UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	)	OPPOSITION

DEFENDANT FEDERAL ELECTION COMMISSION'S
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Thomasenia P. Duncan (D.C. Bar No. 424222)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

Adav Noti (D.C. Bar No. 490714)
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

Dated: March 9, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous

Plaintiffs' motion for summary judgment seeks to relitigate the decision in *McConnell v. FEC*, 540 U.S. 93 (2003), upholding Title I of the Bipartisan Campaign Reform Act, which limits the raising and spending of "soft money" by political parties. The record in *McConnell* amply demonstrated that the political parties had raised hundreds of millions of dollars in soft money, circumvented the "hard money" contribution limits, and undermined the Federal Election Campaign Act's ability to prevent corruption and the appearance of corruption. Plaintiffs offer no evidence that *McConnell's* factual basis or reasoning have been undercut by changed circumstances, and the governmental interests recognized by the Supreme Court continue to justify the provisions Plaintiffs challenge. Accordingly, the Court should deny Plaintiffs' motion for summary judgment.

BACKGROUND

More than a century ago, Congress enacted the first campaign finance statute to help ensure that elected leaders shape public policy based on the wishes of their constituents or their best judgment of what serves the national interest, not on the inducements of money. Tillman Act, Ch. 420, 34 Stat. 864 (1907). Since then, Congress has reacted to repeated cycles of scandal and disillusionment with "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which the Supreme Court has accorded "considerable deference." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982).

The Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-55 ("FECA"), is meant to reduce the "opportunities for abuse inherent in a regime of large individual financial contributions," *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam), by limiting the size of contributions that may be made to candidates. In light of the central role played by political parties as intermediaries between donors and candidates, *see FEC v. Colorado Republican Fed.*

Campaign Comm., 533 U.S. 431, 451-52 (2001) ("*Colorado II*"), FECA has long imposed limits on contributions made to political party committees. FECA also incorporates previously enacted prohibitions against corporate and labor union spending on federal elections, to prevent unions and corporations from converting their aggregated wealth into political "war chests" that can distort and corrupt democratic processes. 2 U.S.C. § 441b; *see Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

Some thirty years after enacting FECA, Congress determined that the statute no longer lived up to its intended purpose and amended it significantly in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. In the years leading up to BCRA, political parties, corporations, unions, and other wealthy donors and organizations systematically exploited a breach in FECA's statutory scheme known as "soft money" — the term used for contributions raised outside the framework of FECA's source and contribution limits and disclosure requirements. *See McConnell*, 540 U.S. at 122-23. Funds raised pursuant to the source-and-amount limitations are known as "federal funds" or "hard money," while funds raised outside these limitations — i.e., funds raised from corporate or union sources or in excess of the contribution limits — are known as "non-federal funds" or "soft money."

The concept of soft money derived from the fact that party committees engage in certain activity in connection with state and local elections that is not necessarily related to federal elections. In practice, however, the parties had raised and spent hundreds of millions of soft dollars for activities that, while purportedly for nonfederal purposes, in reality were intended to support the parties' candidates for federal office and were indistinguishable from the types of activities that parties and candidates are required to use their hard money to fund. Indeed, in the 2000 election cycle, soft money constituted 42% of the national parties' total budget. *See*

McConnell, 540 U.S. at 124. The soft money loophole had thus grown from a narrow exception to FECA's limitations into a huge and ever-growing means of circumventing those limitations.

In 1998, after an extensive investigation, the Senate Committee on Governmental Affairs issued a report detailing the influence that soft money had come to wield in the electoral process. *Id*. at 129; S. Rep. No. 105-167 (1998). The report concluded that the parties' ability to solicit and spend soft money had destroyed FECA's source-and-amount limitations. *See McConnell*, 540 U.S. at 129-32. The report also noted that state and local parties had played a crucial role in the soft-money system, as the national parties had made a practice of transferring funds to the state and local parties to conduct putatively non-federal activities "'that in fact ultimately benefit[ed] federal candidates.'" *Id*. at 131 (quoting S. Rep. 105-167 at 4466 (alteration in original)). In sum, the national, state, and local political parties, as well as federal candidates themselves, had all become players in a system that was designed to evade FECA's contribution limits and that permitted large and corporate donors the corrupting influence of which FECA was intended to deprive them.

In response to the conduct detailed in the Senate report and elsewhere, Congress enacted BCRA: "the most recent federal enactment designed 'to purge national politics of . . . the pernicious influence of "big money" campaign contributions.'" *McConnell*, 540 U.S. at 115 (quoting *United States v. Automobile Workers*, 352 U.S. 567, 572 (1957)). Title I of BCRA, entitled "Reduction of Special Interest Influence," closed the soft-money loophole. Specifically, BCRA section 101(a) prohibited national political parties and their officers from soliciting, receiving, or disbursing soft money. BCRA § 101(a) (codified at 2 U.S.C. § 441i(a)); *McConnell*, 540 U.S. at 133 ("[Section 101(a)] takes national parties out of the soft-money business."). The statute imposes no limits on how the national party committees may spend their

money; it simply requires that all money spent by the national parties must be raised in accordance with FECA's longstanding requirements. At the same time, Congress substantially raised the limits on contributions of hard money to national party committees and indexed those limits for inflation, making it easier for those committees to raise hard money.[1]

Other provisions in Title I are carefully drawn to complement the national party soft money ban by eliminating additional existing and potential loopholes involving, among others, state, district, and local party committees ("state and local" party committees). As Congress recognized, state and local party committees had been a primary vehicle through which the national parties had circumvented FECA. The national parties had transferred millions of dollars in soft money to their state and local counterparts, which had used those funds largely to support federal election activity, and under fewer restrictions than were applicable to the national parties. Title I prevents those committees from continuing the same abuse of soft money that the national parties had accomplished. Thus, with one important exception,[2] BCRA section 101(b) also prohibits state and local parties from receiving soft money for "federal election activity." 2 U.S.C. § 441i(b).

Federal election activity, in relevant part, is defined as:

---

[1] As of the 2009-2010 election cycle, the individual contribution limits had been raised to $2,400 per election per candidate, $30,400 per national party per year, and $115,500 in the aggregate for the two-year election cycle. *See* FEC, *Contribution Limits 2009-2010*, http://www.fec.gov/pages/brochures/contriblimits.shtml (last visited Mar. 9, 2009). Corporations and unions may not make contributions or expenditures except through their "separate segregated funds." *See* 2 U.S.C. §§ 431(4)(B), 441b(b).

[2] In the "Levin Amendment," Congress provided an exception to the requirement that state and local parties spend only federal funds for certain "Federal election activity." *See McConnell*, 540 U.S. at 162-64; 2 U.S.C. § 441i(b)(2); 11 C.F.R. §§ 300.2(i), 300.31, 300.32. Under the Amendment, the federal election activity described in 2 U.S.C. § 431(20)(A)(i) & (ii) can be financed by state and local party committees with either federal funds or a combination of federal and "Levin funds." Individuals can donate as much as $10,000 per year in Levin funds to a state or local political party.

> (i) voter registration activity during the period . . . 120 days before . . . a regularly scheduled Federal election . . . ;
>
> (ii) voter identification, get-out-the-vote activity, or generic campaign activity[3] conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot); [or]
>
> (iii) a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports . . . or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) . . . .

2 U.S.C. § 431(20)(A)(i)-(iii). Through these provisions, BCRA eliminated the receipt of soft money by national political party committees and the receipt of soft money by state and local parties for federal election activity. State and local parties remain free to receive funds under applicable state and local law for all other activities, and all political parties remain free to spend an unlimited amount of hard money for any activity.

Immediately after BCRA was passed, eleven complaints challenging the Act's constitutionality were filed in this Court. One such complaint was *Republican National Committee v. FEC*, which named as plaintiffs the RNC, Mike Duncan, and several state and local party affiliates. *Republican Nat'l Comm. v. FEC*, Compl., Civ. No. 02-874 (D.D.C. filed May 7, 2002); *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 220, 225 (D.D.C. 2003). Together, the complaints challenged, *inter alia*, the constitutionality of BCRA Title I's prohibition on federal parties' receipt of soft money and state and local parties' receipt of soft money to engage in federal election activity.

[3] "Generic campaign activity" is "campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." 2 U.S.C. § 431(21).

All of the BCRA complaints were consolidated before this Court with *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.). When the case reached the Supreme Court, it upheld BCRA Title I in its entirety. *See McConnell*, 540 U.S. at 188-89. The Court held that BCRA section 101(a) was constitutional because "there [was] substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption," *id*. at 154, and that the state and local party limits were also "closely drawn to match the important governmental interests of preventing corruption and the appearance of corruption," *id*. at 173. The Court observed, *inter alia*, that "all large soft-money contributions to national parties [were] suspect." *McConnell*, 540 U.S. at 155.

ARGUMENT

While framed as an as-applied challenge, Plaintiffs' claims in this action seek to revisit the Supreme Court's conclusion in *McConnell* that BCRA's limits on soft money are constitutional. Plaintiffs attempt to create the illusion that "soft money" is qualitatively different from hard money, and that they have a constitutional right to raise unlimited contributions. But money is fungible, and in fact, soft money is nothing more than a donation that exceeds FECA's contribution limits or comes from a source that the statute prohibits. Congress, therefore, was amply justified in placing an effective limit on contributions made to party committees whose activities influence federal elections. This Court should reject Plaintiffs' attempt to turn back the clock to FECA's pre-BCRA state.

I. STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The Court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Defenders of Wildlife v. Dep't of Agric.*, 311 F. Supp. 2d 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970)).

II. BCRA'S SOFT MONEY RESTRICTIONS FUNCTION AS CONTRIBUTION LIMITS AND ARE SUBJECT TO INTERMEDIATE SCRUTINY

As Plaintiffs concede (Pls.' Br. 17), *McConnell* understood Title I's soft money restrictions as limits on contributions, not expenditures, and thus employed intermediate scrutiny when it upheld them. The same provisions are at issue here and warrant the same level of scrutiny.

The Supreme Court has repeatedly rejected the kind of argument Plaintiffs make here, i.e., that a contribution limit should be scrutinized as an expenditure limit because it may reduce the total funds an organization has available to spend on particular kinds of activity. In *Buckley*, the Court explained that the "overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would [have] otherwise contribute[d] amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 21-22. In *McConnell*, when determining the appropriate level of scrutiny, the Court found it irrelevant that BCRA's soft money provisions prohibit national political parties from both receiving and spending nonfederal money and limit state and local parties' spending of soft money for certain federal election activity. The Court observed that "neither provision in any way limits the total amount

of money parties can spend. Rather, they simply limit the source and individual amount of donations." 540 U.S. at 139 (citation omitted). Thus, "for purposes of determining the level of scrutiny, it is irrelevant that Congress chose . . . to regulate contributions on the demand rather than the supply side." *Id*. at 138 (citing *Nat'l Right to Work Comm.*, 459 U.S. at 206-11). Instead, the determinative factor is whether the provision creates any burden on speech that would be greater than a simple, direct limit on contributions:

> The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.

Id. at 138-39.

Unlike a "limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20. Contribution limits leave contributors free to become members of associations and assist with their various efforts on behalf of candidates, and also "to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* at 28. As a result, the Court has concluded that "contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21). Thus, a contribution limit is valid if it satisfies the "lesser demand" of being "closely drawn" to match a "sufficiently important

interest." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000); *FEC v. Beaumont*, 539 U.S. 146, 162 (2003); *see also Buckley*, 424 U.S. at 25.[4]

Plaintiffs do not challenge the current $30,400 limit on hard money contributions to national parties (*see supra* p. 4 n.1),[5] but only its application to donations made to national parties ostensibly for certain purposes. The premise of the underlying contribution limit, however, is that large contributions to a party may influence the conduct of officeholders affiliated with that party. Once the validity of that premise is conceded, Congress is entitled to considerable deference in deciding whether donations purportedly made for nonfederal purposes should be exempted from the limits, or whether those donations also create an unacceptable risk of actual or apparent corruption of officeholders. The Court's ultimate task, then, is to determine whether the contribution limits are "so radical in effect as to render political association ineffective" for the parties. *Shrink Missouri*, 528 U.S. at 397. The political parties thrived

---

[4] Contrary to Plaintiffs' suggestion (Pls.' Br. 29), the provisions they challenge do not "prohibit[]" any campaign activities. The Supreme Court's application of strict scrutiny in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), is thus irrelevant here, because that case involved 2 U.S.C. § 441b, a direct prohibition on independent corporate campaign spending that does not function as a contribution limit. Plaintiffs' further suggestion (*see* Pls.' Br. 17 n.14) that this Court should overturn the applicable standard of review, is unjustifiable. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("[O]nly [the Supreme] Court may overrule one of its precedents."). Plaintiffs' reliance (Pls.' Br. 18) on *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), is also misplaced. That case, which involved a municipal restriction on contributions to a ballot measure committee, is clearly distinguishable from the long line of cases applying lesser scrutiny to contribution limits involving candidate elections. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978), the Court explained that that the "risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." Indeed, the Court later quoted this very passage in *Citizens Against Rent Control* when it continued to rely on the distinction between limits involving candidate elections and those involving ballot measures. 454 U.S. at 298.

