVE RAISED BILLIONS OF DOLLARS, AMOUNTS THAT ARE SUFFICIENT FOR EFFECTIVE ADVOCACY

National party fundraising has flourished in the wake of BCRA, as the six national party committees have dramatically expanded their pool of contributors and raised more hard money

¹ This memorandum and statement of material facts incorporate the "discovery and disclosure materials" obtained from Plaintiffs' responses to the Commission's first set of discovery requests. Fed. R. Civ. P. 56(c). Additional discovery requests were served on Plaintiff on February 23, 2009, but, on March 30, Plaintiffs stated that they would not respond to those requests — or any others — until the Court rules on the Commission's pending motion to dismiss the complaint and on Plaintiffs' pending motion for summary judgment. Defendant-Intervenor Van Hollen has filed a motion to compel Plaintiffs' responses to Defendants' outstanding discovery requests (Docket No. 54). Although that motion has not yet been resolved, the Commission is filing its motion for summary judgment at this time so as to not disrupt the Court's scheduled hearing date of April 29, 2009. The Commission respectfully requests, however, that the Court permit the filing of supplemental memoranda and statements of fact should the Court grant the motion to compel.

than they raised in hard and soft money *combined* before BCRA.² The limit on contributions to national parties — presently set at \$30,400 per year and indexed for inflation (see FEC S.J. Opp. at 4 n.1) — is “closely drawn” because it is not “so low as to ‘preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.’” *McConnell*, 540 U.S. at 135 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)); see also *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (same) (Breyer, J., joined by Roberts, C.J. and Alito, J.). The hundreds of millions of dollars that the parties have been able to raise after BCRA are plainly sufficient for “effective advocacy.”

Each election cycle since BCRA, the national party committees have raised amounts of hard money that are comparable to or greater than the amounts raised in hard and soft money combined before BCRA. The national parties collectively raised approximately \$1.24 billion in hard money in each of the 2003-04 and 2007-08 election cycles, roughly 15% more than the \$1.09 billion these committees raised in the last pre-BCRA presidential election cycle. (Def. FEC’s Statement of Material Facts Not in Genuine Dispute (“FEC SMF”) ¶ 40.) In the 2005-2006 non-presidential election cycle, the parties raised approximately \$900 million in hard money alone, representing approximately 90% of the amount they had raised in hard and soft money combined in 2001-2002. (*Id.* ¶ 41.)

This trend holds true for the RNC, which raises comparable or greater amounts of hard money now in relation to how much it raised in hard and soft money combined before BCRA. In the final presidential election cycle pre-BCRA (1999-2000), the RNC raised approximately \$379 million in hard and soft money combined. (FEC SMF ¶ 42(a).) In the two presidential election

² The national party committees are the RNC, the National Republican Congressional Committee (NRCC), the National Republican Senatorial Committee (NRSC), the Democratic National Committee (DNC), the Democratic Congressional Campaign Committee (DCCC), and the Democratic Senatorial Campaign Committee (DSCC).

cycles since BCRA was enacted, the RNC has raised — in hard money alone — approximately \$392 million (2003-2004) and \$427 million (2007-2008). (*Id.* ¶ 42(b)-(c).) Similarly, in the last non-presidential election cycle (2005-2006), the RNC raised in hard money alone approximately 85% of the amount it had previously raised in hard and soft money combined. (*Id.* ¶ 43.)

In *McConnell*, the RNC predicted that “[t]he net effects of BCRA will be massive layoffs and severe reduction of . . . speech at the RNC, and reduction of many state parties to a ‘nominal’ existence.” *McConnell v. FEC*, 251 F. Supp. 2d 176, 698 (D.D.C. 2003) (Kollar-Kotelly, J.) (quoting RNC brief). Despite BCRA’s raising and indexing for inflation the limits on contributions to political parties, BCRA § 307(a)(2),(d), the RNC “calculate[d] that that the BCRA will cause the RNC to lose revenues of approximately \$48.5 million per nonpresidential election year, and \$125 million per presidential election year.” (FEC SMF ¶ 48 (quoting Shea Decl. ¶ 19).) The RNC further asserted that it would “*not* be able to recoup these lost non-federal revenues” because, the RNC projected, “it is unlikely that the RNC will be able to raise more federal money from lower-dollar contributors than it currently does.” (*Id.* (emphasis in original).)

The Court in *McConnell* found that the “political parties’ evidence regarding the impact of BCRA on their revenues” was “‘speculative and not based on any analysis.’” *McConnell*, 540 U.S. at 173 (quoting *McConnell*, 251 F. Supp. 2d at 524 (Kollar-Kotelly, J.)). “If the history of campaign finance regulation . . . proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities.” *McConnell*, 540 U.S. at 173. The Court was prescient. Directly contrary to the RNC’s predictions, the undisputed fundraising data shows that the national party committees — including the RNC — have, in fact, massively expanded their low-dollar contributor base in precisely the way that the RNC alleged

in *McConnell* was unlikely. (FEC SMF ¶ 49.) The RNC's dire predictions about the "severe reduction" of the RNC's "speech," *McConnell*, 251 F. Supp. 2d at 698 (Kollar-Kotelly, J.), have been proven unfounded. Consistent with *McConnell*, this Court should thus give short shrift to Plaintiffs' conclusory and unsupported statements that they "cannot" or "will not" engage in any of the activities in their complaint because they cannot afford such activities absent the ability to receive contributions in unlimited amounts and from corporate and union sources. (*E.g.*, Pls.' Statement of Undisputed Material Facts ("Pls.' SMF") ¶¶ 23, 45, 62.)

Furthermore, the funds that the RNC has raised since BCRA's enactment have been sufficient for the RNC to engage in all of the activities it now claims it wishes to pursue: supporting state candidates, including in elections where no federal candidates are on the ballot; redistricting; grassroots lobbying; and litigation. (FEC SMF ¶ 52.) Similarly, the CRP has "spent . . . money supporting" federal candidates through direct and coordinated expenditures (*id.* ¶ 54 (quoting Pls.' SMF ¶ 38)), and through substantial sums spent on federal election activity, including voter registration, voter identification, GOTV, and generic campaign activity. (*Id.*) The RPSD has distributed material promoting federal and state candidates together in every election cycle (*id.* ¶ 55), and, regardless of the outcome of this case, the RPSD will continue to conduct all of its voter registration, GOTV, and generic campaign activities in the same manner that it has conducted them since BCRA was enacted. (*Id.* ¶ 56.)

To the extent that Plaintiffs are now claiming to suffer some form of *competitive* disadvantage (Pls.' SMF ¶ 26), such a claim has no basis in law or fact. BCRA's soft-money provisions apply equally to all political parties and impose no unconstitutional competitive burden on Plaintiffs. Even if Plaintiffs' Democratic counterparts were able to raise more hard money under BCRA's neutral rules, such a fundraising advantage would be due to an ability to

obtain funds from a greater number of supporters, which is merely “an indication of popular support” for those party committees’ “political ideas.” *Cf. FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (“Relative availability of funds is after all a rough barometer of public support.”). In any event, if a fundraising disparity between the parties were relevant, Plaintiffs have significantly outraised their Democratic counterparts since BCRA’s enactment. After a rough parity in the 2003-2004 election cycle, the RNC had fundraising advantages of 64% and 85% in the two most recent election cycles. (FEC SMF ¶ 45(a).) Similarly, the CRP’s hard-money fundraising has dwarfed that of the California Democratic Party, with the former nearly quadrupling the latter’s income in the most recent election cycle. (*Id.* ¶ 45(b).) The RPSD has outraised its Democratic Party equivalent in hard money by a total of approximately \$800,000 in the six years since BCRA became effective. (*See id.* ¶ 45(c).)

To the extent that Plaintiffs claim a competitive disadvantage relative to outside special interest groups (Pls.’ SMF ¶ 26), *McConnell* definitively rejected such a claim as the basis for a constitutional challenge. 540 U.S. at 187-88. BCRA actually favors political parties in a number of ways, and political parties have considerably greater legislative power than do interest groups. (FEC S.J. Opp. at 25.) The Court thus found that the political parties’ Equal Protection claims lacked merit. *McConnell*, 540 U.S. at 187-88.³

³ Even if the fundraising of outside interest groups were relevant, Plaintiffs’ allegation of a fundraising disparity once again has no basis in fact. In comparison to the outside groups — i.e., the “527” organizations not registered with the Commission as political committees — with which Plaintiffs claim to be disadvantaged (*see* Pls.’ SMF ¶ 26), the national Republican Party committees have demonstrated a significant fundraising advantage. Not once since BCRA was passed have the Democratic-leaning 527s raised even half of what the Republican party committees raised in hard money; indeed, in the most recent cycle, the three national Republican committees outraised Democratic-leaning 527s by over \$400 million — a ratio of more than four-to-one. (FEC SMF ¶ 46.) Furthermore, if each national party’s fundraising totals are aggregated with the 527s supporting that party, the totals for each side were roughly equal in the

In sum, the record amassed since *McConnell* belies any assertion that Plaintiffs lack the ability to raise sufficient hard-money funds for effective advocacy. Plaintiffs' prediction in that case that BCRA Title I would strip Plaintiffs of their funding, and that their huge, unregulated receipts could not be replaced by smaller, regulated contributions has proved to be inaccurate. "The overall effect of the Act's contribution ceilings is merely to require . . . political committees to raise funds from a greater number of persons," *Buckley*, 424 U.S. at 21-22, and such an expansion of the donor pool — as well as increased contributions up to the revised hard-money limits — has occurred. The Court should reject Plaintiffs' unsupported claims that they cannot fund all of their proposed activities with hard money and that BCRA unconstitutionally limits their ability to raise funds.

II. PLAINTIFFS' RECEIPT OF CONTRIBUTIONS UNRESTRAINED BY THE ACT'S SOURCE AND AMOUNT LIMITATIONS WOULD CREATE AN APPEARANCE OF CORRUPTION AND CREATE A DANGER OF ACTUAL CORRUPTION

Much of Plaintiffs' case is premised on their claim that they must, as a constitutional matter, be permitted to solicit and spend soft money because they allegedly will not (a) provide soft-money donors with additional preferential access to candidates or officeholders above and beyond the preferential access those donors would receive through substantial hard-money contributions, or (b) involve federal candidates or officeholders in the solicitation of soft money. (See FEC S.J. Opp. at 26-32.) The record in the instant case disproves these claims, and the same promises were raised and rejected in *McConnell*.