[5] Notably, this is much greater than the $5,000 limit on contributions an individual can give to other political committees (i.e., PACs). 2 U.S.C § 441a(a)(1).

before they began accepting hundreds of millions of dollars in soft money contributions, they have done so after BCRA's effective date, and there is no basis for finding that they will not continue to do so if Plaintiffs' claims are rejected. (*See* Def. FEC's Statement of Genuine Issues ("FEC Fact Resp.") ¶ 23 (noting that RNC has engaged in activities at issue since BCRA was enacted).)

III. *McCONNELL'S* HOLDING THAT TITLE I IS CONSTITUTIONAL REGARDLESS OF HOW THE NATIONAL POLITICAL PARTIES SPEND THEIR FUNDS IS DISPOSITIVE HERE

McConnell rejected the premise of Plaintiffs' case — that political parties should be able to raise soft money as long as they will spend it on activities that, in their view, do not sufficiently influence federal elections. 540 U.S. at 138-39, 154-56. The Court's reasoning and holding are dispositive here:

> Plaintiffs and THE CHIEF JUSTICE contend that [section 101(a)] is impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including, for example, *funds spent on purely state and local elections in which no federal office is at stake.* Such activities, THE CHIEF JUSTICE asserts, pose "little or no potential to corrupt . . . federal candidates and officeholders." This observation is beside the point. Section [101(a)], like the remainder of [§ 101], regulates contributions, not activities. As the record demonstrates, it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made *all large soft-money contributions* to national parties suspect.

McConnell, 540 U.S. at 154-55 (second and third emphases added; footnote and citations omitted). In making these points, the Court explicitly acknowledged that 30% of the nonfederal funds the RNC had raised in 2001 was spent on "purely state and local election activity." *Id.* at 154 n.50. Despite this fact, the Court found the ban on all soft-money contributions justified by the extensive evidence demonstrating the influence that soft-money donors to the national parties wielded over the federal officeholders affiliated with those parties. *See id*. at 150; *see generally*

id. at 143-54. The Court therefore upheld the soft-money prohibition, finding that "large soft-money contributions to national political parties give rise to corruption and the appearance of corruption," *id*. at 154 — regardless of how the money is spent.

The Court then addressed the prohibition on officers of national parties soliciting soft money for state and local parties, 2 U.S.C. § 441i(a)(2), one of the provisions that Duncan challenged in *McConnell* and again contests here. Rejecting Duncan's claim, the Court held that the prohibition on officer solicitation "follows sensibly from the prohibition on national committees' receiving soft money." *McConnell*, 540 U.S. at 157-58. Thus, the Court held that the officer solicitation prohibition was constitutional for the same reasons as the national party prohibition. *Id*.

The Court further held that prohibiting state and local parties from receiving soft money for "federal election activity," 2 U.S.C. §§ 431(20), 441i(b), was a necessary corollary to the national party soft-money ban. *McConnell*, 540 U.S. at 161. The Court noted the evidence that the national limit would be "wholly ineffective" without the state and local limit, *id*. at n.53 (internal quotation mark omitted), and so held that the latter "promotes an important governmental interest by confronting the corrupting influence that soft-money donations to political parties already have." *Id*. at 165; *see also id.* at 156 n.51 ("close relationship" between federal officeholders and state and local party committees makes those parties "effective conduits for donors desiring to corrupt federal candidates and officeholders"). Accordingly, the Court upheld the state and local limit on the grounds that "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *Id*. at 165-66.

In reaching that conclusion, the Court discussed the state and local parties' contention that some conduct meeting the "federal election activity" statutory definition is activity relating only to state and local elections. *See id*. at 166-68. Rejecting this contention, the Court found that the statutory definition of "federal election activity" — particularly "voter registration, voter identification, GOTV, and generic campaign activity" — "clearly capture[s] activity that benefits federal candidates" and that "funding of such activities creates a significant risk of actual and apparent corruption." *Id*. at 167-68. The Court held that section 101(b) "is a reasonable response to that risk," and therefore constitutional. *Id*.

Finally, the Court addressed the state and local parties' arguments regarding the prohibition on receiving soft money for advertising that promotes, attacks, supports, or opposes a federal candidate. 2 U.S.C. § 431(20)(A)(iii). The Court found that, as to the substantial influence of such advertising on federal elections, "[t]he record on this score could scarcely be more abundant." *McConnell*, 540 U.S. at 169-70. Because the evidence regarding such influence was clear, the Court held that the statutory limit is "closely drawn to the anticorruption interest it is intended to address," *id*., and does not unconstitutionally limit state and local parties' "ability to engage in effective advocacy," *id*. at 173.

Although Plaintiffs style their case as an as-applied challenge, their various counts cover numerous *categories* of activity, and these activities were at the heart of Plaintiffs' case in *McConnell*. There, both their factual allegations and legal arguments relied heavily on these same kinds of activities in Plaintiffs' failed attempt to convince the courts that Title I unconstitutionally infringed their rights by regulating activity that was not sufficiently connected to federal elections. (*See* Def. FEC's Mem. in Supp. of Mot. to Dismiss (Docket No. 20) at 12-15.) Thus, when *McConnell* rejected Plaintiffs' arguments, the Court clearly understood

these kinds of disbursements would have to be financed under the new BCRA rules. *McConnell* did not, of course, decide as-applied challenges that were not before it. *See Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006). But the *reasoning* used by the Court in *McConnell* rejecting the facial challenge to Title I is inconsistent with Plaintiffs' *particular* as-applied challenge here.[6]

IV. THE RISK OF CORRUPTION FROM UNLIMITED SOFT MONEY CONTRIBUTIONS JUSTIFIES BCRA'S LIMITS AS APPLIED TO PLAINTIFFS

A. Background: The Constitution Was Designed to Limit the Power of Political Parties, and Corruption Involving Political Parties Later Helped Instigate the Enactment of the Campaign Finance Laws

Far from giving political parties special constitutional rights, the Constitution's Framers consciously created a constitutional framework designed to restrain the power of political parties because they viewed parties as a potential threat to representative governance. "Partisan politics bears the imprimatur only of tradition, not the Constitution." *Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976) (plurality). Commenting on the political beliefs of leaders like Washington, Adams, Madison, Hamilton, and Jefferson, the historian Richard Hofstadter has written:

---

[6] When the Court in *McConnell* left open the possibility for some as-applied challenges to Title I, it did not suggest that any such challenge would be successful based on the nature of the disbursements that parties wished to make with soft-money donations. Regarding state and local parties, the Court found it "largely inconsequential" that BCRA might reduce the money available to them; rather, the relevant question was whether the impact of the new provisions "is 'so radical in effect as to . . . drive the sound of [the recipient's] voice below the level of notice.'" 540 U.S. at 173 (quoting *Shrink Missouri*, 528 U.S. at 397). In responding to the argument that some state laws might make it impossible for state and local candidates to receive hard-money donations at all, the Court stated, "[t]he fact that a handful of States might interfere with the mechanism Congress has chosen for such solicitations is an argument that may be addressed in an as-applied challenge." *Id*. at 157 n.52. The Court also noted that a "nascent or struggling minor party can bring an as-applied challenge if § 323(a) prevents it from 'amassing the resources necessary for effective advocacy.'" *Id*. at 159 (quoting *Buckley*, 424 U.S. at 21). None of these types of as-applied challenges identified in *McConnell* turn on how donations are spent.

> If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party.

Richard Hofstadter, *The Idea of a Party System* at 3 (1970).

> Alexander Hamilton was among those who agreed that the elimination of parties was a possible goal in a well-designed and well-run state. "We are attempting by this Constitution," he said to the New York ratifying convention in 1788, "to abolish factions, and to unite all parties for the general welfare."

Id. at 17; *see also The Federalist*, No. 85 (Hamilton) at 521 (Rossiter ed., 1961). George Washington warned that although political parties can play a useful role, if their power is not checked they can destroy the government through corruption: "I have already intimated to you the danger of parties in the State. . . . It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion." G. Washington, *Farewell Address*, reprinted in *Documents of American History*, 169, 172 (H. Commager ed. 1946).

These concerns led the framers to structure the Constitution to try to minimize the influence of parties.

> [T]he authors of the Constitution set up an elaborate division and balance of powers within an intricate governmental structure designed to make parties ineffective. It was hoped that the parties would lose and exhaust themselves in futile attempts to fight their way through the labyrinthine framework of the government . . . . This is the antiparty part of the constitutional scheme. To quote Madison, the "great object" of the Constitution was "to preserve the public good and private rights against the danger of such a faction [party] and at the same time to preserve the spirit and form of popular government."

E.E. Schattschneider, *Party Government*, at 7 (1942) (citing *The Federalist*, No. 10 (Madison); alteration by Schattschneider). "[T]he Fathers hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties."

Hofstadter, at 53. Therefore, although political parties have come to play an important role in the nation's democracy, which justifies Congress's decision to give them certain special advantages (*see, e.g.*, 2 U.S.C. § 441a(d)), there is no basis for concluding that the Constitution forecloses reasonable limits on contributions to the parties.

In the late 19th and early 20th centuries, concerns about corruption and political parties led to the first efforts to regulate campaign finance. After the Civil War, great aggregations of wealth amassed during the industrial revolution flooded the parties, which in turn used their officeholders to satisfy the parties' contributors. Congress responded to this perceived threat to democracy with its first efforts to regulate campaign financing, beginning in 1907 with the Tillman Act. Fifty years later, the Supreme Court in *Automobile Workers* reviewed the history of these initial legislative efforts. After explaining that the "concentration of wealth consequent upon the industrial expansion in the post-Civil War era had profound implications for American life," 352 U.S. at 570, the Court focused on the corruption associated with political parties' becoming indebted to their large contributors. The Court quoted Elihu Root's speech of 1894, where he stated, "I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that *a debt is created from a political party to it*." *Id*. at 571 (emphasis added; citations omitted). In 1906, the Court continued, the "feeling of articulate reform groups was reflected at a public [congressional] hearing," by one leader who explained: "[T]his thing has come to the breaking point. We have had enough of it. We don't want any more secret purchase of organizations, which nullifies platforms, nullifies political utterances and the pledges made by political leaders in and out of Congress." *Id*. at 573 (citation omitted); *see also id*. at 577-78 ("We all know that large contributions to political campaigns . . . put the political party under

obligation to the large contributors, who demand pay in the way of legislation . . . .") (quoting Senator Bankhead).

B. Even If They Do Not Solicit Soft Money Donations Themselves, Officeholders Can Become Obliged to Large Donors to Their Parties

Relying on *Automobile Workers* and other cases, *McConnell* recounted much of the above history, 540 U.S. at 115-17, and specifically noted the "special relationship and unity of interest" between national parties and federal candidates and officeholders, *id.* at 145. "This close affiliation has placed national parties in a unique position, '*whether they like it or not,' to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'*" *Id.* (quoting *Colorado II*, 533 U.S. at 452) (emphasis added). Although the Court noted the role that officeholders had played in raising soft money for their political parties, the Court also found that, "[e]ven 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*." *Id.* 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.)). Thus, Plaintiffs' alleged intentions (*e.g.*, Pls.' Br. 6) not to involve officeholders directly in raising soft money is of no functional or constitutional significance; Plaintiffs provide no evidence that would suggest that donors themselves would suddenly remain quiet about their own generosity.

At some point, an outside interest group's contributions to a political party and its candidates can become large enough to engender an overall sense of indebtedness from the party and its officeholders, regardless of the specific contributions any single Member of Congress

may have received. The Supreme Court found that "[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." 540 U.S. at 150 (citations omitted). For example, as former Senator Simon explained:

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

McConnell, 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.).[7] After reviewing evidence like this, the Court in *McConnell* rejected a "crabbed view of corruption" and instead embraced "common

[7] "Once elected to legislative office, public officials enter an environment in which political parties-in-government control the resources crucial to subsequent electoral success and legislative power. Political parties organize the legislative caucuses that make committee assignments." *McConnell*, 540 U.S. at 156 (quoting Expert Report of Donald P. Green, Yale University). Thus "officeholders' reelection prospects are significantly influenced by attitudes of party leadership," *id*. (citation omitted), and an individual Member's stature and responsibilities vary dramatically depending on whether his party is in the majority or in the minority. *See* Green Rept. at 8 [DEV 1-Tab 3]. ("DEV" and "Tab" cites refer to the volumes and tab numbers of Defendants' Exhibit Volumes submitted to this Court in *McConnell*. Copies of non-confidential exhibits are contemporaneously being filed on DVD, with courtesy copies to Chambers.) Party officials both inside and outside Congress will naturally seek to cultivate an attitude that each party member has an important stake in the success of the larger organization. It was thus reasonable for Congress and the Supreme Court to conclude that a Member of Congress is likely to look favorably upon his party's large-scale benefactors, and that substantial contributions to the party will therefore create risks of "undue influence on an officeholder's judgment, and the appearance of such influence," *McConnell*, 540 U.S. at 150 (citing *Colorado*

sense, . . . the realities of political fundraising," and the need to prevent corruption and the "appearance of corruption." 540 U.S. at 152. In particular, the Court rejected the notion that only a "direct contribution to the candidate" can "threaten to create . . . a sense of obligation" from a candidate to a donor, *id.* at 144, or that only "contributions made at the express behest of" a candidate created a concern about corruption, *id.* at 152. Rather, the Court explained that persons seeking influence with officeholders and candidates have shown a history of exploiting loopholes in the Act, and that indirect attempts to use money to gain influence can create actual corruption, or the appearance of corruption, that can justify congressional efforts to protect the integrity of the democratic process. *See generally id*. at 143-154.[8]

Moreover, despite Plaintiffs' alleged plans not to return to all of the pre-BCRA fundraising practices, the record in *McConnell* makes clear that "[m]any in the corporate world view large soft money donations as a cost of doing business." *Id*. at 147 n.46 (citation and quotation marks omitted). Indeed, the record was replete with evidence that big donors gave largely to secure influence, not for ideological reasons — a fact proven most pointedly by the pattern of top donors' giving to *both* major national parties. *Id*. at 148.[9] Often this giving was

---

II, 533 U.S. at 441), similar to those posed by a sizeable contribution to the candidate himself. Plaintiffs concede (Pls.' Br. 40), for example, that the RNC's chairman will be grateful to soft money donors, but provide no plausible reason why its officeholders would not share that sense of gratitude.

[8] As the Supreme Court has made clear, avoiding the appearance of corruption is an important governmental interest; if the government leaves "the perception of impropriety unanswered," the "cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Shrink Missouri*, 528 U.S. at 390 (internal citation and quotation marks omitted).

[9] *See, e.g.*, *McConnell*, 540 U.S at 147 n.46 (many corporate donors "'view large soft money donations as a cost of doing business'") (quoting Hasbro CEO Alan Hassenfeld); Bumpers Decl. ¶¶ 18-23 [DEV 6-Tab 10] (explaining that soft money donations can buy access to officeholders and get phone calls to officeholders returned, and that there is often "an

not in response to particular solicitations, but made at the suggestion of professional lobbyists as part of a broader plan to obtain influence. As lobbyist Daniel Murray explained (emphasis added),

> 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.); *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 lobbyist Wright Andrews).

Nothing in Plaintiffs' allegations or evidence suggests that Plaintiffs could or would do anything to change the behavior of lobbyists. When the Supreme Court discussed the "evidence in the record showing that national parties have actively exploited the belief that contributions purchase influence or protection to pressure donors into making contribution," it quoted the statement of a CEO who specifically referred to heavy-handed solicitations by lobbyists. *McConnell*, 540 U.S. at 148 n.47. If a corporation had given a lot of money to one side, the CEO explained, "'the other side,'" i.e., the opposing national party committee, might have "'a friendly

---

expectation of reciprocation where donations to the party are made"); Simpson Decl. ¶¶ 8-12 [DEV 9-Tab 38] ("Big labor and big business use large soft money donations to corrupt the system to the detriment of the little guy"; "[l]arge donors of both hard and soft money receive special treatment"; recounting instances in which Senators' votes and legislative priorities were affected by fear of losing future donations); *McConnell*, 251 F. Supp. 2d at 496 (Kollar-Kotelly, J.) ("'Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done.'") (quoting Senator Rudman); *id.* at 484-85 (poll of senior executives shows that pressure is placed on business leaders to make large contributions, and that main reasons such contributions are made are fear of adverse legislative consequences and to obtain access to lawmakers); Hickmott Decl. ¶ 9 [DEV 6-Tab 19] ("[C]orporations, labor unions and individuals make soft money contributions to national political parties and federal candidate PACs, including joint fundraising committees, to influence the legislative process for their business purposes.").

lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed.'" *Id.* (quoting Wade Randlett). Thus, if Plaintiffs prevail, lobbyists will have every incentive to again raise soft money and advise their clients to make large soft money donations to the political parties. These incentives are strong and exist independent of any solicitations that parties or officeholders may make.

> The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system. . . . Those who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most political clout.

Id. at 495 (Kollar-Kotelly, J.), 869-70 (Leon, J.) (quoting Andrews). None of this predictable behavior would be quelled by the absence of officeholders from direct fundraising.

Even when solicitations are made by party officials rather than officeholders, the solicitations can place tremendous pressure on prospective donors. Solicitations from party leaders are potentially coercive because party leaders are so closely connected to federal officeholders. *See* McCain Decl. ¶ 21 [DEV 8-Tab 29]. The Thompson Committee, for example, found that Clinton Administration Deputy White House Chief of Staff Harold Ickes "ran the DNC on a day-to-day basis," that he reported its fundraising and expenditures to the President and the Vice President, and that the DNC's national chairman, Don Fowler, was effectively subordinate to Ickes. S. Rep. No. 105-167 at 34; *see also* Kolb Decl. Exh. 6 at 4 [DEV 7-Tab 24] (51% of corporate executives surveyed agreed that "many business executives fear adverse legislative consequences to themselves or their industry if they turn down requests for campaign contributions from high-ranking political leaders and/or political operatives").

The "party's involvement does not sterilize the system" 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 were 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; 251 F. Supp. 2d at 487 (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 parties are.'") (quoting Senator McCain); *id*. at 487-88 (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). Thus, "[p]arty committees do not so much dilute and 'cleanse' private interest money as centralize it and focus it on the President and the congressional leadership." Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 651 (2000); *see also Colorado II*, 533 U.S. at 455 ("[P]arties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape."). These concerns about the national parties are equally acute for the state and local parties.

> "[T]he federal candidates who benefit from state party use of these funds 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, 540 U.S. at 165 (quoting Senator Rudman).[10]

Plaintiffs' fundraising procedures ensure that this knowledge of donors' largesse will continue in the future. Plaintiffs frequently arrange meetings, receptions, dinners, and other events, at which their major donors mingle with federal candidates and officeholders, from candidates for the House of Representatives to the sitting President of the United States. (FEC Fact Resp. ¶ 24.) An attending donor has an opportunity to inform these federal candidates and officeholders about the donor's opinion on legislation or issues. (*Id*.) Because only major donors attend these events (the public at large is not invited), the candidates and officeholders who attend know that, by definition, each attendee who expresses such an opinion has given a significant sum to the party. (*Id*.) Furthermore, Plaintiffs' organizational structure ensures that federal officeholders have access to information regarding large donations. "[T]he role of the RNC is to be a political arm of Republicans either seeking office or in office" (FEC Fact Resp. ¶ 1 (quoting Josefiak Dep. 197:1-18)), and so the RNC is "inextricably intertwined with federal officeholders and candidates" (*id*. (quoting *McConnell*, 540 U.S. at 155)). The CRP and RPSD reserve positions in their leadership structures for federal officeholders (*id*. ¶¶ 2-3), positions in

---

[10] Plaintiffs contend (Pls.' Br. 26 n.16) that BCRA does not reduce the appearance of corruption because trust in government has remained low subsequent to its passage. Even assuming that BCRA has not single-handedly been able to boost confidence in government, however, such measurements were only a subset of the public opinion evidence presented in *McConnell*, and Plaintiffs do not make any effort to call into question the more specific findings that contributions above the federal limits appear corrupt to broad majorities of the American public. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 512-14, 517 (Kollar-Kotelly, J.). Recent polls continue to confirm that the public generally believes that federal officeholders can be influenced by large contributions. *See, e.g.*, Rasmussen Reports, Most Say Political Donors Get More Than Their Money's Worth, Feb. 9, 2009 (FEC Exh. 25) (majority believes member of Congress can be influenced by contributions of $50,000 or less).

which these officeholders learn of large donations as a matter of course (*id*. ¶ 24). Given these procedures and interlocking arrangements, federal candidates and officeholders will inevitably know who the respective parties' largest donors are — the same donors who have frequent opportunities, not open to others, to ask federal candidates and officeholders to take action in accordance with the donors' views.

Finally, Plaintiffs do not suggest that their officeholders will cease raising hard money for the RNC, and Plaintiffs concede that certain hard money donors currently receive preferential treatment and will continue to do so. Plaintiffs state that the "RNC will not facilitate meetings between officeholders and contributors, encourage officeholders to meet with contributors, or provide any other opportunities for access, *different than or beyond that provided to contributors of federal funds*." (Pls.' Br. 23 (emphasis added).) But it defies common sense and the record from *McConnell* to suggest that when the RNC provides big donors special access to officeholders, that the legislators can strike from their consciousness, for example, that a donor has given not only $30,000 in hard money to the RNC, but another $100,000 or $500,000 in soft money. "'[D]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician.'" *McConnell*, 251 F. Supp. 2d at 476 (Kollar-Kotelly, J.), 822 (Leon, J.) (quoting Senator Simpson).[11]

[11] Though now restricted in whole or in part to dollar amounts that reduce the danger of corruption, Plaintiffs continue to provide access to contributors of federal funds based on the size of the contribution: At the RNC, 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." (FEC Fact Resp. ¶ 24 (quoting FEC Exh. 7).) And 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. (*Id*.) If the RNC were permitted to accept million-dollar donations, it is difficult to believe it would not establish additional "benefits" (i.e., access to candidates and officeholders) beyond the

The examples described above are simply illustrative. Voluminous record evidence in *McConnell* describes donors' use of large soft-money donations to obtain access to federal officeholders and thereby attempt to affect legislative outcomes. That evidence is exhaustively catalogued in Judge Kollar-Kotelly's opinion (*see* 251 F. Supp. 2d at 481-512) and dwarfs the evidence of corruption that the Court in *Buckley* (*see* 424 U.S. at 27 & n.28) and *Shrink Missouri* (*see* 528 U.S. at 393-394) found sufficient in upholding the contribution limits at issue in those cases. In sum, there is every reason to believe that wealthy interests will use any and all available opportunities for buying influence, with or without the active fundraising of officeholders.[12]

C. Overall, FECA Confers Advantages on Political Parties Relative to Other Entities

Plaintiffs argue (Pls.' Br. 29) that in some ways they are worse off than corporations and unions, but they fail to view the big picture. As the Supreme Court has repeatedly held, "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process." *California Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *accord, e.g., Nat'l Right to Work*, 459 U.S. at 210-11. Overall, political parties are subject to fewer restrictions than other entities.

---

current top level (which would be quite minimal in comparison). In any event, it is beyond dispute after *McConnell* that soft money contributors will secure access to, and influence over, federal officeholders, without regard to whether access is provided by the political parties themselves.

[12] In *McConnell*, the Plaintiffs' own expert, David Primo, testified that, assuming that money does buy access to or influence of 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).

In *McConnell*, the Court noted that "BCRA actually favors political parties in many ways." 540 U.S. at 188. Specifically, compared with "nonparty political committees," political parties can accept much higher contributions from individuals, 2 U.S.C. § 441a(a)(1)(B),(C), and can make contributions that "greatly exceed the contribution limits that apply to other donors" in the form of coordinated expenditures, 2 U.S.C. § 441a(d). *McConnell*, 540 U.S. at 188. In turn, the Court had previously noted that nonparty political committees have "far *fewer* restrictions" than corporations and unions because the former can make unlimited expenditures on political speech. *California Med*., 453 U.S. at 200. Putting these two comparisons together, political parties have the most favorable set of restrictions among these entities. And to the extent the parties are regulated differently, the Supreme Court has noted why that difference is appropriate: Other entities "do not select slates of candidates for elections[, or] . . . determine who will serve on legislative committees . . . . Political parties have influence and power in the Legislature that vastly exceeds that of any interest group." *McConnell*, 540 U.S. at 188.