If the political parties were again permitted to accept million-dollar donations, soft-money donors "know that elected officials would become aware of who has given significant

2003-2004 and 2007-2008 cycles, and the Republican groups had a significant advantage in the 2005-2006 cycle. (See *id.* ¶ 46; Biersack Decl. ¶ 13 (FEC Exh. 33).)

amounts” (FEC SMF ¶ 16 (quoting Greenwald Decl. ¶ 11)), even if Plaintiffs were to exclude federal officeholders from the soft-money solicitation process:

Members will find out who made large contributions from their staffs, other Members, or through ‘thank you’ type events run by the party. . . . Sophisticated donors would understand that elected officials of the party would be aware and appreciative of the amounts contributed even if an officeholder had not personally solicited the funds contributed.

(*Id.* (quoting Rozen Decl. ¶ 4).) Once the federal officials know who the big donors are, “those checks open the doors to the offices of individual and important Members of Congress and the Administration,” which “gives [soft-money donors] an opportunity to shape and affect governmental decisions.” (*Id.* ¶ 18 (quoting Greenwald Decl. ¶¶ 11-12).)

The RNC has a robust operation providing preferred access to officeholders at assorted events for its largest hard-money donors. (*See* FEC S.J. Opp. at 22-23.) “Even if entrance to [donor] events were tied to hard money contributions rather than soft money, such events would provide opportunities for people who had also given additional soft money amounts to interact with elected officials.” (FEC SMF ¶ 17 (quoting Rozen Decl. ¶ 3).) Specifically, “the officeholders would often know which of the attendees had made the large soft money donations, [and] they would naturally feel gratitude towards those donors commensurate with the amount of the donation.” (*Id.*; *see also id.* (quoting Rozen Decl. ¶ 4: “Members will find out who made large contributions . . . , and they will naturally be more responsive to those donors due to the amount of help the donors have provided to the Member’s party.”).)

Because this system turns on the officeholders’ knowledge of donations — not solely on direct involvement in the solicitations — and because such knowledge will undoubtedly be obtained, a system in which the parties accept unlimited donations will inherently and inevitably create actual and/or apparent corruption of federal candidates and officeholders. Thus, “the

pernicious effects of the soft money system . . . will result whether or not Members of Congress themselves directly solicit the contributions.” (FEC SMF ¶ 17 (quoting Rozen Decl. ¶ 3); *see also id.* ¶ 18 (“[T]he system would be perpetuated whether a Member or some other person representing the party is calling to ask.”) (quoting Greenwald Decl. ¶ 11).)

The RNC’s allegation that it will be only a limited conduit for access is not new. The RNC claimed in *McConnell* that its policy was to “not offer to arrange personal meetings between donors — no matter how large — and federal officeholders or candidates for office.” (FEC SMF ¶ 11 (quoting, *inter alia*, Shea Decl. ¶ 44).) When a donor would request such access as a condition of making a donation, the RNC asserted, the party “rejected the donation and denied the request.” (*Id.*) When an existing donor would request a meeting with an officeholder, the RNC’s stated policy was to “pass the request along to the officeholder’s staff without inquiring into the purpose of the proposed meeting, but neither to advocate a meeting nor ascertain whether a meeting has been arranged.” (*Id.* (quoting Shea Decl. ¶ 46).) These assertions are similar to the RNC’s claims about the policy it has followed and would follow in the future if it were permitted to solicit soft money again. (*Id.* (citing Josefiak Dep. 129:18-21); *see also* Pls.’ SMF ¶ 24.)

In spite of this alleged “policy,” trading of soft money for access to federal officeholders — by the RNC and other party committees — was rampant before BCRA. *See McConnell*, 540 U.S. at 150-52 (“The record in the present case[] is replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations. . . . [T]he RNC holds out the prospect of access to officeholders to attract soft-money donations and encourages officeholders to meet with large soft-money donors.”) (citing *McConnell*, 251 F. Supp. 2d at 500-03 (Kollar-Kotelly, J.), 860-61 (Leon, J.)). Party officials

regularly arranged preferential access for soft-money donors: The *McConnell* record contained an enormous number of examples of explicit exchanges of soft money for access. (See FEC S.J. Opp. at 16-24.) All of these occurred under a policy — which the RNC would like to re-establish — of allegedly not encouraging meetings between soft-money donors and officeholders.

The RNC also claims that it will not directly involve federal candidates and officeholders in soft-money fundraising. This is similar to the RNC's position in *McConnell*, in which the party claimed that it was “exceedingly rare for [Members of Congress] to solicit funds through telephone calls or personal meetings.” (FEC SMF ¶ 14 (quoting, *inter alia*, Shea Decl. ¶ 17); see also *id.* (quoting RNC General Counsel's testimony in *McConnell* that “it's certainly not a program that we have in place to ask Members of Congress to solicit soft money”).) Such arrangements, however, neither removed federal officials from the soft-money solicitation process (see *id.* (noting solicitations by federal candidates and officeholders)), nor had any effect on the Members' *knowledge* of who the biggest donors were: “Even when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute lists of potential or actual donors, *or donors themselves would report their generosity to officeholders.*” *McConnell*, 540 U.S. at 147 (emphasis added). “[F]or a member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties *and the donors themselves.*” *Id.* (quoting *McConnell*, 251 F. Supp. 2d at 487-88) (Kollar-Kotelly, J.) (emphasis added); see also *id.* (citing *McConnell*, 251 F. Supp. 2d at 853-55 (Leon, J.)). The record in *McConnell* established in great detail the myriad ways in which federal officials sought out

information regarding the largest donors, obtained that information, and factored it into their decision- and law-making activities. (See FEC S.J. Opp. at 16-24.)

Given the RNC's extensive (and thoroughly adjudicated) history of encouraging access and fundraising by officeholders in spite of the policies and practices the RNC has put forward in litigation, the most logical inference in the instant case is that, if the RNC were again permitted to raise soft money, the same exchanges of money for access would occur. For example, the RNC would undoubtedly take into account the amounts of soft-money donations when it determines who would sit with which officeholders at its various functions. (See FEC SMF ¶ 8.) The RNC might also raise its tiers of donation thresholds — as it does each time the contribution limits increase — to account for the permissibility of unlimited donations. (See *id.* ¶ 9 (noting that RNC's donation tiers correspond to maximum legal contribution).) Prior to BCRA, when there was no legal limit on soft-money contributions, the RNC's donor tiers were substantially higher than they are now: The "Team 100" threshold (currently \$30,400) was \$100,000, and the "Regents" threshold (currently \$60,800 divided between the donor and his/her spouse) was \$250,000 from one person during a single election cycle. (*Id.*) Because these tiers are the primary way in which the RNC (like the CRP and RPSD) determines which of its donors will receive the most preferential access to federal candidates and officeholders (*see id.* ¶¶ 7-8), the parties' ability to directly or indirectly incorporate soft money into the thresholds would inherently provide the donors of unregulated funds with the most access to federal officials. On the level of individual donors, as well, the strong inference to be drawn from the RNC's pre-BCRA conduct discussed above is that its "policies" and alleged practices regarding access would not prevent the party from openly or secretly helping its donors gain influence.

III. PLAINTIFFS' ACTIVITIES AFFECT FEDERAL ELECTIONS

As discussed in the Commission's prior memorandum, *McConnell* held that BCRA Title I is constitutional as a contribution limit, and so the parties' ultimate intended spending of their soft money is "beside the point" for purposes of assessing Title I's constitutionality. (FEC S.J. Opp. at 7-13.) This holding is binding in the instant matter, and Plaintiffs are precluded from challenging it here. (FEC Mem. in Support of Mot. to Dismiss (Docket No. 20) at 24-28.) In any event, even if the Court were to address the specific activities that Plaintiffs claim to wish to fund with soft money, those activities would not be entitled to any form of constitutional exemption from BCRA.⁴ In addition to the reasons discussed at FEC S.J. Opp. 36-44, Plaintiffs' arguments regarding their activities fail for the reasons set forth below.⁵

A. The RNC's "Grassroots Lobbying" Is Sham Issue Advertising

Prior to BCRA, when the RNC was permitted to receive nonfederal funds ostensibly to conduct "issue advertising," "genuine issue advocacy on the part of political parties [was] a rare occurrence." 251 F. Supp. 2d at 451 (Kollar-Kotelly, J.). Similarly, the RNC spent only "a minuscule percentage" of its nonfederal budget on state and local governmental affairs. *Id.* at 463. Instead, the parties funded hundreds of millions of dollars of "sham" issue advertising, i.e., "so-called 'issue ads'" that "were actually electioneering advertisements," *id.* at 826 (Leon, J.).

⁴ Plaintiffs' artificial segregation of their activities into "federal" and "not-unambiguously-federal" is particularly untenable because, as *amici* note, "[m]oney is fungible." (Mem. of P. & A. of Brennan Ctr., *et al.*, Opp. Pls.' Mot. for S.J. at 20-21 (quoting *Sabri v. United States*, 541 U.S. 600, 606 (2004)).) Thus, any soft money spent on a putatively nonfederal activity simply allows the party to spend more hard money on other activities. (See FEC S.J. Opp. 34-35, 44 (citing *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981)).)

⁵ As to Plaintiffs' activities involving redistricting, voter registration, and ballot-initiative advertising, the Commission presents no further arguments at this time but supplements its prior discussions (FEC S.J. Opp. 12, 38-42) with additional factual support developed during discovery. (See FEC SMF ¶¶ 68-69 (redistricting), ¶¶ 60, 77-78 (voter registration), ¶¶ 79-80 (ballot-initiative advertising).)

These ads, many of which overtly attacked the character, qualifications, and fitness for office of federal candidates, were one of the prime motivating factors for BCRA. *See McConnell*, 129-32 (noting Senate Committee’s findings that “the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide”), 169-170. They were also one of the main considerations in the Supreme Court’s upholding of the Act. *See id.*

While *McConnell* unquestionably upheld BCRA’s prohibition on using soft money to fund the type of purported issue advocacy that the national political parties abused in the 1990s, the precise contours of what the RNC *now* considers to be “grassroots lobbying” — and therefore constitutionally exempt from Title I — are unclear. For example, when asked during the course of discovery to respond to interrogatories and to produce certain documents relating to “grassroots lobbying” as that term was defined in Plaintiffs’ own filings in this case, the RNC objected that the term was “extremely vague, overbroad and ambiguous.” (FEC SMF ¶ 63.) Indeed, the RNC’s definition is so vague that the party cannot even determine how much money, if any, it has spent on advertisements that it considers “grassroots lobbying” during the last three election cycles. (*Id.* ¶ 64.) Apparently, therefore, the RNC is asking this Court to hold that the First Amendment prohibits Congress from restricting the financing of a category of communications whose boundaries are so hazy that the RNC itself does not know what is or is not within them.⁶ Because *McConnell* upheld Title I as to all advertising by national political parties, in large part as a reaction to the previously underinclusive regulatory scheme that had allowed sham issue ads, *see McConnell*, 540 U.S. at 129-32, 169-70, Plaintiffs’ request to re-blur this line must fail.