Plaintiffs ignore this bigger picture when they cite (Pls.' Br. 29) *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL*"), for the proposition that political parties are disadvantaged relative to corporations and unions. *WRTL* permits corporations and unions to use their general funds only for communications that are not the functional equivalent of express advocacy, *see WRTL*, 127 S. Ct. at 2667, but for all spending on FECA *expenditures*, political parties have a distinct advantage. Corporations and unions must finance their expenditures with hard-money donations raised in increments of $5,000 or less to their PACs, while national political parties can raise over $30,000 from each donor. *See* 2 U.S.C. § 441a(a)(1); *see also* FEC Fact Resp. ¶¶ 18 (noting that RNC and DNC are subject to identical contribution limits), 26 (discussing "527" organizations; redacted from public version, filed under seal). And because

Congress and the Supreme Court have presumed that all money spent by political parties is campaign-related, *see infra* p. 33, parties have a distinct fundraising advantage for spending at the core of their mission. Thus, Plaintiffs' argument that *WRTL* renders political parties "disadvantaged" is contrary to the overall statutory scheme, under which national political parties possess significant advantages over all other entities.

V. PLAINTIFFS' APPROACH WOULD CREATE AN UNWORKABLE CONSTITUTIONAL ANALYSIS THAT RELIES ON THEIR UNVERIFIABLE PLEDGES TO AVOID CERTAIN KINDS OF BEHAVIOR

Another fundamental flaw in Plaintiffs' case is its reliance on their vague and unenforceable intention to reduce opportunities for corruption. While acknowledging (Pls.' Br. 21) that *McConnell* upheld Title I in part because of the past fundraising practices of the national parties, Plaintiffs nevertheless attempt (*id*. 21-24) to distance themselves from the corrupting effects of those practices — and *McConnell*'s precedent — by resting their case on the steps they will purportedly take to minimize corruption and its appearance. Thus, even under their own theory, Plaintiffs' case turns on their ability to show, at a minimum, not only that their proposed spending is far removed from influencing federal elections, but also that the behaviors they intend to adopt will eliminate the corruption concerns identified in *McConnell*. For several reasons, this unprecedented attempt to prevail in an as-applied challenge based on ill-defined, inadequate changes in behavior must fail.

First, as discussed above, the record in *McConnell* demonstrates that the changes Plaintiffs intend to make would do little to prevent real or perceived corruption. Large moneyed interests will take advantage of opportunities to buy influence regardless of whether they are formally solicited. Even if officeholders do not themselves solicit soft-money donations, they will be aware of and appreciate such donations to their parties. Donors can feel tremendous

pressure to give even if the solicitations come from party officials rather than officeholders. And when Plaintiffs facilitate special access for donors who give both hard and soft money, the officeholders are unlikely to selectively forget what they know about the donors' soft money generosity.

Second, Plaintiffs have insufficient control over their donors and officeholders to ease the corruption concern. Donors who give large amounts of soft money to the parties will be free to share this information with officeholders — to obtain meetings, to remind officeholders of their generosity at meetings arranged by the party (purportedly because of hard money donations), or to equip their lobbyists when sent out to seek special favors. Likewise, although Plaintiffs assert that they will not facilitate extra access for soft-money donors, they do not purport to represent or control the behavior of the hundreds of federal officeholders and candidates who are members of their party. Given the complete lack of evidence suggesting that Plaintiffs could do anything to prevent a relapse of the *donor* and *officeholder* behaviors demonstrated in *McConnell*, Plaintiffs' intentions to reduce their own role as facilitators of access is of no constitutional significance.

Third, Plaintiffs' suggested constitutional test for exemptions from facially valid contribution limits would introduce an unworkable, vague standard that would defeat the purpose of those limits. In addressing constitutional challenges to other FECA provisions, the Supreme Court has recognized the value of bright-line rules in preventing evasion of the statute's anti-corruption purposes and in furnishing clear guidance to regulated entities. In *Buckley* the Court "assumed" that "most large contributors do *not* seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29 (emphasis added). The Court held, however, that the difficulty of isolating suspect contributions and Congress's interest in guarding

against the inherent appearance of abuse justified universal application of the $1,000 individual contribution limit. *Id*. at 29-30. The Court's analysis clearly portends the likely failure of as-applied challenges to the contribution limits by well-intentioned contributors who might seek to prove that their own contributions, though in excess of the statutory caps, would be made without any intent to receive special influence in return.[13] The Court did not invite the lower courts to replace the fixed-dollar contribution limits with new multi-part tests to apply whenever a particular individual seeks to demonstrate that his or her contribution is sufficiently well-intentioned to avoid regulation. *See California Med.*, 453 U.S. at 198-99 (specific contributions to a political committee are subject to general FECA restrictions even if they were purportedly to be used for administrative support, rather than for affecting elections directly); *Goland v. United States*, 903 F.2d 1247, 1258-59 (9th Cir. 1990) (contributions are subject to FECA restrictions even if contributor keeps his identity secret by using straw donors, thereby allegedly precluding opportunity to exert undue influence).

More generally, many prophylactic statutory rules, including the Act's contribution limits, cannot depend upon an in-depth analysis of the extent to which the interests underlying them are served in each particular situation. In *Hill v. Colorado*, 530 U.S. 703 (2000), for example, the Supreme Court made clear that the rule at issue would simply cease to function if it were made susceptible to as-applied challenges. In that case, a statute banned "unwelcome demonstrators" from coming closer than eight feet to people entering health care facilities. The Court specifically recognized that the statute's "prophylactic approach . . . will sometimes inhibit a demonstrator whose approach in fact would have proved harmless." *Id*. at 729. The Court in

[13] The Court rejected an exception for contributions from "immediate family members," even though the Court accepted the proposition that the "risk of improper influence is somewhat diminished" in that circumstance. *Buckley*, 424 U.S. at 53 n.59.

Hill nonetheless upheld the statute, explaining that the very exercise of engaging in a case-by-case factual analysis would thwart the rule's effectiveness and limit free expression (*id.*):

> But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary. Such individual characterization of each individual movement is often difficult to make accurately. A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.

Similarly, in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court upheld Florida Bar rules prohibiting lawyers from sending targeted direct mail solicitations to victims and their relatives for 30 days following an accident or disaster. *Id*. at 620. The Court did not question the claims of those challenging the rules that the injuries or grief of some victims are "relatively minor," but stressed instead that making case-specific judgments would entail "drawing difficult lines" as to the severity of different kinds of "grief, anger, or emotion." *Id*. at 633. In such cases, the Court has upheld objective, prophylactic rules that it acknowledged would regulate speech that might not implicate the government interests involved in order to pretermit the practical difficulty and chilling effect of case-by-case analysis. *See also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc*., 452 U.S. 640, 654 (1981) (rejecting both as-applied and facial challenges and explaining that "any such exemption [from a rule fixing the physical location of First Amendment activity] cannot be meaningfully limited to [the plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern").

Here, Plaintiffs present the same kind of unworkable line-drawing exercise by relying on vague steps they intend to take to reduce the opportunity for corruption. Plaintiffs allege (Pls.'

Br. 23) that the RNC will not "facilitate" meetings between officeholders and contributors; but might they passively participate in the meetings or, conversely, try to prevent them from happening? Plaintiffs allege (*id*.) that they will not "encourage" officeholders to meet with contributors or provide other access in a manner "different than or beyond that provided to contributors of federal funds"; but will they acquiesce in such meetings or, conversely, discourage them? Will the answer differ depending upon how much special access contributors are already getting because of their hard-money contributions? Plaintiffs' conclusory assertion (*id*.) that an appearance of corruption "is simply not present" here is unsupported by specific evidence about their future practices, silent regarding the relevance and variety of the officeholders' and donors' behavior beyond the control of Plaintiffs (*see supra* pp. 26-28), and disconnected from any constitutional yardstick for evaluating these facts. In sum, Plaintiffs' proposal for as-applied constitutional challenges would enmesh the courts in formless *ad hoc* inquiries into subtle forms of behavior generally occurring behind closed doors.[14]

Plaintiffs also provide no suggestion for how their as-applied victory could be enforced or monitored. If an agent of the RNC errs and facilitates a meeting between an officeholder and a soft-money donor, does the RNC have to forfeit the money in its new soft-money accounts? Does it matter how generous the donor has been, how important the meeting was, or whether the

[14] Plaintiffs' proposed exemption differs not just in degree, but in kind, from the as-applied exemption the Court established in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 253-54 (1986) ("*MCFL*"). In *MCFL*, the Court held that the pre-BCRA prohibition on the use of corporate treasury funds for campaign-related expenditures cannot constitutionally be applied to a narrow class of corporations having specified characteristics. *Id*. at 263-64; *see also McConnell*, 540 U.S. at 209-211. The exemption turns on an objective and readily administrable assessment of the organization's structure and overall activities. Specifically, the inquiry involves several threshold, bright-line inquiries: whether the corporation engages in any business activity, whether anyone has a claim on its assets or earnings, whether the corporation was established by a business corporation or a labor union, and whether it has a policy not to accept any contributions from such entities. *See McConnell*, 540 U.S. at 210-11.

public finds out? How is the Commission to become aware of purposeful or inadvertent failures of Plaintiffs to live up to their promised code of conduct? The Court should be especially wary of blessing an arrangement that creates additional incentives to hide special access for large donors. *Cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (rejecting construction of statute that would introduce "complexity and uncertainty" and thereby "undermin[e] . . . the [statute's] . . . purposes and 'breed[ ] litigation from a statute that seeks to avoid it'").[15]

As discussed above, *see supra* pp. 22-23, Plaintiffs already provide their major donors with substantial access to federal candidates and officeholders — access that increases as the size of the donation increases. 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. (FEC Fact Resp. ¶ 24.) To the extent the RNC has an *un*written "policy" on this issue, it is the same policy that was in effect prior to BCRA, when the trading of soft money for access ran rampant. (*Id*.) Thus, if the RNC were granted the right to solicit soft money, such solicitations, in combination with the manifestly ineffective anti-access policy, would recreate precisely the situation that existed prior to BCRA's enactment. It was this situation that the *McConnell* Court held Congress was justified in ending, and so it cannot be Plaintiffs' constitutional right to bring it back.

---

[15] Plaintiffs' position is reminiscent of the argument defendants sometimes make when claiming that a case has become moot: that the voluntary cessation of certain practices has ended any concern about their behavior. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000). The Supreme Court has explained that the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* (citation omitted). That same burden should apply here concerning Plaintiffs' alleged changes in fundraising practices and facilitating access to officeholders.

Plaintiffs' proposed constitutional methodology is particularly unworkable because it requires the Court to assess both the relative nexus between their spending and federal elections *and* the sufficiency of their anti-corruption code of conduct as it relates to each type of category of spending Plaintiffs have created. (We explain *infra* pp. 36-44 why Plaintiffs' arguments about the federal impact of their spending are flawed.) Because their challenge marries several categories of spending with several proposed behavioral limits, Plaintiffs' methodology would essentially allow any political party to litigate the validity of a huge number of spending/behavioral permutations — and would require the courts to rule on all of these hypothetical campaign finance regimes that Congress could have, but has not, enacted. Such an approach is almost certain to prove incapable of workable administration, and it would dismantle the careful legislative balancing of interests that culminated in BCRA.

VI. PLAINTIFFS ARE NOT ENTITLED TO A CONSTITUTIONAL EXEMPTION BASED ON THE USES THEY INTEND FOR THEIR FUNDS

A. Plaintiffs' Invented "Unambiguously Campaign Related" Standard Is Inapplicable Here

Throughout their brief, Plaintiffs rely upon their erroneous argument that all campaign finance restrictions are unconstitutional unless they are "unambiguously campaign related." This assertion grossly misinterprets *Buckley* and its progeny. Plaintiffs distort *Buckley* by contending that the decision enshrined the phrase "unambiguously-campaign-related" as a stand-alone constitutional "requirement" (Pls.' Br. 9) that all campaign finance provisions must pass. On the contrary, this phrase was merely part of the Court's explanation that its statutory construction of "expenditure" in one part of the Act's disclosure provisions would resolve "serious problems of vagueness," *Buckley*, 424 U.S. at 76 — a problem that not even Plaintiffs have suggested exists concerning contribution limits.

In particular, Plaintiffs' contention (Pls.' Br. 9-10, 15 n.11) that *Buckley* applied an "unambiguously campaign related" requirement to the definition of "contribution" is flatly contradicted by the plain language of that case and others. Initially, *Buckley* held that the definition of "contribution" raises lesser constitutional concerns than that of "expenditure." While expenditure limits are subject to strict scrutiny because they "place substantial and direct" limits on speech, *Buckley*, 424 U.S. at 58, limits on contributions entail "only a marginal restriction upon the contributor's ability to engage in free communication," *id*. at 20, and will be upheld if they are "closely drawn to match a sufficiently important interest," *McConnell*, 540 U.S. at 136 (citations and quotation marks omitted). Next, *Buckley* found it unnecessary to narrowly construe "contribution" as it did "expenditure," and instead stated that the term includes

> not only contributions made directly or indirectly to a candidate, *political party*, or campaign committee, and contributions made to other organizations or individuals but *earmarked for political purposes*, but also all expenditures placed in cooperation with . . . a candidate . . . . So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.

424 U.S. at 78 (emphases added); s*ee also id*. at 24 n.24 ("Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution.").

Buckley thus concluded that *all* donations received by a candidate or political party have a "sufficiently close relationship" to campaigns to fall legitimately within the scope of the Act, *id.* at 78, and, contrary to Plaintiffs' suggestion, the Court did not employ an "unambiguously campaign related" analysis in reaching this conclusion. Indeed, the only qualifier the Court added was that funds would have to be "earmarked for political purposes" if donated to individuals or organizations *other than* political committees, and even that qualifier is much

broader than Plaintiffs' "unambiguous campaign related" label. Moreover, in *California Medical*, the petitioner argued that contributions to political committees earmarked for administrative support could not be regulated because such contributions lacked potential to corrupt the political process. 453 U.S. at 198 n.19. The Court rejected that argument and explained that donations "earmarked for administrative support" and other non-political purposes can be constitutionally regulated as contributions because exempting such donations "could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit." *Id*.

In *McConnell*, the Court reaffirmed its holdings in *Buckley* and *California Medical* and rejected a "crabbed view of corruption." 540 U.S. at 152. In facially upholding the very contribution limits at issue here, the Court specifically rejected the suggestion that limits on contributions can be upheld only if they involve a direct relationship with a candidate.

> [W]e upheld [in *Buckley*] FECA's $25,000 limit on aggregate yearly contributions to candidates, *political committees*, and *party committees* out of recognition that FECA's $1,000 limit on candidate contributions would be meaningless if individuals could instead make huge contributions to the candidate's political party. Likewise, in *California Medical Assn. v. Federal Election Comm'n*, we upheld FECA's $5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 and $25,000 limits restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and *numerous other noncoordinated expenditures.*

McConnell, 540 U.S. at 152 n.48 (last emphasis added) (quotation marks and internal citations omitted). Thus, the Court again held that limits on contributions to political parties (and other

political committees) are constitutional even if the funds received are eventually used for a variety of "noncoordinated expenditures" that do not include express advocacy.[16]

Plaintiffs also rely heavily on *MCFL* and *WRTL* in their "unambiguously campaign related" argument, but those cases involved 2 U.S.C. § 441b's direct limits on corporate independent expenditures and electioneering communications, not contributions. Moreover, while those cases limited the scope of section 441b, nothing in them undermines *McConnell*'s holding that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-92. Thus, *Buckley*'s interpretation of the term independent "expenditure" (when made by individuals or groups other than political committees) to mean spending that is "unambiguously related" to the campaign of a candidate, 424 U.S. at 79-80, has no bearing on the Act's *contribution* limits, which, as discussed *supra* p. 33, requires no narrowing construction to avoid vagueness.[17]

---

[16] *Cf. FEC v. Malenick*, Civ. No. 02-1237, 2005 WL 588222 (D.D.C. Mar. 7, 2005) (*California Medical* stands for proposition that classifying funds as "contributions" under Act is not function of subjective intent of contributor as to how money will be spent).

[17] Plaintiffs also rely (Pls.' Br. 11 n.7) on *Bellotti* and *Citizens Against Rent Control* for their "unambiguously campaign related" theory, but those cases neither used that phrase nor had anything to do with any *candidate* campaigns; they concerned pure issue speech regarding citizen initiatives and referenda. *See Bellotti*, 435 U.S. at 790 (distinguishing referendum from candidate campaign); *Citizens Against Rent Control*, 454 U.S. at 297 (same). Neither *Citizens Against Rent Control* nor *Bellotti* even mentioned *Buckley*'s "expenditure" construction, much less applied it to ballot initiative funding issues.

Likewise, Plaintiffs' reliance (Pls.' Br. 16 n.13) on FEC Advisory Opinion 2005-10 is mistaken. In that opinion, the Commission permitted two members of Congress to raise nonfederal funds for a state committee formed to support or oppose state ballot initiatives in a special election in which no candidates — state or federal — were on the ballot. *See* FEC Advisory Op. 2005-10 ("AO 2005-10"), http://saos.nictusa.com/aodocs/2005-10.pdf (Aug. 22, 2005); Cal. Sec'y of State, *Statewide Special Election Nov. 8, 2005*, http://vote2005.sos.ca.gov/ (last visited March 5, 2009). The Commission found that the specific language of 2 U.S.C. § 441i(e)(1) did not encompass elections where there were *no* candidates of any kind on the ballot. *See* AO 2005-10 at 2-3; *Concurring Statement of Comm'rs Weintraub & McDonald*, AO

Finally, Plaintiffs cite *North Carolina Right to Life, Inc. v. Leake*, in which the court invalidated state statutes that defined when an organization would be considered a political committee and that restricted communications made by entities other than political committees. *See* 525 F.3d 274, 281, 288 (4th Cir. 2008). The Fourth Circuit, however, specifically noted that these holdings were inapplicable to organizations that "have the support or opposition of candidates as their primary purpose." *See id*. at 289 (citing *Buckley*). Political parties are the paradigmatic example of such organizations, because

> [w]hile contributions made to political parties may not be passed through directly to candidates, the "special relationship and unity of interest" between political parties and candidates makes parties logical "agents for spending on behalf of those who seek to produce obligated officeholders."

Id. at 292 (quoting *McConnell*, 540 U.S. at 145-47; internal citations omitted).[18] Thus, *Leake* does not support Plaintiffs' attempt to apply their invented doctrine to political parties.

B. Much of Plaintiffs' Proposed Activity Will Affect Federal Elections

As explained *supra* pp. 10-12, in *McConnell* the Court rejected the argument that Title I is "impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including, for example, *funds spent on purely*

2005-10, at 4, http://saos.nictusa.com/aodocs/413243.pdf; *Concurring Opinion of Vice-Chairman Toner & Comm'r Mason*, AO 2005-10, at 1, http://saos.nictusa.com/aodocs/413244.pdf. That purely statutory interpretation is irrelevant to this case and does not embrace or support Plaintiffs' unambiguously-campaign-related theory.

[18] One of the statements of FEC Commissioners to which Plaintiffs cite (Pls.' Br. at 16 n.13) similarly related to a determination regarding political committee status — a determination that is irrelevant in the context of political parties. *See* Statement of Reasons of Vice Chairman Petersen, *et. al*, *In re November Fund*, MUR 5541, at 5 n.21, http://eqs.nictusa.com/eqsdocs/29044223819.pdf (Jan. 22, 2009) (distinguishing political parties and citing *McConnell*). The other Commissioner statement on which Plaintiffs rely cites the *Buckley* language only in construing the statutory definition of "expenditure," just as *Buckley* itself did. *See* Statement of Reasons of Chair Weintraub, et al., *In re Council for Responsible Gov't, Inc.*, MURs 5024, 5146, 5154, at 2, http://eqs.nictusa.com/eqsdocs/000006C6.pdf (Dec. 16, 2003).

state and local elections in which no federal office is at stake." 540 U.S. at 154 (second emphasis added). Again, the Court was fully aware that 30% of the nonfederal funds the RNC had raised in 2001 was spent on "purely state and local election activity." *Id.* at 154 n.50. Thus, although Plaintiffs are correct when they note (Pls.' Br. 24) that the Court explained that much of the activity at issue under Title I in fact "benefits federal candidates," 540 U.S. at 167, Plaintiffs are wrong when they suggest that this factual finding was meant in any way to provide a litmus test for future as-applied challenges.

In any event, the Court has a much broader view than Plaintiffs of what benefits federal candidates:

> 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)).

540 U.S. at 167-68.[19] Thus, Congress concluded that capping soft money donations rather than eliminating them would represent legislative approval of direct donations by corporations and unions to national political parties that would "send[] the campaign finance laws back in time to the very beginning of the 20th century before the Tillman Act banned direct corporate donations

[19] When the Court discussed the exploding use of soft money just before the enactment of BCRA, the Court explained that, "concerning the treatment of contributions intended [to be spent on activities] to influence both federal and state elections," a "literal reading of FECA's definition of 'contribution' would have *required such activities to be funded with hard money*." *McConnell*, 540 U.S. at 123 (emphasis added). An expenditure that influences federal elections does not lose that effect even if it also influences state elections. *See id.* at 166.

to the parties and before Taft-Hartley banned direct labor contributions to the parties." 147 Cong. Rec. S2887-88 (Mar. 26, 2001) (Sen. Feingold).

Much of the activity that Plaintiffs intend to pursue affects both federal and nonfederal elections. On the other hand, some activity by state and local parties may be financed entirely with *nonfederal* funds, in which case Title I imposes no restrictions. All of these kinds of activities were before the Court in *McConnell*. Specifically:

1. The RNC wants (Pls.' Br. 3-5) to create "state accounts" to finance, *inter alia,* "GOTV mail, voter registration drives," and other activities to support the election of state candidates, and to set up separate accounts for New Jersey and Virginia state elections in 2009. The CRP and RPSD wish to engage in similar activities in California and San Diego Country.[20] Plaintiffs concede (*id*. 38) that some of these state accounts and resulting activities will be conducted "in elections where federal candidates are on the ballot." Although they assert that these activities will not "target" federal candidates, they also concede (*id.*) that these activities "might have the collateral [e]ffect of benefitting federal Republican candidates on the ballot with state candidates." Specifically, all three organizational Plaintiffs have conceded that their voter registration activities are designed to maximize the number Republicans registered to vote, and that these activities are intended to influence, and do influence, *all* partisan elections, both state and federal. (FEC's Fact Resp. ¶¶ 42, 45, 62.) All three party Plaintiffs have also conceded that GOTV efforts in mixed elections inherently influence all elections that are on the ballot, as it is impossible to increase the number of Republican and Republican-leaning voters in state races without also increasing the number of those voters in the federal races on the same ballot. (*Id*. ¶¶

[20] Plaintiff Duncan's claim regarding a desire to solicit soft money for each of the parties' activities is entirely derivative — i.e., Duncan's claim fails because none of the underlying

43, 45, 62; *see also* Pls.' Br. 45.)[21] As discussed above, *McConnell* has already held that such mixed purpose activity affects federal elections and that what Plaintiffs call a "collateral" effect is quite sufficient to justify Title I's contribution limits: "It is . . . 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 . . . . A campaign need not mention federal candidates to have a direct effect on voting for such a candidate."[22] 540 U.S. at 167-68 (emphasis added; internal quotation marks and citations omitted).[23] Plaintiffs appear to rest this portion of their attempt (Pls.' Br. 38, 45) to undermine *McConnell* — including their New Jersey and Virginia activities — on their "unambiguous campaign related" theory; however, as explained *supra* pp. 32-36, that theory lacks merit.

---

activities is permissible — and so the Commission does not separately address Duncan herein. (*See also* FEC Fact Resp. ¶ 4 (noting that Duncan no longer holds leadership position at RNC).)

[21] As the Supreme Court noted in *McConnell*, the Commission has interpreted 2 U.S.C. § 431(20)(A)(ii) to allow state and local parties to use nonfederal dollars to engage in voter registration and GOTV "during the runup to elections when no federal office is at stake." *McConnell*, 540 U.S. at 169 & n.63 (citing 11 C.F.R. § 100.24(a)(1)). Thus, Title I would not place any limits on state and local parties in Virginia and New Jersey if they intend to engage in such activity leading up the gubernatorial races in 2009.