⁶ BCRA, of course, does not prohibit the parties from engaging in any speech, including grassroots lobbying, regardless of how it is defined; in fact, the Democratic National Committee (which has far less cash-on-hand than does the RNC) recently used hard money to produce and distribute a genuine grassroots lobbying advertisement. (FEC SMF ¶ 67.)

In any event, it is undisputed that the RNC's current definition of grassroots lobbying includes the very same sham issue advertising as to which the soft-money restriction was upheld in *McConnell*. Although the RNC has been unable to articulate any coherent description of the boundaries of its desired advertising, the party has specifically testified that several communications that this Court found in *McConnell* to be sham issue ads would constitute "grassroots lobbying" under the RNC's definition of that term. (FEC SMF ¶ 65.)⁷ Thus, regardless of how the RNC would ultimately define grassroots lobbying, the definition would, at a minimum, permit unlimited corporate donations to be used to fund some sham issue ads. That result cannot possibly be squared with *McConnell*.

Plaintiffs have claimed that, in light of *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"), this Court is free to disregard *McConnell*'s holdings regarding sham issue advertising. (See Pls.' Reply Mem. in Support of S.J. at 16 (Docket No. 50) ("Pls.' S.J. Reply").) Such an argument has no basis in the text of *WRTL* itself, which (a) applied strict scrutiny (b) to a restriction on spending (c) by an outside advocacy group. (See FEC S.J. Opp. at 42.) In contrast, the instant case involves (a) the application of intermediate scrutiny (b) to a contribution limit (c) for a national political party. Because "actions taken by political parties are presumed to be in connection with election campaigns," *McConnell*, 540 U.S. at 170 n.64 (citing *Buckley*, 424 U.S. at 79), the *WRTL* holding that *non-political committees* are permitted to finance certain limited advertising with corporate funds has no application to the RNC's request for a constitutional exemption for whatever it ultimately deems to be grassroots lobbying.

⁷ Similarly, the CRP has acknowledged that its "non-advocacy issue oriented mailings" are part of the CRP's activities "supporting" candidates. (FEC SMF ¶ 66 (quoting Pls.' SMF ¶ 39).)

B. The RNC's Support for State and Local Candidates, Even in Elections Where No Federal Candidates Are on the Ballot, Affects Federal Elections

As the Commission noted in its prior brief, most of the putatively state and local activities that the RNC wishes to finance with soft money affect federal elections — by Plaintiffs' own admission. (FEC S.J. Opp. at 38-39; *see also infra* Part III.D-E.) In any event, the RNC is free to spend as much of its money on these, or any other state and local activities, as it would like. Since 2003, the RNC has spent a total of approximately \$2.2 million on elections in which there is no federal candidate on the ballot, although that only constitutes approximately 0.2% of the RNC's disbursements during this period.⁸ (FEC SMF ¶ 57.) If the RNC were interested in committing more of its resources to state and local activity, it could have spent more of the nearly \$1.1 billion it raised during that time period (*see id.* ¶¶ 42-43) on such activity. As the history of soft money demonstrates, however, it is more likely that if the RNC is permitted to funnel soft money to them, "state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising," just as state parties served as that conduit prior to BCRA. *See McConnell*, 540 U.S. at 185.

The RNC has asserted that supporting state and local candidates specifically in elections in which no federal candidates are on the ballot is insufficiently connected to federal elections for constitutional purposes. (*See* Pls.' S.J. Reply at 12-13.) However, the RNC's off-year voter registration efforts increase the number of registered Republicans in subsequent years and facilitate the RNC's compilation of voter information that the party uses to drive its GOTV and

⁸ Even when soft money was permitted, the RNC and DNC spent relatively little on state and local candidates: Combined, the two national parties spent "less than 4% of their soft money spending and 1.6% of their total financial activity in 2000" on state candidates. (FEC SMF ¶ 59 (quoting *McConnell*, 251 F. Supp. 2d at 464 (Kollar-Kotelly, J.)).) Activities such as training of state and local candidates or direct donations to them "constituted a very small portion of the political parties' nonfederal expenditures during the 2000 election cycle." (*Id.*)

other programs assisting federal candidates in later elections. (FEC SMF ¶ 60.) In addition, by the RNC's own admission, the party uses its state and local activities to "give the RNC the opportunity to test new and improved targeting and tactics." (*Id.* (quoting memorandum from RNC Chairman).) For example, to "improve [its] grassroots effort, the RNC . . . deployed trained staff and resources into 2005 legislative and local special elections." (*Id.*) These same efforts, refined in state and local races, "helped the GOP expand [its] majorities in the U.S. Congress . . . , in addition to re-electing President Bush." (*Id.*; *see also id.* (quoting RNC press release stating that RNC's "investment in [its] state parties and . . . grassroots organizations . . . will help ensure victory in the special election in New York's 20th Congressional district.").) The CRP likewise uses its state and local campaign activities to "further refine the strategies and tactics for [its] target congressional candidates." (*Id.* (quoting CRP Chairman's website post).) It is, therefore, undisputed that the RNC's state and local activities help the party increase its electoral success in federal elections.

C. The RNC's Litigation Affects Who Obtains Federal Office

The purpose of the RNC's "litigation account" is unclear: Plaintiffs' complaint alleged that the account would "be used *solely* for paying the fees and expenses attributable to this case" (Compl. ¶ 21 (emphasis added)), while Plaintiffs' briefs appear to take a more expansive view. (*E.g.*, Pls.' SMF ¶ 20.) To the extent the litigation account is limited to the instant case, it affects federal elections for the same reasons discussed previously regarding soft money in general and Plaintiffs' activities in particular. To the extent the account also would be used to fund litigation regarding voter registration and similar issues (*see* Josefiak Dep. 172:13-176:3 (FEC Exh. 1)), such litigation affects federal elections for the same reasons that voter registration affects federal elections. (*See* FEC S.J. Opp. at 38-39; FEC SMF ¶¶ 77-78.) Finally, to the extent the account would be used to fund recount litigation and related activity for federal elections, such litigation

is, in the language of FECA, 2 U.S.C. § 441b(a), “in connection with” the underlying federal election, such that it must be financed with federal funds. *See* FEC Advisory Op. 2006-24, <http://saos.nictusa.com/aodocs/2006-24.pdf> (Oct. 5, 2006) (“[E]lection recount activities are in connection with a Federal election . . .”).

D. Get-Out-The-Vote Activity Affects All Elections on the Ballot

All three organizational Plaintiffs have explicitly acknowledged that the purpose of their GOTV activities is to support all Republican candidates — state and federal — on any given ballot, and that these activities do, in fact, help all such candidates. (FEC SMF ¶¶ 72-73; *see also* FEC S.J. Opp. at 38-39.) Indeed, Plaintiff Duncan has stated publicly that the RNC’s “prodigious fundraising” has allowed it to build up, “over a long period of time,” a GOTV program and other “organizational efforts [that] make the difference . . . generally, there’s probably a 2 to 5 percent difference in additional turnout for a candidate that you can make.” (FEC SMF ¶ 74 (quoting *Victory Dream Team*, CONGRESS DAILY, July 29, 2008).) This “difference” applies to both federal and “down-ballot” candidates (*see id.*), and it is effective regardless of whether any federal candidates are specifically mentioned in the course of the GOTV activity (*id.* ¶¶ 82-83). Thus, any argument that Plaintiffs’ GOTV activity does not influence federal elections is contrary to Plaintiffs’ own admissions and the record in this case.

Furthermore, the CRP and RPSD already engage in the activity that they claim they require soft money to finance: Although they allegedly conduct GOTV only for purposes of helping state and local candidates, the RPSD uses federal funds to make GOTV phone calls and to distribute GOTV doorhangers “that include[] all Republican candidates” (FEC SMF ¶ 76 (quoting Pls.’ Supplemental Discovery Resps. at 10)), and the CRP includes federal candidates in

some of its GOTV slate listings. (*Id.* ¶ 75.) Nothing in BCRA prohibits Plaintiffs from devoting more of their federal funds to GOTV activities in mixed federal-and-state elections.⁹

E. Plaintiffs’ Other Federal Election Activity Affects Federal Elections

To the extent that any of the state or local parties’ intended activities constitute “generic campaign activity” 2 U.S.C. § 431(20)(A)(ii) — which is “campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate,” 2 U.S.C. § 431(21) — such activities influence federal elections. (*See* FEC S.J. Opp. 37-38 (quoting *McConnell’s* discussion of “generic campaign activity”).) As the CRP’s Chairman has stated: “Building organizational and communications capability — and expanding the ranks of congressional, state and local officials from our party — makes it more likely a state will be competitive in a presidential election down the road.” (FEC SMF ¶ 81; *see also id.* (quoting CRP Chairman’s website post noting that Congressional candidate was “benefitting from the organization our volunteer groups have built in the region”); *id.* ¶ 60 (noting use of party-building operations to refine strategies and tactics for federal campaigns).) This effect occurs (indeed, it is intended) regardless of whether the generic activity takes the form of GOTV, voter registration, or general party-building:

Common sense dictates, and it was “undisputed” below, that a party’s efforts to register voters sympathetic to that party directly assist the party’s candidates for federal office. 251 F. Supp. 2d, at 460 (Kollar-Kotelly, J.). It is equally clear that federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls. *See, e.g., id.*, at 459 (“[The evidence] shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct

⁹ Furthermore, in BCRA § 101, 2 U.S.C. § 441i(b)(2)(A)-(B), Congress permitted state and local parties to fund certain GOTV, voter registration, and other programs that constitute “federal election activity” under 2 U.S.C. § 431(20)(A)(i)-(ii) in part with nonfederal funds raised in amounts up to \$10,000 per donor per year and in accordance with state law. (*See* FEC S.J. Opp. at 4 n.2, 41.)

will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate [G]eneric campaign activity has a direct effect on federal elections” (quoting Green Expert Report 14)).