[22] As discussed *infra* pp. 42-44, state and local parties can finance certain kinds of mixed federal/nonfederal election activity with a mixture of hard money and "Levin funds," so CRP need not use entirely federal dollars for some of this activity.

[23] The Supreme Court concluded that BCRA's state money provisions were justified in part by a danger that the national parties would use the state parties to circumvent the new limits on contributions to the national parties. *McConnell*, 540 U.S. at 165-66. Plaintiffs suggest (Pls.' Br. 25) that that portion of *McConnell* is at odds with a statement in *WRTL* about the limits of potential circumvention as a government justification in the context of strict scrutiny, but only the Supreme Court may overrule one of its precedents. *See supra* n.4. Moreover, Plaintiffs' suggested overruling ignores not only that *WRTL* was in the different context of strict scrutiny, but also that the holding in *McConnell* regarding state parties rested on both Congress's prediction of circumvention and its conclusion, "based on the evidence before it," that "state committees function as an alternative avenue for precisely the same corrupting forces" related to soft money as the national party committees. 540 U.S. at 164.

2. Plaintiffs claim (Pls.' Br. 33) that money spent on redistricting is too attenuated to be "unambiguously campaign related." Again, that phrase is not the applicable standard. In any event, the record from *McConnell* demonstrates that "[r]edistricting efforts affect federal elections no matter when they are held." 251 F. Supp. 2d at 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 Green Expert Report at 11-12 [DEV 1-Tab 3]). The importance of redistricting to federal officeholders has not been 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 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 (quoting memorandum).

Consistent with the *McConnell* record, Plaintiffs admit that redistricting "involves congressional districts," and 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." (FEC Fact Resp. ¶ 13 (quoting Josefiak Dep. 155:18-21 (FEC Exh. 1)); *see also id*. (noting CRP and RPSD's admissions regarding federal effect of redistricting activities).)

3. The CRP alleges that it intends to spend funds supporting or opposing ballot initiatives. Although Plaintiffs acknowledge (Pls.' Br. 40) that BCRA's soft money rules for state and local parties only apply to "federal election activity," Plaintiffs ignore the rules' details. 2 U.S.C. § 441i(b). Title I does not prevent CRP from using nonfederal funds to support or oppose ballot initiatives.

As the Court in *McConnell* summarized, 540 U.S. at 161-63, state and local parties can pay for certain kinds of federal election activity (such as voter registration activity and GOTV) with a mix of hard money and a special kind of soft money known as "Levin funds"; public communications that promote, attack, support or oppose ("PASO") a clearly identified federal candidate must be paid for entirely with federal dollars; and public communications that refer solely to nonfederal candidates and do not otherwise constitute federal election activity can be paid for entirely with nonfederal funds. Communications that address only state ballot initiatives would not constitute federal election activity, and state and local parties can finance them with nonfederal dollars. Thus, if CRP wishes to finance public communications that advocate for or against ballot initiatives, it can use nonfederal dollars to do so, as long as those communications do not include other messages that constitute federal election activity. Indeed, the CRP distributes communications that endorse or oppose state ballot initiatives and identify federal candidates, without PASOing those candidates. (FEC Fact Resp. ¶ 63.) If, however, CRP combines otherwise unregulated communications with additional content that constitutes federal election activity, the unregulated portion cannot immunize the federal election activity from regulation.

The Court in *McConnell* upheld these provisions on their face, finding them closely drawn to an anticorruption interest, justified despite whatever associational burden they may

impose, and not so severe as to prevent the parties from engaging in effective advocacy. 540 U.S. at 166-74. In particular, the Court upheld the provision that requires communications that PASO federal candidates to be financed entirely with federal dollars and rejected the argument that the PASO standard is unconstitutionally vague. *Id*. at 170 & n.64.

Plaintiffs suggest (Pls.' Br. 42-44) that the Supreme Court's analysis in *WRTL* should be applied to the PASO standard, but that case is inapplicable here. *WRTL* addressed an expenditure limit for corporations and unions subject to strict scrutiny, while this case involves a contribution limit subject to intermediate scrutiny; *WRTL* dealt with a bright-line definition of "electioneering communication" that the Court narrowed to be sure it did not go beyond the functional equivalent of express advocacy, while this case deals with the PASO standard, which the Court has already determined is not unconstitutionally vague; and *WRTL* concerned regulation of corporate speech, while this case concerns regulation of political parties. The Court in *McConnell* reaffirmed its holding in *Buckley* that "actions taken by political parties are presumed to be in connection with election campaigns." 540 U.S. at 170 n.64 (citing *Buckley*, 424 U.S. at 79). No such presumption existed regarding the corporate plaintiff in *WRTL*.

In sum, CRP can finance public communications taking positions on ballot initiatives with nonfederal dollars, but if it includes in those communications messages that PASO federal candidates, Congress may lawfully require it to finance those communications with money raised within the federal contribution limits.

4. The RNC alleges that it intends to engage in additional activities that it contends are not "unambiguously" related to a federal campaign and thus not constitutionally subject to BCRA's soft money provisions. As explained *supra* pp. 32-36, that "test" has not been endorsed

by the Supreme Court, and the lack of any such "unambiguous" nexus to a particular federal campaign does not entitle the RNC to any constitutional exemption.

In particular, the RNC intends (Pls.' Br. 3-5) to pay for "grassroots lobbying" in connection with federal legislation, to finance litigation such as this case (*see* FEC Fact Resp. ¶ 20), and to maintain its building headquarters (*see id*. ¶ 21). While the precise contours of what the RNC considers to be "grassroots lobbying" are unclear, the record demonstrates that the RNC's request to fund these communications with soft money would open the door to precisely the same kind of "issue advertising designed to influence federal elections" about which Congress and the Supreme Court were concerned. *McConnell*, 540 U.S. at 131.[24] Indeed, the RNC has testified that several of the specific 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 (Leon, J.) — would constitute "grassroots lobbying" under the RNC's definition of that term. (FEC Fact Resp. ¶ 16.) Permitting these ads to once again be financed with unlimited, corporate contributions would undo the very heart of what BCRA was intended to stop and the Supreme Court upheld.

As to the miscellaneous other activities, Plaintiffs concede (Pls.' Br. 40) that the RNC's own party solicitor will be grateful to contributors for such soft money donations and provide no reason to conclude that their own officeholders would not share that gratitude. As explained *supra* pp. 16-24, the record in *McConnell* amply demonstrates that officeholders are generally grateful to donors who have given large soft money contributions to their party, and the Supreme

[24] In listing the disbursements it has made to "support" candidates, the CRP includes "non-advocacy issue-oriented mailings." (*See* Pls.' Statement of Undisputed Material Facts ¶ 39.) By acknowledging that "issue-oriented" communications are made to "support" candidates, the CRP negates the RNC's putative rationale for permitting such communications to be financed with soft money.

Court relied upon this and other aspects of the soft money system when it upheld BCRA and concluded that its provisions were constitutional to prevent both corruption and the appearance of corruption. Also as explained *supra* pp. 33-35, the Court had previously held in *California Medical* that donations to political committees for ostensibly non-electoral purposes can still be counted as statutory contributions and subjected to limits, both because of the fungibility of money and because of the undue influence that large donors can acquire, even by giving funds that are not earmarked directly for political purposes. Plaintiffs have offered no reason to reach a different result here.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied.

Thomasenia P. Duncan (D.C. Bar No. 424222)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

/s/ Adav Noti
Adav Noti (D.C. Bar No. 490714)
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

Dated: March 9, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	)	STATEMENT OF GENUINE ISSUES

DEFENDANT FEDERAL ELECTION COMMISSION'S
STATEMENT OF GENUINE ISSUES

Pursuant to LCvR 7(h) and 56.1, Defendant Federal Election Commission ("Commission") submits the following statement of genuine issues in opposition to Plaintiffs' Statement of Undisputed Material Facts ("Pls.' Stmnt."). The Commission reproduces below the enumerated paragraphs of Plaintiffs' Statement, each followed by the Commission's response.

Many of Plaintiffs' proposed facts directly or indirectly attempt to call into question findings of legislative fact made by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). Once resolved by an appellate court, however, issues of legislative fact need not be relitigated in lower courts each time they arise. *See Carhart v. Gonzales*, 413 F.3d 791, 800-01 (8th Cir. 2005) (legislative fact addressed by the Supreme Court need not be relitigated); *A Woman's Choice v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (same). For each of the following facts in which the Supreme Court has resolved the challenged fact, this Court does not need to revisit the issue and may simply adopt the finding already made.

1. Plaintiff Republican National Committee ("RNC") "ha[s] the general management of the Republican Party, subject to direction from the national convention." Rule 1, *Rules of the Republican Party* (2004). It is "[a] national committee of a political party" under 2 U.S.C. § 441i(a). Complaint ¶ 11.

FEC RESPONSE 1: The record in *McConnell* established that the national parties are "inextricably intertwined with federal officeholders and candidates," *McConnell*, 540 U.S. at 155 (quoting Congressman Shays), and that "[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.) (internal quotation omitted)). "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.).

The record in this case is not to the contrary. "[T]he role of the RNC is to be a political arm of Republicans either seeking office or in office" (Josefiak Dep. 197:1-18 (FEC Exh. 1)), and so the RNC's activities are inherently geared towards the interests of Republican officeholders and candidates. For example, 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 id*. 193:2-194:20.) The RNC also works with candidates each election cycle to develop "victory plans," which are joint, comprehensive, election-specific strategies (*see id*. 198:13-199:8), and by selling voter preference data to campaigns (*see id*. 200:10-12) or, on occasion, exchanging donor lists with them (*see id*. 98:8-14).

In addition to being an "arm" of Republican candidates and officeholders, the RNC is tightly connected to state Republican parties. The chairperson of each state Republican party sits

on the RNC (*id*. 14:18-15:13) — an arrangement that facilitates near-constant strategic communication between the RNC and the states (*see id*. 200:13-201:1). Thus, the RNC is not merely a standalone "national committee."

2. Plaintiff California Republican Party is the state Republican Party of California. It is "a State . . . committee of a political party" under 2 U.S.C. § 441i(b)(1). Complaint ¶ 12.

FEC RESPONSE 2: According to the Court in *McConnell*, "Congress recognized that" there were "close ties between federal candidates and state party committees," 540 U.S. 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.

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); *see also supra* FEC Response ¶ 1.) 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* Christiansen Dep. 173:19-174:15 (FEC Exh. 2).) 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.

3. Plaintiff Republican Party of San Diego is a "local committee of a political party" under 2 U.S.C. § 441i(b)(1). Complaint ¶ 13.

FEC RESPONSE 3: Congress through BCRA and the Court in *McConnell* recognized that there were "close ties" between federal candidates and "local committees." 540 U.S. at 161. 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. In addition, 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).)

4. Plaintiff Robert M. (Mike) Duncan is the National Committeeman of the Kentucky Republican Party and the RNC Chairman, in which capacity he is RNC's chief executive officer. Complaint ¶ 14.

FEC RESPONSE 4: Duncan's term as RNC Chairman ended on January 30, 2009. (Josefiak Dep. 29:4-20 (FEC Exh. 1).) Duncan remains a member of the RNC, but he has no official leadership role within that organization. (*Id*. 29:21-30:13.) He has no authority, beyond that of any other RNC member, over the actions or decisions of the current RNC Chairman. (*See id*.)

5. Defendant Federal Election Commission ("FEC") is the government agency with enforcement authority over FECA. Complaint ¶ 15.

FEC RESPONSE 5: The FEC is the government agency with authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-55 ("FECA"), and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," 2 U.S.C. §§ 437d(a)(8), 438(a)(8); *see* 2 U.S.C. § 438(d); and to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. §§ 437d(a)(7), 437f.

6. As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the federal, state and local levels. The RNC seeks to advance its core principles by advocating Republican positions, electing

Republican candidates and encouraging governance in accord with Republican views at the federal, state and local levels. *McConnell*, 251 F. Supp.2d at 335 (citations omitted) (Judge Henderson's findings). The RNC "has historically participated and participates today in electoral and political activities at the federal, state and local levels." *Id.* These activities in state and local elections "are substantial both in their importance to the RNC's mission and in their resource commitment." *Id.* "Even for elections in which there is no federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities." *Id.* at 336.