McConnell, 540 U.S. at 167-68; *see also* FEC SMF ¶ 82 (quoting RNC Memorandum stating that “[t]here are certain election related party expenditures that make no reference to any specific candidates but do benefit the entire Republican ticket These generic programs include voter registration[] and GOTV programs These programs and projects benefit the Republican Party and all of its candidates, federal and state.”); *id.* (quoting state party chair’s testimony that state party’s “Get-out-the-vote program is designed to benefit all candidates. That could include voter registration and so on and so forth. Q. And is the same true of generic party advertising, in other words, Vote Republican, that’s designed to benefit all the candidates? A. Yes.”). To finance such “generic” activity with unlimited and corporate contributions would create the same actual and/or apparent corruption as would each of Plaintiffs’ other proposed uses for their soft money.

IV. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court grant summary judgment to the Commission.

Respectfully submitted,

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Dated: April 10, 2009

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

_____	)	
REPUBLICAN NATIONAL COMMITTEE,	)	
<i>et al.</i> ,	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
	)	
FEDERAL ELECTION COMMISSION,	)	
<i>et al.</i> ,	)	STATEMENT OF MATERIAL FACTS
	)	
Defendants.	)	
_____	)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S
STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

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Pursuant to LCvR 7(h) and 56.1, Defendant Federal Election Commission (“Commission”) submits in support of its motion for summary judgment the following statement of material facts not in genuine dispute.

I. UNLIMITED CONTRIBUTIONS TO PLAINTIFFS WOULD CREATE AN APPEARANCE OF CORRUPTION AND POSE A DANGER OF ACTUAL CORRUPTION

A. The Republican National Committee Is in a Unique Position Between Donors and Federal Candidates and Officeholders

1. Plaintiff Republican National Committee (“RNC”) is a “political arm of Republicans either seeking office or in office,” and representatives of the RNC are in communication with candidates and officeholders on a frequent, ongoing basis. (Josefiak Dep. 197:1-18 (FEC Exh. 1).)¹

2. National political parties are “inextricably intertwined with federal officeholders and candidates.” *McConnell v. FEC*, 540 U.S. 93, 155 (2003) (quoting 148 Cong. Rec. H409 (Feb. 13, 2002)).²

3. “[T]here is no meaningful separation between the national party committees and the public officials who control them.” *Id.* (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 468-69 (D.D.C. 2003) (Kollar-Kotelly, J.)).

4. The “national parties” are in a “unique position” to serve as “agents for spending on behalf of those who seek to produce obligated officeholders.” *Id.* at 145 (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001)).

¹ FEC Exhibits 1-25 were appended to the Commission’s memorandum in opposition to Plaintiffs’ motion for summary judgment (Docket No. 39); FEC Exhibits 26-41 are appended to the instant memorandum.

² Once resolved by an appellate court, issues of legislative fact need not be relitigated in lower courts each time they arise. *See A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002). Thus, as to any fact that the Supreme Court resolved in *McConnell*, this Court may simply adopt the relevant finding from that case.

5. “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*, 251 F. Supp. 2d at 697 (Kollar-Kotelly, J.). When the President of the United States is a Republican, the President nominates the chairperson of the RNC, and there is regular strategic coordination between the party and the White House. (See Josefiak Dep. 193:2-194:20 (FEC Exh. 1).)

6. The RNC works with federal candidates each election cycle to develop “victory plans,” which are joint, comprehensive, election-specific strategies. (See Josefiak Dep. 198:13-199:8 (FEC Exh. 1); *see also McConnell*, 540 U.S. at 159-60 (rejecting RNC’s Title I challenge in relation to victory plans); *Victory Dream Team*, CONGRESS DAILY, July 29, 2008, 2008 WLNR 14131041 (FEC Exh. 26) (noting victory plans’ use in federal and “down-ballot” elections); [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The RNC also sells voter preference data to campaigns (see Josefiak Dep. 200:10-12 (FEC Exh. 1)) and, on occasion, exchanges donor lists with them (see *id.* 98:8-14).

B. The Republican National Committee Facilitates Its Largest Donors’ Access to and Influence Over Federal Candidates and Officeholders

7. To facilitate its donors’ access to federal candidates and officeholders, the RNC organizes private receptions, dinners, and other events at which individuals who have made large

contributions (i.e., \$15,000 or more) to the RNC have an opportunity to meet, dine, and speak with federal candidates and officeholders. (See Josefiak Dep. 58:18-61:5 (FEC Exh. 1).) These opportunities are “not offered to the public at large.” (Pl. RNC’s Discovery Resps. at 7 (FEC Exh. 4).)

8. The RNC has created tiers of donors with specified benefits: For example, donors who give \$15,000 receive “intimate luncheons, dinners, and meetings with key policymakers”; donors who give \$30,400 “enjoy exclusive private functions with elected Republican leaders”; and donors who commit to raising \$60,800 receive “at least one . . . exclusive event during the year,” as well as other “intimate events with key GOP policymakers.” (RNC 000130 (FEC Exh. 7).) All of these benefits involve the privilege of attending events with federal candidates and officeholders, from candidates for the U.S. House to the sitting President of the United States. (See generally RNC 000058-000371 (FEC Exh. 8) (invitations to donor events with federal candidates and officeholders).) At these events, an attending donor has an opportunity to inform the federal candidate or officeholder about the donor’s opinion on legislation or other issues, and the candidate or officeholder is aware that the person expressing that opinion is a major donor. (See Josefiak Dep. 76:14-77:11 (FEC Exh. 1); see also Draft letter from Jim Nicholson to Deimer True, RNC 0302806 [DEV 102]³ (explaining that donor who buys only one ticket to event is unlikely to sit with U.S. Senator because “sponsors, major donors, and table buyers are given first choice” of “VIP” assigned to their table).)

³ “DEV” and “Tab” citations refer to the *McConnell* Defendants’ Exhibit Volumes. A DVD copy of the non-confidential DEVs and a CD containing the confidential DEVs were filed in the instant action (see Docket No. 39-23), and courtesy copies were delivered to Chambers contemporaneously with the filing of the Commission’s opposition to Plaintiffs’ motion for summary judgment.

9. The RNC sets its highest donation tier to correspond to the legal contribution limit; when the contribution limits rise, the RNC increases the size of the donation required to reach the top tier. (Josefiak Dep. 102:19-103:6 (FEC Exh. 1).) Prior to BCRA, when there was no legal limit on soft-money contributions, the RNC's donor tiers were substantially higher than they are now: The "Team 100" threshold (currently \$30,400) was \$100,000, and the "Regents" threshold (currently \$60,800 divided between the donor and his/her spouse) was \$250,000 from one person during a single election cycle. (See Shea Decl. ¶¶ 10, 14(f)-(g), *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.) (Oct. 4, 2002) (FEC Exh. 27).)

10. In *McConnell*, the plaintiffs' own expert testified that, assuming money does buy access to or influence over federal officeholders, soft money is more likely to buy access or influence "simply by virtue of the numbers." Primo Cross Tr. (Oct. 23, 2002) at 162, *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.), Docket No. 344 (May 16, 2003); accord Krasno & Sorauf Expert Rep. at 15 [DEV 1-Tab 2] ("[T]he much greater size of the [soft money] individual donations at issue here pose a proportionately larger risk of influencing their beneficiaries than do contributions of hard money."); Andrews Decl. ¶ 18 [DEV 6-Tab 1]; Wirthlin Cross Tr. (Oct. 21, 2002) at 57, *McConnell*, Docket No. 344 (May 16, 2003).

11. The RNC has no written policy — and gives no written guidance to its employees — against providing donors with preferential access to federal candidates and officeholders. (Josefiak Dep. 128:2-5, 184:10-21 (FEC Exh. 1).) To the extent the RNC has an unwritten policy on this issue, it is the same policy that was in effect prior to BCRA. (*Id.* 129:18-21.) That policy, according to the RNC in *McConnell*, was to "not offer to arrange personal meetings between donors — no matter how large — and federal officeholders or candidates for office." (Shea Decl. ¶ 44 (FEC Exh. 27); see also Shea Dep. 79:22-81:11, *McConnell v. FEC*, Civ. No.

02-582 (D.D.C.) (FEC Exh. 28) (discussing policy).) When a donor requested such access as a condition of making a donation, the RNC asserted that it “rejected the donation and denied the request.” (Shea Decl. ¶ 44 (FEC Exh. 27).) When an existing donor requested a meeting with an officeholder, the RNC’s stated policy was to “pass the request along to the officeholder’s staff without inquiring into the purpose of the proposed meeting, but neither to advocate a meeting nor ascertain whether a meeting has been arranged.” (*Id.* ¶ 46.) In spite of this policy, trading of soft money for access to federal officeholders was rampant. *See McConnell*, 540 U.S. at 150-52 (“The record in the present case[] is replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations. . . . [T]he RNC holds out the prospect of access to officeholders to attract soft-money donations and encourages officeholders to meet with large soft-money donors.”) (citing *McConnell*, 251 F. Supp. 2d at 500-03 (Kollar-Kotelly, J.), 860-61 (Leon, J.)).

12. Many donors make large contributions at the suggestion of professional lobbyists as part of a broader plan to obtain influence. As one lobbyist explained,

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.*

McConnell, 251 F. Supp. 2d at 495 (Kollar-Kotelly, J.) (citation omitted, emphasis added); *see also id.* (“To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important.”) (quoting different lobbyist). Through lobbyists and others, “national parties have actively exploited the belief that contributions purchase influence or protection to pressure donors into making contributions.” *McConnell*, 540 U.S. at 148 n.47. As the CEO of a major corporate donor explained, if a corporation had given a

lot of money to one party, “the other side,” i.e., the opposing national party committee, might have “a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed.” *Id.* (internal quotation marks omitted).

C. Federal Candidates and Officeholders Know the Identity of Their Parties’ Large Donors, Regardless of Who Solicits the Donations

13. It is not only “contributions made at the express behest of” a candidate that raise corruption concerns, *McConnell*, 540 U.S. at 152, but also other contributions, because “[e]lected officials know exactly who the big party contributors are.” Rudman Decl. ¶ 12 [DEV 8-Tab 34]; *accord* Simpson Decl. ¶ 5 [DEV 9-Tab 38]; Greenwald Decl. ¶ 11 [DEV 6-Tab 16]. Donation patterns are well-known or easily ascertainable by party officials, officeholders, staff, and opposing lobbyists, through FEC reports or other means. *See McConnell*, 540 U.S. at 148 n.47; *McConnell*, 251 F. Supp. 2d at 488 (Kollar-Kotelly, J) (“[T]here is communication among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff.”) (quoting CEO Wade Randlett); *id.* at 487 (Kollar-Kotelly, J.), 853-54 (Leon, J.) (“[Y]ou cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party.”) (quoting Senator Bumpers); *id.* at 487-88 (Kollar-Kotelly, J), 854 (Leon, J.) (“Legislators of both parties often know who the large soft money contributors to their party are.”) (quoting Senator McCain); *id.* at 487 (Kollar-Kotelly, J), 854 (Leon, J.) (donor’s “lobbyist informs the Senator that a large donation was just made”) (quoting Senator Boren). Congressional staffers also know the identities of the big soft-money donors. *See id.* at 482 (“Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.”) (quoting Senator Simpson).

14. In *McConnell*, the RNC asserted that it was “exceedingly rare for [Members of Congress] to solicit funds through telephone calls or personal meetings.” (Shea Decl. ¶ 17 (FEC Exh. 27); Josefiak Dep. 105:6-7, *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.) (Sept. 28, 2002) (FEC Exh. 29) (“I am not aware of Members of Congress being asked to solicit soft money on behalf of the RNC.”); *id.* at 119:15-121:3 (testifying that RNC staff and existing donors conducted most major-donor solicitations for RNC, and “it’s certainly not a program that we have in place to ask Members of Congress to solicit soft money. I’m not aware of that at all.”);

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In fact, however, before the passage of BCRA, some soft-money solicitations were made by employees or officers of the national parties, and some were made by officeholders. *McConnell*, 540 U.S. at 125 (“[S]oft-money contributions . . . were in many cases solicited by the candidates themselves.”); *id.* at 147 (discussing fundraising in which federal candidates were not involved).

15. “Even when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute lists of potential or actual donors, *or donors themselves would report their generosity to*

officeholders.” *McConnell*, 540 U.S. at 147 (emphasis added). “[F]or a member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties *and the donors themselves.*” *Id.* (quoting *McConnell*, 251 F. Supp. 2d at 487-88) (Kollar-Kotelly, J.) (emphasis added); *see also id.* (citing *McConnell*, 251 F. Supp. 2d at 853-55 (Leon, J.)).

16. In light of the foregoing, even if Plaintiffs were to exclude federal officeholders from the soft-money solicitation process, soft-money donors “know that elected officials would become aware of who has given significant amounts” (Greenwald Decl. ¶ 11 (FEC Exh. 30) (former CEO of soft-money donor)): As a lobbyist and former congressional aide explains, “Members will find out who made large contributions from their staffs, other Members, or through ‘thank you’ type events run by the party.” (Rozen Decl. ¶ 4 (FEC Exh. 31).) Indeed, “fundraising does not always involve a solicitation directly from a Member. . . . Sophisticated donors would understand that elected officials of the party would be aware and appreciative of the amounts contributed even if an officeholder had not personally solicited the funds contributed.” (*Id.*)

17. Thus, “the pernicious effects of the soft money system . . . will result whether or not Members of Congress themselves directly solicit the contributions.” (Rozen Decl. ¶ 3 (FEC Exh. 31).) “Even if entrance to [donor] events were tied to hard money contributions rather than soft money, such events would provide opportunities for people who had also given additional soft money amounts to interact with elected officials.” (*Id.*) For example, fundraising events for hard-money donors would inevitably include donors who had also made soft-money donations. At such events, “the officeholders would often know which of the attendees had made the large soft money donations, [and] they would naturally feel gratitude towards those donors

commensurate with the amount of the donation.” (*Id.*; *see also* Ornstein Decl. ¶ 16 (Exh 3 to Van Hollen S. J. Opp. (Docket No. 41)) (“If the parties could now return to creating and managing events to solicit unlimited soft money contributions . . . with officeholders present, where they would interact with large donors and could be told by the parties who the large donors are, and would likely be told by the donors themselves, . . . it would require a huge suspension of disbelief to imagine that the officeholders would not pay close attention to who they are, and would lavish attention on them.”).) “The same willful suspension of disbelief is required to imagine that a busy lawmaker with a long list of phone calls to return or limited time to see people would ignore the call or appointment from a soft money donor who may have given six- or seven-figure contributions to his or her party.” (Ornstein Decl. ¶ 16; *see also* Rozen Decl. ¶ 4 (FEC Exh. 31) (“The dangers of the soft money system . . . will still be present. Members will find out who made large contributions . . . , and they will naturally be more responsive to those donors due to the amount of help the donors have provided to the Member’s party.”).)

18. “Though a soft money check might be made out to a political party, . . . those checks open the doors to the offices of individual and important Members of Congress and the Administration” (Greenwald Decl. ¶ 12 (FEC Exh. 30).) This access to federal candidates and officeholders, even if it were “not explicitly promised” by the party, “gives [soft-money donors] an opportunity to shape and affect governmental decisions.” (*Id.* ¶¶ 11-12.) Such influence provides the impetus for “the vast majority of soft money” (*id.* ¶ 11), and “the system would be perpetuated whether a Member or some other person representing the party is calling to ask.” (*Id.*)

D. State and Local Political Parties Are Inextricably Intertwined with National Parties, Federal Candidates, and Federal Officeholders

19. State and local parties — such as Plaintiffs California Republican Party (“CRP”) and Republican Party of San Diego County (“RPSD”) — are “entities uniquely positioned to serve as conduits for corruption” because of their close connection to the national parties and to federal officeholders and candidates. *See McConnell*, 540 U.S. at 156 n.51; *see also id.* at 161.

20. “Congress recognized that” there were “close ties between federal candidates and state party committees,” *id.* at 161, and concluded — “based on the evidence before it” — that “state committees function as an alternative avenue for precisely the same corrupting forces” of soft money as the national party committees, *id.* at 164.

21. The chairperson of each state Republican party sits on the RNC. (Josefiak Dep. 14:18-15:13 (FEC Exh. 1).) This arrangement facilitates near-constant strategic communication between state parties and the RNC. (*See id.* 200:13-201:1.)

22. The CRP’s chairperson serves on the RNC, and all three of the CRP’s RNC members regularly convey strategic information among and between the CRP and the RNC. (*See* Christiansen Dep. 14:16-18, 15:2-5, 17:14-18 (FEC Exh. 2).) Communication between the RNC and CRP is particularly frequent during election years, when the parties discuss strategic topics such as voter registration and voter contact goals. (*See id.* 173:19-174:15.) In addition, the CRP’s Board of Directors always includes a United States Representative, who serves on behalf of the entire California Republican congressional delegation. (*Id.* 170:6-11.) The CRP, therefore, is inextricably intertwined with both the RNC and California’s federal officeholders and candidates.

23. Each Republican nominee for the United States Senate and House of Representatives sits on the CRP’s State Central Committee. *Standing Rules & Bylaws of the*

Cal. Republican Party § 2.01.01(A)(1)-(2) (Feb. 22, 2009), available at http://www.cagop.org/index.cfm/about_party_bylaws.htm. If elected, each of these federal officeholders appoints a minimum of eight to twelve additional delegates to the Committee. *See id.* § 2.01.01(B)(1)-(2),(6). Even if not elected, each nominee appoints a minimum of one to five additional delegates. *See id.* § 2.01.01(B)(7). All of California’s RNC members also sit on the CRP’s State Central Committee. *See id.* § 2.01.01(A)(3)-(4). Each of these members appoints four to twelve additional delegates to the Committee. *See id.* § 2.01.01(B)(3)-(4).

24. The CRP engages in strategic coordination with local Republican committees, including the RPSD, as to key party activities, such as voter registration and voter contact. (*See* Christiansen Dep. 175:8-176:4 (FEC Exh. 2).)

25. The CRP’s Board of Directors — which always includes at least one federal officeholder, *see supra* ¶ 22 — is informed of individual “generous donations.” (*Id.* 82:14-83:25.)

26. Each Republican United States Representative from San Diego County is an officer of the RPSD (Buettner Dep. 11:14-23, 99:14-24 (FEC Exh. 3)), and so the leadership of the RPSD is inextricably intertwined with that area’s federal officeholders and candidates.

27. The RPSD’s committee members — including federal officeholders, *see supra* ¶ 26 — have access to the RPSD’s internal donor records. (Buettner Dep. 33:20-34:4 (FEC Exh. 3).)

28. The RPSD also makes available to some candidates for the House or Representatives the RPSD’s file containing voter information. (*Id.* at 89:9-90:2.)

E. State and Local Political Parties Facilitate Their Largest Donors' Access to and Influence Over Federal Candidates and Officeholders

29. The CRP invites its donors to meet and speak with federal candidates and officeholders, including the President and Vice President (Christiansen Dep. 62:5-25 (FEC Exh. 2)), candidates for President and Vice President (*id.* 54:2-58:16), and many other federal candidates and officeholders (*see id.* 94:24-99:2 (describing state party conventions); *see also id.* 109:22-110:7 (acknowledging that “at a fundraising event, . . . [donors] can have access through that”); Pls.’ Supplemental Discovery Resps. at 5-6 (Response ¶ 4) (FEC Exh. 32) (“Federal candidates or officeholders who have spoken at such events include: Former Mayor Rudy Giuliani and former Governor Mitt Romney (2007); Senate candidate Bill Jones (2004); Congressman Ed Royce, Congresswoman Mary Bono Mack, Congressman Dana Rohrabacher, and Congressman Kevin McCarthy.”).)

30. Some of these events have tiered ticket structures, with donors who pay larger amounts receiving more intimate access to the officeholders and candidates, such as at seated dinners, where the officeholders and candidates know that the people with whom they are eating are the largest donors. (*See* Christiansen Dep. 54:2-58:16, 94:24-99:2 (FEC Exh. 2).)