FEC RESPONSE 6: The fact that the RNC spends a small portion of its funds on state and local elections is not relevant. As the Supreme Court explained in *McConnell*, it "is beside the point" for purposes of evaluating the soft money restrictions in BCRA. 540 U.S. at 154. For example, the Court noted the political parties' claim that the RNC had spent 30% of the nonfederal funds it raised in 2001 on "purely state and local election activity," *id.* at 154 n.50, and then explained that the record demonstrated that "the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, . . . have made *all large soft-money contributions* to national parties suspect." *McConnell*, 540 U.S. at 154-55 (emphasis added).

Even if the proposed spending were relevant, the record in *McConnell* demonstrated that 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. 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.*

Moreover, nothing prevents the RNC from spending as much of its money on state and local activities as it prefers. 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*.; contributions and disbursements per election cycle available at http://www.fec.gov/finance/disclosure/srssea.shtml.) 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.

7. "The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views at the federal, state and local levels." 251 F. Supp. 2d at 335 (Judge Henderson's findings).

FEC RESPONSE 7: The fact that the RNC claims to spend money on activities other than electing federal candidates is "beside the point," i.e., not relevant. *See supra* FEC Response ¶ 6 (quoting *McConnell*). Even if its proposed spending were relevant, the record in *McConnell* demonstrated that prior to BCRA — when the RNC was permitted to receive nonfederal funds ostensibly to, *inter alia*, advance Republican policy positions — "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. "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. The RNC was unable in this case to substantiate that it had spent any money on advertisements that it considers "grassroots lobbying" during the last three election cycles. (Pl. RNC's Discovery Responses at 6 (FEC Exh. 4).)

8. The RNC intends to (a) create a New Jersey Account for state funds (non-federal funds subject to state regulation) subject to New Jersey state law, (b) solicit state funds into the account under New Jersey state law, and (c) use those funds to support state Republican candidates in the November 2009 election. Because New Jersey holds its state elections in odd numbered years, there will be no federal candidates on the 2009 ballot. Beeson Aff. ¶ 3.

FEC RESPONSE 8: The fact that the RNC hopes to spend some of its money on New Jersey state candidates this year is "beside the point," i.e., not relevant. *See supra* FEC Response ¶ 6 (quoting *McConnell*). Moreover, the RNC may spend as much of its money on those campaigns as it prefers. Indeed, the RNC contributed nearly $900,000 to a candidate for governor of New Jersey in 2005 and nearly $300,000 to New Jersey county parties that year. *Id.*

9. The RNC plans to use funds from the New Jersey Account to make direct contributions to New Jersey state and local candidates according to state law limits. At this time, the RNC does not know the specific candidates that it will support, as the party rules preclude it from supporting pre-primary candidates unless (1) the candidate is unopposed or (2) it receives prior written and filed approval of all RNC members from the state in question. The RNC plans to use these funds to make independent expenditures advocating the election of the New Jersey Republican gubernatorial nominee, specific advertising and direct mail for the entire Republican ballot in New Jersey, and for get-out-the-vote ("GOTV") calls. None of these activities would clearly identify any federal candidate. Beeson Aff. ¶ 4.

FEC RESPONSE 9: *See supra* FEC Response ¶ 8.

10. The RNC intends to (a) create a Virginia Account for state funds subject to Virginia state law, (b) solicit state funds into the account under Virginia state law, and (c) use those funds to support Republican candidates for the November 2009 election. Like New Jersey, Virginia also holds its elections for state office in odd numbered years. Therefore, there are no federal candidates on the 2009 Virginia ballot. Beeson Aff. ¶ 5.

FEC RESPONSE 10: The fact that the RNC hopes to spend some of its money on Virginia state races is "beside the point," i.e., not relevant, and the RNC is permitted to spend as

much of its money on Virginia state candidates this year as it prefers. *See supra* FEC Response ¶ 6 (quoting *McConnell*).

11. The RNC plans to use funds from the Virginia Account to make direct contributions to legislative races. Such contributions are especially important to maintain the Republican majority in the state assembly before redistricting. The RNC plans to directly coordinate campaign activities with the Republican gubernatorial nominee and place GOTV calls. None of these activities would clearly identify any federal candidate. Beeson Aff. ¶ 6.

FEC RESPONSE 11: *See supra* FEC Response ¶ 10; *infra* FEC Response 13 (discussing redistricting).

12. Virginia is especially important to the RNC's political strategy for several reasons: (1) Virginia has traditionally been a stronghold for Republicans, and the RNC is looking forward to recapturing this "red state"; (2) maintaining a Republican majority in the state assembly is crucial to influencing the state's redistricting; (3) the current Democrat frontrunner for governor, Terry McAuliffe, a former Democratic National Committee ("DNC") chairman, has extremely high name recognition; (4) the appointment of Governor Tim Kaine as DNC chairman puts a national focus on the Virginia gubernatorial race. Beeson Aff. ¶ 7.

FEC RESPONSE 12: *See supra* FEC Response ¶ 10; *infra* FEC Response 13 (discussing redistricting).

13. The RNC intends to (a) create a Redistricting Account, for non-federal funds and state funds subject to state law, (b) solicit funds into the account under applicable state laws, and (c) use those state funds to support the redistricting efforts of various states' Republican parties after the 2010 census. Beeson Aff. ¶ 8.

FEC RESPONSE 13: The fact that the RNC hopes to spend some of its money on redistricting is "beside the point," i.e., not relevant. *See supra* FEC Response ¶ 6 (quoting *McConnell*). If the manner of spending were relevant, the *McConnell* record demonstrated that "[r]edistricting efforts affect federal elections no matter when they are held," and that 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." 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.

The record in this case is consistent with *McConnell*. 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).) 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.' Stmnt. ¶¶ 36, 38 ("California's Congressional seats were redistricted in 2001 to virtually eliminate partisan competition at general elections . . . .").) The RPSD has noted the same effect. (*Id*. ¶ 55.)

14. The Redistricting Account would provide resources for political activity related to winning state legislative races; technology and staffing to support the data compilation, analysis, and map drawing related to redistricting; and litigation efforts and other legal fees related to redistricting. The political components would involve two primary objectives: (1) the hiring of political and communications staffers to develop and execute a political strategy related to redistricting, and (2) the use of the RNC's State Elections Accounts to advance redistricting goals by supporting state legislative candidates nationwide. The Redistricting Account would

support data analysis and map drawing primarily in the following ways: (1) the hiring of data management and census data experts; and (2) the purchasing of hardware and software to support the RNC's redistricting efforts. The Redistricting Account would also support the legal component of the RNC's redistricting efforts through hiring additional in-house legal staff with expertise in redistricting and enabling the RNC to hire outside counsel to assist in redistricting related litigation. Beeson Aff. ¶ 9.

FEC RESPONSE 14: *See supra* FEC Response ¶ 13.

15. The RNC intends to (a) create a Grassroots Lobbying Account, for non-federal funds, (b) solicit non-federal funds into the account, and (c) use those funds to support grassroots lobbying efforts for federal legislation and issues important to the Republican Party's platform. Beeson Aff. ¶ 10.

FEC RESPONSE 15: *See infra* FEC Response ¶ 16.

16. The RNC intends to use the Grassroots Lobbying Account to pay for radio, television, and internet grassroots lobbying advertisements on relevant public-policy issues. The first two issues the RNC would like to address are issues being debated by the 111th Congress: (1) "card check" legislation, which allows unionization without secret-ballot elections for workers; and (2) legislation to revive the "Fairness Doctrine," which would require radio station owners to provide equal time on matters of public importance or risk losing their broadcast licenses. The following are true and correct copies of ads that RNC intends to broadcast:

Card Check
Secret Ballot
[Text of radio ad]

Today, when workers vote on whether to join a union, they use a secret ballot. Just like we use for any public election. But, some in Congress and their labor union allies want to change that. The "Employee Free Choice Act" is about anything but free choice. The legislation would establish a card check scheme that would strip employees of the right to vote in private when deciding whether to join a union. Under the card check scheme, secret ballot voting is eliminated. Every worker's vote is public. There is no protection against intimidation or coercion, and no guarantee that workers would be able to vote their true wishes. We elect our members of Congress by secret ballot. Why should millions of Americans be stripped of that right? Call [insert Representative/Senator name] and tell him [her] to stand up to the union special interests. Tell him [her] to oppose card check legislation. Viewers see a parent with a child while the parent votes in an election. The parent is teaching the child about the role of the secret ballot in democracy only to have "union goons" grab the parent away from the child and force the parent to vote on whether to form a union in a huge public arena (possibly a game show). The child cries out, "Daddy/Mommy, what happened to democracy?" and the evil game show host says, "Not when it comes to unions, kid."

Fairness Doctrine
Freedom of Speech

[Text of radio ad]

> Freedom of speech. One of our most fundamental rights. So, why is it that some in Congress want to censor speech on the airwaves? Do they not trust Americans to think for themselves? Are they that frightened of their critics? The Fairness Doctrine was killed off more than 20 years ago, because it was anything but fair. Yet, some in Congress are pushing legislation to bring the doctrine back and require broadcasters to present opposing viewpoints on controversial issues of public importance. Let's face the facts. The Fairness Doctrine is nothing more than a clear attack on free speech. It would give total control of the public airwaves to the government, and allow the government to dictate the kind of news and opinions that broadcasters choose to air. The freedom is speech is central to our democracy. We must protect it. Call [insert Representative/Senator name] and tell him [her] to tell him [her] to oppose any efforts to bring back the Fairness Doctrine.

Beeson Aff. ¶ 11.

FEC RESPONSE 16: The fact that the RNC hopes to spend some of its money on communications that it characterizes as "grassroots lobbying" is "beside the point," i.e., not relevant. *See supra* FEC Response ¶ 6 (quoting *McConnell*). If the manner of spending were relevant, the *McConnell* record demonstrated that prior to BCRA — when the RNC was permitted to receive nonfederal funds ostensibly to, *inter alia*, conduct "issue advocacy" — "genuine issue advocacy on the part of political parties [was] a rare occurrence." 251 F. Supp. 2d at 451 (Kollar-Kotelly, J.). Moreover, the RNC may spend as much of the funds it raises on "grassroots lobbying" as it prefers.

While the precise contours of what the RNC considers to be "grassroots lobbying" are unclear, the record demonstrates that the RNC's request to fund "grassroots lobbying" with soft money would open the door to precisely the same kind of "issue advertising designed to influence federal elections" about which Congress and the Supreme Court were concerned. *See McConnell*, 540 U.S. at 131. 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 (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).) And the CRP includes "non-advocacy issue oriented mailings" in its lists of disbursements that "support" candidates. (*See* Pls.' Stmnt. ¶ 39.)

17. The RNC intends to (a) create several State Elections Accounts, for state funds, (b) solicit state funds into the accounts, and (c) use those funds exclusively to support state candidates in various states. The funds would be solicited and spent in accordance with any applicable state law. The RNC intends to support state candidates from this Account in elections where only state candidates appear on the ballot and in elections where both federal and state candidates appear on the ballot. Beeson Aff. ¶ 12.

FEC RESPONSE 17: The fact that the RNC hopes to spend some of its money to support state candidates is "beside the point," i.e., not relevant, and the RNC may spend as much of its money on state campaigns as it prefers. *See supra* FEC Response ¶ 6 (quoting *McConnell*).

18. The RNC plans to use funds from the State Elections Accounts to make direct contributions to state and local candidates. Several states permit unlimited contributions to candidates and/or corporate contributions to candidates. The RNC is looking to compete on an equal playing field in these states. It will also use these funds for independent expenditures for Republican state and local candidates, specific advertising and direct mail for the entire Republican ballot, and GOTV calls. Beeson Aff. ¶ 13.

FEC RESPONSE 18: *See supra* FEC Response ¶ 17. In addition, the RNC already "compete[s] on an equal playing field" with its Democratic Party equivalent in all relevant financial respects, as the national party committees are subject to identical contribution limits, *see* 2 U.S.C. § 441a(a)(1)(B), and FECA imposes no restrictions on the amount of funds that a national party may spend on any of the activities mentioned in the paragraph. With regard to the RNC's GOTV activities, *see infra* FEC Response ¶ 45.

The Supreme Court has already held, on the basis of the record in other cases, that the "national parties" are in a "unique position" to serve as "'agents for spending on behalf of those who seek to produce obligated officeholders.'" *McConnell*, 540 U.S. at 145 (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001)). "'[T]he differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process,'" *id.*, 540 U.S. at 158 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)) (internal quotation marks omitted), and Congress was not required to subject the national parties to the exact same rules regarding funding of state and local candidates as other entities that are not as well-situated to serve as conduits for undue influence on federal officeholders.