31. The CRP has a menu of defined benefits for its major donors, promising them that they will “work closely with California’s Republican candidates and officials” and that donors “are well recognized for their important support of the Republican campaign.” California Republican Party, *Golden State Leadership Team*, http://www.cagop.org/index.cfm/golden_state_leadership_team.htm (last visited Mar. 8, 2009) (FEC Exh. 9); *see also* California Republican Party, *Join the California Republican Party Golden State Leadership Team*, http://www.cagop.org/pdf/Golden_State_Leadership_Application.pdf (last visited Mar. 8, 2009)

(FEC Exh. 10). The CRP believes that providing these benefits helps the party raise funds. (Christiansen Dep. 88:10-89:4 (FEC Exh. 2).)

32. The CRP also “strong arms” federal candidates and officeholders into participating in conference calls with major donors. (Christiansen Dep. 85:25-86:16 (FEC Exh. 2).) For example, Senator McCain’s presidential campaign manager held a conference call for the CRP’s major donors (*id.* 91:17-20, 92:23-94:6), and then held a second call for an even more exclusive set of the CRP’s very biggest donors — those who gave over \$25,000 (*id.* 106:19-107:15).

33. The CRP does not intend to change its practice of giving its donors access to federal candidates and officeholders, even if the CRP is permitted to raise and spend soft money on federal election activity. (*See id.* 177:19-178:6.)

34. The RPSD provides its donors with access to federal candidates and officeholders, including at events attended by such candidates and officeholders where donors giving larger amounts receive greater recognition. (Buettner Dep. 20:15-22:2 (FEC Exh. 3); *see also id.* 37:10-38:3, 39:7-9.) Each month, the RPSD holds a meeting that is open to the public but that is followed by a reception to which only major donors and important guests (including federal candidates and officeholders) are invited. (*Id.* 49:2-51:3.) The RPSD also arranges “VIP junkets” to Washington, where major donors meet with members of Congress. (*Id.* 43:23-45:2, 45:24-46:7.) This preferential access is set out in menus of defined benefits, including, “for [the RPSD’s] most generous supporters . . . private, complimentary VIP meetings and events with major Republican leaders and candidates.” RPSD, *Join a Republican Supporter Club or Renew Your Membership*, <https://secure.repweb.net/sandiegorepublicans/donor/> (last visited Mar. 8, 2009) (FEC Exh. 11); *see also* RPSD, *Tony Krvaric, Chairman’s Circle Chair*,

http://www.sandiegorepublicans.org/donor/chairmans_circle/ (last visited Mar. 8, 2009) (FEC Exh. 12) (listing benefits for RPSD's highest donor group).

35. The RPSD does not intend to change its practice of giving access to donors, even if the RPSD is permitted to raise and spend soft money on federal election activity. (*See* Buettner Dep. 56:18-23 (FEC Exh. 3).)

36. “[T]he federal candidates who benefit from state party use of [soft money] will know exactly whom their benefactors are; the same degree of beholdenness and obligation will arise; the same distortions on the legislative process will occur; and the same public cynicism will erode the foundations of our democracy — except it will all be worse in the public’s mind because a perceived reform was undercut once again by a loophole that allows big money into the system.” *McConnell*, 251 F. Supp. 2d at 467 (Kollar-Kotelly, J.) (quoting Senator Rudman).

F. A National Party Official Acting as an Agent of His Party Raises the Same Actual and Apparent Corruption Concerns as the National Party Itself

37. Plaintiff Duncan was Chairman of the RNC until January 30, 2009. (Josefiak Dep. 29:4-20 (FEC Exh. 1).)

38. To the extent Duncan wishes to solicit soft-money donations in his capacity as an RNC member, each of the foregoing facts regarding the RNC, *see supra* ¶¶ 1-18, applies to Duncan with equal force. To the extent Duncan wishes to solicit soft money for state and local candidates in his individual capacity, or in his capacity as a state party official, BCRA does not prevent him from doing so. *McConnell*, 540 U.S. at 157.

39. Duncan remains a member of the RNC, but he has no official leadership role within that organization. (Josefiak Dep. 29:21-30:13 (FEC Exh. 1).) He has no authority, beyond that of any other RNC member, over the actions or decisions of the current RNC Chairman. (*See id.*)

II. PLAINTIFFS AND OTHER POLITICAL PARTY COMMITTEES HAVE RAISED SUFFICIENT FUNDS FOR EFFECTIVE ADVOCACY WITHIN THE FEDERAL CONTRIBUTION LIMITS

40. Since BCRA's enactment, which raised the limit on contributions to national political parties and indexed it to inflation, BCRA § 307(a)(2),(d), the national party committees⁴ have raised more hard money during each presidential election cycle than they raised in hard and soft money combined prior to BCRA:

a. In the 1999-2000 election cycle, the national party committees raised a total of approximately \$1.09 billion — approximately \$574.5 million in hard money and approximately \$515.1 million in soft money. (Biersack Decl. ¶¶ 3-4 (FEC Exh. 33).)

b. In the 2003-2004 election cycle, the national party committees raised approximately \$1.24 billion in hard money. (*Id.*)

c. In the 2007-2008 election cycle, the national party committees raised approximately \$1.24 billion in hard money. (*Id.*)

41. In the 2005-2006 non-presidential election cycle, the national party committees raised approximately \$900.2 million in hard money alone, representing approximately 90 percent of the \$1.011 billion (\$515.2 million in hard money and \$496.1 million in soft money) they raised in 2001-2002. (Biersack Decl. ¶¶ 3, 5 (FEC Exh. 33).)

42. Since BCRA's enactment, the amounts of hard money raised by the RNC each presidential election cycle have been greater than the amounts the RNC raised in hard and soft money combined prior to BCRA:

⁴ The national party committees are the RNC, the National Republican Congressional Committee (NRCC), the National Republican Senatorial Committee (NRSC), the Democratic National Committee (DNC), the Democratic Congressional Campaign Committee (DCCC), and the Democratic Senatorial Campaign Committee (DSCC).

a. In the 1999-2000 election cycle, the RNC raised a combined total of approximately \$379 million — nearly \$212.8 million in hard money and approximately \$166.2 million in soft money. (Biersack Decl. ¶¶ 3, 6 (FEC Exh. 33).)

b. In the 2003-2004 election cycle, the RNC raised approximately \$392.4 million in hard money. (*Id.*)

c. In the 2007-2008 election cycle, the RNC raised approximately \$427.6 million in hard money. (*Id.*)

43. In the 2005-2006 non-presidential election cycle, the RNC raised approximately \$243 million in hard money, representing approximately 85 percent of the \$284 million (\$170 million in hard money and \$113.9 million in soft money) the RNC raised in 2001-2002. (Biersack Decl. ¶¶ 3, 7 (FEC Exh. 33).)

44. The RNC, CRP, and RPSD are subject to the same contribution limits as their Democratic Party equivalents. *See* 2 U.S.C. § 441a(a)(1).

45. Since BCRA's enactment, the RNC, CRP, and RPSD have in most election cycles each raised considerably more hard money than their Democratic counterparts:

a. In the 2007-2008 cycle, the RNC raised approximately \$427.5 million, roughly 64% more than the DNC's \$260.1 million. In the 2005-2006 election cycle, the RNC raised approximately \$243 million, approximately 85% more than the DNC's \$130.8 million. In the 2003-2004 election cycle, the RNC and DNC each raised almost \$400 million. (Biersack Decl. ¶¶ 3, 8 (FEC Exh. 33).)

b. In the three post-BCRA election cycles, the CRP has raised significantly more hard money than the California Democratic Party ("CDP"). In the 2007-2008 election cycle, the CRP raised approximately \$14 million, over 3.5 times more hard money than the

CDP's \$3.8 million. In the 2005-2006 election cycle, the CRP raised approximately \$10.8 million, almost double CDP's \$5.6 million. And in the 2003-2004 election cycle, the CRP raised approximately \$13.3 million, or 25% more than the CDP's \$10.7 million. (Biersack Decl. ¶¶ 9-10 (FEC Exh. 33).)

c. In the six years since BCRA became effective, the RPSD has raised considerably more hard money than the San Diego Democratic Party ("SDDP"). Although the SDDP raised about \$90,000 more hard dollars than the RPSD in the 2007-2008 election cycle, the RPSD raised twice as much hard money as the SDDP in the 2005-2006 cycle: \$648,137 for the RPSD, versus \$297,827 for the SDDP. In the 2003-2004 election cycle, the RPSD raised \$703,478, more than 5.5 times the \$121,803 raised by the SDDP. (Biersack Decl. ¶¶ 11-12 (FEC Exh. 33).)

46. In the three election cycles since BCRA's enactment, the amount of money raised by the national committees of the Republican Party is considerably greater than the combined total raised by all of the Democratic-leaning 527 groups that have a national presence and affect federal elections. In the 2007-2008 election cycle, the three national committees of the Republican Party cumulatively raised approximately \$640.3 million, while the national Democratic 527 groups raised less than one-quarter of that amount, about \$154 million. (Biersack Decl. ¶¶ 3, 13 (FEC Exh. 33); Hajjar Decl. ¶ 4 (FEC Exh. 34).) Similarly, in the 2005-2006 election cycle, the national committees of the Republican Party raised approximately \$508.1 million, more than quadrupling the Democratic 527 groups' \$112.5 million. (Biersack Decl. ¶¶ 3, 13 (FEC Exh. 33); Hajjar Decl. ¶ 5 (FEC Exh. 34).) The national Republican committees raised almost 2.5 times as much as all national Democratic 527 groups in the 2003-2004 election cycle: \$657 million for the Republican committees versus \$264.5 million for the

key Democratic 527 groups. (Biersack Decl. ¶¶ 3, 13 (FEC Exh. 33); Hajjar Decl. ¶ 6 (FEC Exh. 34).) The corresponding fundraising totals for national Republican-leaning 527 groups were \$138 million in the 2008 election cycle, \$106.2 million in the 2006 cycle, and \$164.7 million in the 2004 cycle. (Hajjar Decl. ¶¶ 7-9 (FEC Exh. 34).)

47. The RNC raises substantial funds via joint fundraising committees (“JFCs”), through which the RNC, state parties, and candidate campaign committees solicit donors collectively and share the proceeds received from those solicitations. (*See, e.g.*, RNC 000106-000110 at 000108, 000110 (FEC Exh. 13) (explaining breakdown of donations to JFC shared by RNC, McCain presidential campaign, and state Republican parties of Colorado, Minnesota, New Mexico, and Wisconsin).)

48. The RNC predicted in *McConnell* that “[t]he net effects of BCRA will be massive layoffs and severe reduction of . . . speech at the RNC, and reduction of many state parties to a ‘nominal’ existence.” *McConnell*, 251 F. Supp. 2d at 698 (Kollar-Kotelly, J.) (quoting RNC brief). The RNC “calculate[d] that the BCRA will cause the RNC to lose revenues of approximately \$48.5 million per non-presidential election year, and \$125 million per presidential election year.” (Shea Decl. ¶ 19 (FEC Exh. 27).) The RNC further asserted that it would “*not* be able to recoup these lost non-federal revenues” because, the RNC projected, “it is unlikely that the RNC will be able to raise more federal money from lower-dollar contributors than it currently does.” (*Id.* (emphasis in original).)

49. Directly contrary to the RNC’s foregoing predictions in *McConnell*: (a) the RNC generally raises more hard money now than it raised in hard and soft money combined before BCRA, *see supra* ¶¶ 40-43; and (b) the RNC also has massively expanded its low-dollar

contributor base. (See Ornstein Decl. ¶¶ 21-26 (Exh 3 to Van Hollen S. J. Opp. (Docket No. 41)).)

50. The RNC acknowledges that it has not yet “been able to compete effectively in [the] area” of fundraising via the internet. (Josefiak Dep. 185:22-186:12 (FEC Exh. 1); *see also id.* 188:17-189:1 (Q: . . . [T]here’s no reason that the RNC can’t raise hard dollars over the Internet in the same way and with the same effect as any other hard money group, is there? A. Correct. We attempt to raise it. It’s not productive, so the competition is there because others can, and we can’t.”), 83:18-84:5 (“[E]ven though we constantly try to increase . . . the solicitations by e-mail, which is very cost effective, we have not been as successful as the opposition party in generating interest by our donor base to contribute that way.”).)

III. PLAINTIFFS’ ACTIVITIES

A. Plaintiffs Are Demonstrably Willing and Able to Finance Their Activities with Federal Funds

51. BCRA does not “in any way limit[] the total amount of money parties can spend. Rather, [it] simply limit[s] the source and individual amount of donations.” *McConnell*, 540 U.S. at 139 (citation omitted).

52. Since BCRA’s enactment, the RNC has engaged in all of the activities it now claims to wish to pursue: supporting state candidates, including in elections where no federal candidates were on the ballot (Plaintiff RNC’s Discovery Resps. at 4-5 (FEC Exh. 4)); redistricting (*id.* at 5); grassroots lobbying (Josefiak Dep. 156:22-157:10 (FEC Exh. 1)); and litigation (*id.* 171:20-172:9).

53. To the extent that the RNC has chosen to forego certain activities, that is the result of the RNC’s strategic decision to spend its plentiful federal funds on other elections. (See *id.* 141:10-143:16, 160:12-20.)

54. Since BCRA's enactment, the CRP has "spent . . . money supporting" federal candidates through direct and coordinated expenditures (*see* Pls.' Statement of Material Facts ¶ 38), and through substantial sums spent on federal election activity, including voter registration, voter identification, GOTV, and generic campaign activity, *see infra* ¶¶ 72-83.

55. Since BCRA's enactment, the RPSD has distributed material promoting federal and state candidates together in every election cycle. (*See* FEC Exh. 20 (RPSD materials); *see also* Buettner Dep. 77:2-79:21 (FEC Exh. 3) (acknowledging that RPSD has distributed materials endorsing federal candidates).)

56. The purpose of the RPSD's alleged activities is "to get Republicans elected" at the federal, state, and local levels. (Buettner Dep. 62:5-63:18, 66:3-67:9 (FEC Exh. 3).) Regardless of the result of this case, the RPSD will continue to conduct all of its voter registration, GOTV, and generic campaign activities in the same manner that it has conducted them since BCRA was enacted. (*See id.* 76:2-12.)

B. The RNC's Ability to Support State and Local Candidates Is Unlimited, and Such Activity Has the Potential to Affect Federal Elections

57. The RNC contributed approximately \$900,000 to a candidate for governor of Virginia in 2005, \$300,000 to New Jersey county parties that year, \$540,000 to the Louisiana Republican Party in 2007, and \$450,000 to the Kentucky Republican Party in 2007. (*See* Pl. RNC's Discovery Resps. at 4-5 (FEC Exh. 4).) Thus, as to elections "in which there is no federal candidate on the ballot," the RNC has spent a total of approximately \$2.2 million on such elections since 2003, although that only constitutes approximately 0.2% of the RNC's disbursements during this period. (*See id.*; disbursements per election cycle available at <http://www.fec.gov/finance/disclosure/srssea.shtml>.)

58. If the RNC were interested in committing more of its resources to state and local activity, it was free to spend more of the nearly \$1.1 billion it raised in that time period on such activity. *See supra* ¶¶ 42-43.

59. Prior to BCRA — when the RNC was permitted to receive nonfederal funds ostensibly for the same type of activities at issue in this case — the RNC donated only a “small fraction” of its federal funds to state and local candidates. *McConnell*, 251 F. Supp. 2d at 464 (Kollar-Kotelly, J.). Combined, the two national parties donated “less than 4% of their soft money spending and 1.6% of their total financial activity in 2000” to state candidates. *Id.* (internal quotation marks omitted). Activities such as training of state and local candidates or direct donations to them “constituted a very small portion of the political parties’ nonfederal expenditures during the 2000 election cycle.” *Id.* at 465.

60. The RNC’s off-year voter registration efforts increase the number of registered Republicans in subsequent years and facilitate the RNC’s compilation of voter information that the party uses to drive its GOTV and other programs assisting federal candidates in later elections. (*See* Josefiak Dep. 245:17-248:20.) More generally, the RNC’s state and local activities “give the RNC the opportunity to test new and improved targeting and tactics.” *See* RNC, “Memo From Chairman Mehlman Regarding GOTV Efforts in Special Elections,” at 1 (May 23, 2005) (FEC Exh. 35). This is true regardless of whether federal elections are also on the ballot: For example, to “improve [its] grassroots effort, the RNC . . . deployed trained staff and resources into 2005 legislative and local special elections.” (*Id.* at 2.) These same efforts, refined in state and local races, “helped the GOP expand [its] majorities in the U.S. Congress . . . , in addition to re-electing President George W. Bush.” (*See id.* at 1; *see also* Press Release, “RNC Makes Additional Investment in Northeast Republican Leadership” (Mar. 17, 2009) (FEC

Exh. 36) (stating that RNC’s “investment in [its] state parties and . . . grassroots organizations . . . will help ensure victory in the special election in New York’s 20th Congressional district.”).)

The CRP, too, uses its state and local campaign activities to “further refine the strategies and tactics for [its] target congressional candidates.” Ron Nehring, *California GOP Chair: Go Local*, http://www.cagop.org/index.cfm/in-case-you-missed-it_599.htm (Dec. 7, 2008) (FEC Exh. 15).

61. In light of the foregoing, if the RNC is permitted to funnel soft money to them, “state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising,” just as state parties served as that conduit prior to BCRA. *See McConnell*, 540 U.S. at 185.

C. The RNC’s “Grassroots Lobbying” Is Sham Issue Advertising

62. Prior to BCRA — when the RNC was permitted to receive nonfederal funds ostensibly to, *inter alia*, conduct “issue advertising” — “genuine issue advocacy on the part of political parties [was] a rare occurrence.” *McConnell*, 251 F. Supp. 2d at 451 (Kollar-Kotelly, J.). Similarly, the RNC spent only “a minuscule percentage” of its nonfederal budget on state and local governmental affairs. *Id.* at 463. “What is clear from the evidence [in *McConnell*], however, is that regardless of whether or not it is done to advocate the party’s principles, the Republican Party’s primary goal is the election of its candidates who will be advocates for their core principles.” *Id.* at 470.

63. The precise contours of what the RNC now considers to be “grassroots lobbying” are unclear: When asked during discovery to respond to interrogatories and to produce certain documents relating to “grassroots lobbying,” as that term was defined in Plaintiffs’ Statement of

Material Facts, the RNC objected that the term was “extremely vague, overbroad and ambiguous.” (See Pls.’ Supplemental Discovery Resps. at 3 (Objection ¶ 8) (FEC Exh. 32).)

64. The RNC cannot determine how much money — if any — it has spent on advertisements that it considers “grassroots lobbying” during the last three election cycles. (Pl. RNC’s Discovery Responses at 6 (FEC Exh. 4); Pls.’ Supplemental Discovery Resps. at 4 (Response ¶ 1 (FEC Exh. 32).)

65. The RNC has testified that several communications that this Court found in *McConnell* to be sham issue ads — i.e., “so-called ‘issue ads’” that “were actually electioneering advertisements,” *McConnell*, 251 F. Supp. 2d at 826-27 (Leon, J.) — would constitute “grassroots lobbying” under the RNC’s definition of that term. (Compare Josefiak Dep. 164:8-22 (FEC Exh. 1) (testifying that RNC’s “Taxed Too Much” ad is grassroots lobbying), 170:14-171:19 (same for RNC’s “More” ad), with *McConnell*, 251 F. Supp. 2d at 446 (Kollar-Kotelly, J.) (including both ads in list of sham issue ads), 826 (Leon, J.) (same); see also ODP0029-00041 (FEC Exh. 5) (text of ad); ODP 0023-02326 (FEC Exh. 6) (same).)

66. Plaintiffs’ Statement of Material Facts (¶ 39) includes disbursements for “non-advocacy issue oriented mailings” in the CRP’s lists of disbursements “supporting” candidates, thereby further confirming the evidence that so-called “grassroots lobbying” affects candidate elections.

67. Using hard money, the Democratic National Committee (which has far less cash-on-hand than does the RNC) has recently produced and distributed a genuine grassroots lobbying advertisement. See “Door to Door,” http://www.youtube.com/watch?v=KtE4YX7_GVlk (last visited Apr. 3, 2009).

D. Redistricting Affects Federal Elections

68. “Redistricting efforts affect federal elections no matter when they are held,” and national party redistricting efforts “are of value to Members of Congress because the changes in the composition of a Member’s district can mean the difference between reelection and defeat.” *McConnell*, 251 F. Supp. 2d at 462, 468 (Kollar-Kotelly, J.).

The most important legislative activity in the electoral lives of U.S. House members takes place during redistricting, a process that is placed in the hands of state legislatures. The chances that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger. Thus, federal legislators who belong to the state majority party have a tremendous incentive to be attuned to the state legislature and the state party leadership.

Id. at 462 (quoting Defendants’ expert Donald Green). The importance of redistricting to federal officeholders was not lost on large soft-money donors: As one memorandum to a high-level Fortune 100 company executive from the company’s own governmental affairs staff explained,

because both [national] parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list. Given the priority of the redistricting efforts, relatively small soft money contributions in this area could result in disproportionate benefit.

Id. at 508.

69. In this case, the RNC has conceded that the purpose of its redistricting activities is to divide *federal* and state legislative districts “into a proper format that hopefully would be . . . more of a benefit to [the RNC] than the opposition party.” (Josefiak Dep. 155:18-21 (FEC Exh. 1); *see also* Remarks of Chairman Jim Nicholson, RNC 0293683-85 [DEV 102].) Indeed, the CRP has repeatedly noted in this case the effect that redistricting can have on campaigns for the United States House of Representatives. (See Pls.’ Statement of Material Facts ¶¶ 36, 38 (“California’s Congressional seats were redistricted in 2001 to virtually eliminate partisan

competition at general elections”); *see also* Erwin Dep. 47:3-11, *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.) (FEC Exh. 37) (“Q. . . . [T]he prospects for election of a candidate for the [H]ouse of [R]epresentatives would depend on redistricting; correct? A. Yes. Q. And to your knowledge do actual members of Congress and candidates for the [H]ouse of [R]epresentatives communicate with the state party and with state legislative officials about redistricting? A. Certainly members of Congress did.”).) The RPSD has noted the same effect. (Pls.’ Statement of Material Facts ¶ 55.)

E. Plaintiffs’ Litigation Affects Who Obtains Federal Office

70. Plaintiffs’ complaint alleged that the “litigation account” would “be used *solely* for paying the fees and expenses attributable to this case.” (Compl. ¶ 21 (emphasis added).)

71. To the extent the litigation account would be used to fund litigation regarding voter registration and similar issues (*see* Josefiak Dep. 172:13-176:3 (FEC Exh. 1)), such litigation affects federal elections. *See infra* ¶¶ 77-78.

F. Get-Out-The-Vote Activity Affects All Elections on the Ballot

72. The purpose of the CRP’s voter identification and GOTV activities is to “get . . . to the polls” all Republicans and Republican-leaning voters (Christiansen Dep. 127:14-25 (FEC Exh. 2)), so that Republican candidates “win on election day” in federal and state races (*id.* at 128:1-4). Accordingly, the CRP acknowledges that its GOTV activities affect federal elections. (*Id.* at 128:24-129:1.)

73. The RNC, too, has acknowledged the affect of GOTV on federal elections:

A. . . . Your get-out-the-vote program is to get Republicans and independents and maybe disgruntle[d] democrats to vote for your candidate. So it’s more than just the Republican base. It’s getting the base plus in order to win.

Q. So it’s designed to get people to the polls who you believe will vote Republican?

A. Correct.

Q. And, again, doesn't that also help Republican candidates for federal office?

A. It helps the ticket and Republican candidates, all Republican candidates for office, federal and non-federal.

(Josefiak Dep. 27:18-28:19, *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.) (Oct. 15, 2002) (FEC Exh. 17).)

74. In 2008, Plaintiff Duncan stated publicly that the RNC's "prodigious fundraising" has allowed it to "buil[d] up over a long period of time" a GOTV program and other "organizational efforts [that] make the difference . . . generally, there's probably a 2 to 5 percent difference in additional turnout for a candidate that you make." *Victory Dream Team*, CONGRESS DAILY, July 29, 2008, 2008 WLNR 14131041 (FEC Exh. 26). This "difference" applies to both federal and "down-ballot" candidates. *See id.*

75. The CRP includes federal candidates in some of its GOTV slate listings. (*See* Door Hanger, "Elect Our Republican Team" (FEC Exh. 14); *see also* Christiansen Dep. 137:24-139:11 (FEC Exh. 2) (noting that door hanger was distributed).)

76. The RPSD uses federal funds to make GOTV phone calls and to distribute GOTV doorhangers "that include[] all Republican candidates." (Pls.' Supplemental Discovery Resps. at 10 (Response ¶ 16) (FEC Exh. 32).)

G. Voter Registration Affects Federal Elections

77. The purpose of the CRP's voter registration activities is to register "as many Republicans as possible" and help elect Republican candidates in federal and state elections. (Christiansen Dep. 121:12-14, 121:23-122:3 (FEC Exh. 2).) The CRP acknowledges that its voter registration activity is intended to — and actually does — affect federal elections. (*Id.* 123:1-17 ("Q: Does the CRP's voter registration activity affect federal elections? A: Yes.");

see also Phillip J. LaVelle, *For GOP, California Dreamin'?*, 2004 WLNR 17013682, San Diego Union Tribune, Sept. 1, 2004 (FEC Exh. 16) (“[C]hairman of the California Republican Party . . . said Republican registration gains are creating a Bush-friendly environment.”); Erwin Dep. 31:15-32:25, *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.) (FEC Exh. 37) (stating that voter registration is an “ongoing project[]” to “build our party base” that “helps with elections”).)

78. The RNC, too, has acknowledged the affect of voter registration on federal elections:

Q. When a state party . . . conduct[s] voter registration drives, are they designed to register likely Republican voters?

A. Yes.

Q. Doesn't that help Republican candidates for federal office?

A. The hope is, as a lot of these plans refer to it, helps the entire ticket in that state. And whether it's for the legislature or whether it's for governor, whether it's for Congress or the U.S. Senate, if they have any of those races in that particular year, that's the whole purpose behind it and that was really the purpose behind the Federal Election Commission's allocation regulations in the states recognizing based on who was on a ballot in any particular election federal election year. That's how you would allocate resources. There was an acknowledgment that it benefited the entire ticket and how it benefited and what kind of funds were used were based on the categories on those candidates on the ballot.

Q. So it does help federal candidates?

A. It does.

(Josefiak Dep. 26:5-27:8, *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.) (Oct. 15, 2002) (FEC Exh. 17).)

H. Advertising that Mentions State Ballot Measures and Promotes, Attacks, Supports, or Opposes Federal Candidates Affects Federal Elections

79. As to the direct effect on federal elections of advertising that promotes, attacks, supports, or opposes a federal candidate, “[t]he record on this score could scarcely be more abundant.” *McConnell*, 540 U.S. at 170. “Such ads were a prime motivating force behind BCRA’s passage,” and “any public communication that promotes or attacks a clearly identified

candidate directly affects the election in which he is participating.” *Id.* at 169-70 (emphasis added).

80. Using federal funds, the CRP has distributed communications that endorse or oppose state ballot initiatives and identify federal candidates — thus associating the officeholder with the initiative — without promoting or attacking the candidate. (See California Republican Party, *Your Official Orange County Republican Party Endorsements* at 5 (FEC Exh. 21) (listing members of Congress endorsing ballot proposition); Pls.’ Supplemental Discovery Resps. at 9 (Response ¶ 13) (FEC Exh. 32) (acknowledging that Exhibit 21 “was distributed to Republican voters in Orange County” and was paid for with “federal funds only”).) The CRP’s assertions that it “has not made any public communication that supported or opposed a ballot initiative that mentioned a federal candidate since BCRA became effective,” and that “[n]o federal funds were used for ballot measures” (*id.* at 9-10 (Response ¶¶ 14-15)) are therefore contradicted by the undisputed existence of occurrence of such a communication.

I. Plaintiffs’ Other Federal Election Activity Affects Federal Elections

81. To the extent that any of the CRP’s intended activities constitute “generic campaign activity” 2 U.S.C. § 431(20)(A)(ii) — which is “campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate” 2 U.S.C. § 431(21) — such activity also influences federal elections. See Ron Nehring, *A Republican 50-State Strategy?*, http://www.cagop.org/index.cfm/in-case-you-missed-it_617.htm (Jan. 27, 2009) (FEC Exh. 18) (CRP Chairman’s statement: “Building organizational and communications capability — and expanding the ranks of congressional, state and local officials from our party — makes it more likely a state will be competitive in a presidential election down the road.”); *San Joaquin Republicans Organizing for Dean Andal*, <http://www.cagop.org/blog/2008/09/san-joaquin->

republicans-organizing-for.html (Sept. 12, 2008) (FEC Exh. 19) (CRP Chairman's blog post noting that Congressional candidate was "benefitting from the organization our volunteer groups have built in the region"); *see also supra* ¶ 60 (noting use of party-building operations to refine strategies and tactics for federal campaigns).

82. The "generic" activities the CRP plans to conduct with soft money directly helps federal candidates and influences their election. Voter registration, voter identification, GOTV, and generic campaign activity as defined by BCRA "clearly capture activity that benefits federal candidates," and "funding of such activities creates a significant risk of actual and apparent corruption." *McConnell*, 540 U.S. at 167-68.

Common sense dictates, and it was "undisputed" below, that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office. 251 F. Supp. 2d, at 460 (Kollar-Kotelly, J.). It is equally clear that federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls. *See, e.g., id.*, at 459 ("[The evidence] shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate [G]eneric campaign activity has a direct effect on federal elections" (quoting Green Expert Report 14)).

Id.; *see also supra* ¶¶ 60, 72-78 (discussing purpose and effect of voter registration, voter identification, and GOTV activities); RNC Memorandum, *Non-Allocable Party Building Programs*, RNC 0084450-64 at 0084455 [DEV 101] ("There are certain election related party expenditures that make no reference to any specific candidates but do benefit the entire Republican ticket These generic programs include voter registration[] and GOTV programs These programs and projects benefit the Republican Party and all of its candidates, federal and state."); Philp Dep. 49:8-16, *McConnell v. FEC*, Civ. No. 02-874 (D.D.C.) (Sept. 19, 2002)

(FEC Exh. 38) (Chairman of Colorado Republican Party testifying that state party's "Get-out-the-vote program is designed to benefit all candidates. That could include voter registration and so on and so forth. Q. And is the same true of generic party advertising, in other words, Vote Republican, that's designed to benefit all the candidates? A. Yes.").

83. Each of the organizational Plaintiffs has conceded that, in an election where both state and federal candidates are on the ballot, *any* GOTV activity inherently affects the federal elections, even if such activity does not specifically mention any of the federal candidates. (Josefiak Dep. 45:7-16 (FEC Exh. 1); Christiansen Dep. 129:25-130:5 (FEC Exh. 2); Buettner Dep. 68:16-21 (FEC Exh. 3).)

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