19. All of these activities using funds from the State Elections Accounts will be aimed at state candidates and state elections. None of the activities will in any way identify, reference, or otherwise depict any federal candidate. Beeson Aff. ¶ 14.

FEC RESPONSE 19: *See supra* FEC Response 18; *infra* FEC Response ¶ 45.

20. The RNC intends to solicit non-federal funds into a Litigation Account. The RNC plans to use funds from the Litigation Account for costs associated with litigation challenging BCRA and other miscellaneous litigation not related to federal elections. Beeson Aff. ¶ 15.

FEC RESPONSE 20: To the extent this paragraph refers to any litigation other than the instant case, it is irrelevant, as 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).) In any event, the fact that the RNC hopes to spend some of its money to fund litigation is "beside the point," i.e., not relevant, and the RNC may spend as much of its money on litigation as it prefers. *See supra* FEC Response ¶ 6 (quoting *McConnell*).

21. The RNC intends to solicit non-federal funds into a Building Account exclusively for maintenance and upkeep of the RNC's headquarters. Beeson Aff. ¶ 16.

FEC RESPONSE 21: This assertion is irrelevant, as there is no "Building Account" among the activities set forth in Plaintiffs' complaint. In any event, the RNC raised and lost its "building fund" claim in *McConnell*. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 332 (Henderson, J.), 462-63 (Kollar-Kotelly, J.), 819 (Leon, J.) (including "building funds" in list of activities RNC financed with soft money prior to BCRA). The fact that the RNC hopes to spend some of its money to fund maintenance and upkeep of its headquarters is "beside the point," i.e., not relevant, and the RNC may spend as much of its money on its headquarters as it prefers. *See supra* FEC Response ¶ 6 (quoting *McConnell*). Even if the manner of its spending were relevant, the RNC does not even allege that its headquarters activities are unrelated to federal elections, nor could it. *Cf. Cal. Med. Ass'n* v. *FEC*, 453 U.S. 182, 198 n.19 (1981) (declining to exempt donations for "administrative" purposes from regulation as contributions because organization's receipt of such donations would free its other funds to be used to influence elections).

22. Before BCRA, non-federal funds were critical to sustaining the RNC's Building Fund. Since then, the RNC has had to divert federal funds to such uses as replacing the building's generator and fixing aging elevators. Every dollar of federal funds used for those items takes away from the RNC's ability to reach out directly to voters and engage new voters in the political process. Beeson Aff. ¶ 17.

FEC RESPONSE 22: *See supra* FEC Response ¶ 21.

23. The RNC is ready and able to do all these activities but cannot because it is permitted to solicit and use only federal funds. So, unless the RNC obtains judicial relief, it will not create any of the above accounts for non-federal and state funds. In addition to the activities listed above, the RNC would like to participate in materially similar activities in the future. Beeson Aff. ¶ 18.

FEC RESPONSE 23: FECA imposes no restrictions on the RNC's ability to spend its funds on any of the activities the RNC alleges it would like to undertake; thus, the RNC's assertion that it "cannot" "do all these activities" is an incorrect statement of law. 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). Furthermore, as a factual matter, the RNC has engaged in "all these activities" since BCRA: 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). 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.)

24. The RNC will not aid contributors to any of the accounts in obtaining preferential access to federal candidates or officeholders. For example, the RNC will not, in any manner different than or beyond that currently afforded to contributors of federal funds: (1) encourage officeholders or candidates to meet with or have other contact with contributors to these accounts, (2) arrange for contributors to participate in conference calls with federal candidates or officeholders, or (3) offer access to federal officeholders or candidates in exchange for contributions. Furthermore, the RNC will not use any federal candidates or officeholders to solicit funds for any of the Accounts. Beeson Aff. ¶ 19.

FEC RESPONSE 24: The fact that the RNC asserts that it will not itself create an additional program of preferential access is irrelevant. The record in *McConnell* demonstrates that candidates would nevertheless be aware of who the donors are. Although the Court noted the role that officeholders had played in raising soft money for their political parties, the Court also found that, "[e]ven 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*." 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 RNC's assertion that it will not provide preferential access as a direct result of donations to its desired soft money accounts is especially irrelevant given that the RNC currently provides its major donors with substantial preferential access to federal candidates and officeholders. Specifically, 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).) 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).)

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. (*Id*. 102:19-103:6.)

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. (*Id*. 128:2-5, 184:10-21.) To the extent the RNC has an *un*written "policy" on this issue, it is the same policy that was in effect prior to BCRA (*id*. 129:18-21), when the trading of soft money for access ran rampant, *McConnell*, 540 U.S. at 150-52.

The RNC's statement that it will not "use" federal candidates or officeholders to raise soft money is irrelevant to the actual or apparent corruption arising from soft-money donations. *See id*. at 145-52 (rejecting argument that only funds solicited by federal candidates or officeholders may be subject to regulation).

The party admits that it will provide access to federal candidates and officeholders for soft money contributors, but only to the same extent it provides access to hard money contributors. In *McConnell*, however, the plaintiffs' own expert, David Primo, 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).

"Elected 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 were 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 parties are.'") (quoting Senator McCain); *id*. at 487-88 (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).

Because candidates would know the identities of he parties' contributors, this Court noted in *McConnell* the threat of corruption that would result, including from contributions for state party use that would benefit federal candidates.

> "[T]he federal candidates who benefit from state party use of these funds 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).

All of the foregoing is equally applicable to the CRP and the RPSD. 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").). 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 id*. 54:2-58:16, 94:24-99:2.) The CRP also "strong arms" federal candidates and officeholders into participating in conference calls with major donors. (*Id*. 85:25-86:16.) 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). The CRP's Board of Directors — which always includes at least one federal officeholder, *see supra* FEC Response ¶ 2 — is informed of individual "generous donations." (*Id*. 82:14-83:25.) The CRP does not intend to change its practice of giving access to donors, even if the CRP is permitted to raise and spend soft money on federal election activity. (*See id*. 177:19-178:6.)

Like the RNC, 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).)

The RPSD also 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). The RPSD's committee members — including federal officeholders, *see supra* FEC Response ¶ 3 — have access to the RPSD's internal donor records. (Buettner Dep. 33:20-34:4 (FEC Exh. 3).) 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 id*. 56:18-23.)

25. Since 2003, the Republican Party, as an institution, has changed due to leadership and staff turnover. Political majorities across the country have also shifted, making certain races more important than others at any given time. For example, Virginia, once a Republican stronghold, went for a Democrat candidate in 2008. Beeson Aff. ¶ 20.

FEC RESPONSE 25: No response.

26. As a party, the RNC has lived under BCRA for three cycles. The potential problems the RNC identified in its briefs before the *McConnell* Court are even more acute than anticipated. For example, the rise of 527s (and the resulting failure of the FEC to regulate them) has left the RNC at a fundraising disadvantage for a host of its activities. Similarly, the RNC has been negatively affected by the explosion of internet fundraising, barriers to collaborative relationships between national party and state parties, and inequality of restrictions on a party's ability to raise and spend funds. Beeson Aff. ¶ 21.

FEC RESPONSE 26: This statement is vague and ambiguous, as the RNC does not point to any specific "potential problems the RNC identified" in its *McConnell* briefs. Nonetheless, as to "the rise of 527s," [redacted] There has been no "failure of the FEC to regulate" 527 organizations. *See generally* FEC, *Political Committee Status*, 72 Fed. Reg. 5595

(Feb. 7, 2007) (explaining Commission's application of political committee statutes and regulations to 527 organizations).

Regarding "the explosion of internet fundraising," the RNC provides no explanation, much less evidence, of how the ease of raising funds over the internet has harmed the RNC. Instead, the record indicates that the RNC simply has not "been able to compete effectively in that area." (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.").)

The RNC's statement regarding "barriers to collaborative relationships between national party and state parties" is irrelevant, as there is no legal barrier to collaborative fundraising between the RNC and state parties. To the contrary, the RNC raises substantial funds through joint fundraising committees ("JFCs"), which include the RNC, state parties, and candidate campaign committees. (*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).) To the extent the RNC's statement refers to coordinated spending, none of FECA's restrictions on such spending are at issue in this case.

There is no "inequality of restrictions" between the RNC's "ability to raise and spend funds" and that of its competitor, the DNC. *See supra* FEC Response ¶ 18.

The RNC predicted in its *McConnell* brief 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 does not attempt to prove that these predicted problems ever materialized, nor could it.

27. As the current Chairman of the RNC, Mike Duncan intends to **(1)** solicit contributions of state funds and non-federal funds to RNC's New Jersey Account, Virginia Account, Redistricting Account, Grassroots Lobbying Account, State Elections Accounts, Building Account, and Litigation Account; **(2)** solicit contributions of state funds to the California Republican Party; and **(3)** solicit contributions of state funds to the campaigns of Republican candidates for state office appearing on the November 2009 ballot in New Jersey and Virginia. Duncan Aff. ¶ 3.

FEC RESPONSE 27: *See supra* FEC Response ¶¶ 4 (noting that Duncan is no longer RNC Chairman), 8-22 (responding to statements regarding each soft-money activity); *infra* FEC Response ¶ 31.

28. Duncan intends to make the described solicitations in his official capacity as RNC Chairman on behalf of the RNC, that is., as an "officer or agent acting on behalf of such a national committee." 2 U.S.C. § 441i(a)(2). Duncan Aff. ¶ 4.

FEC RESPONSE 28: *See supra* FEC Response ¶ 4; *infra* FEC Response ¶ 31.

29. Duncan intends to (a) attend and be a featured guest at state candidate campaign events/fundraisers and solicit contributions for specific state candidates at such events, (b) sign and send letters and emails soliciting such contributions from RNC donors and other potential donors, and (c) make telephone calls to solicit such contributions from RNC donors and other potential donors. Duncan Aff. ¶ 5.

FEC RESPONSE 29: *See supra* FEC Response ¶¶ 4, 8-22; *infra* FEC Response ¶ 31.

30. Duncan will not provide any donor who gives funds in response to the above solicitations with any preferential access to any federal candidate or officeholder. Duncan Aff. ¶ 6.

FEC RESPONSE 30: *See supra* FEC Response ¶ 24; *infra* FEC Response ¶ 31.

31. Duncan is ready and able to do this activity, and would do this activity but for the fact that 2 U.S.C. § 441i(a) makes it a crime. Unless he is able to obtain judicial relief he will not do

this activity. Duncan intends to solicit state funds and non-federal funds in materially similar situations in the future, if permitted. Duncan Aff. ¶ 7.

FEC RESPONSE 31: Duncan's role in soliciting the planned soft money for the RNC is irrelevant. As the *McConnell* record demonstrates, it does not matter whether party officials or candidates solicit soft money contributions to the national party committees, *see supra* FEC Response ¶ 24. The Court specifically rejected the contention by the dissent that only "contributions made at the express behest of" a candidate created a concern about corruption, 540 U.S. at 152. The *McConnell* record, in fact, demonstrates that many donors gave without being solicited, including, for example, at the suggestion of professional lobbyists as part of a broader plan to obtain influence. As lobbyist Daniel Murray explained (emphasis added),

> 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); *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 lobbyist Wright Andrews). Similarly, when the Supreme Court discussed the "evidence in the record showing that national parties have actively exploited the belief that contributions purchase influence or protection to pressure donors into making contributions," it quoted the statement of a CEO who specifically referred to heavy-handed solicitations by lobbyists. *McConnell*, 540 U.S. at 148 n.47. If a corporation had given a lot of money to one side, the CEO explained, "'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.* (quoting Wade Randlett). The national parties are "entities uniquely positioned to serve as conduits for

corruption," including when donations are made "at the behest of" party officers in their official capacity. *Id.* at 156 n.51.

In addition, *see supra* FEC Response ¶¶ 4 (noting that Duncan is no longer RNC Chairman), 8-22 (responding to statements regarding each soft-money activity). Mr. Duncan — as well as his successor — is free to solicit hard money on behalf of state and local committees and candidates and soft money in his individual capacity or, if he is an official of his state party, in that capacity. *McConnell*, 540 U.S. at 157.

32. California Republican Party ("CRP") supports Republican nominees for partisan elective offices in general elections, particularly in contested races. CRP is prohibited from and does not support candidates for partisan elective office at primary elections. Thus, CRP's potential federal candidate support activity does not take place in any regular primary election. CRP also supports candidates for non-partisan offices at the state and local levels. The statewide offices of Insurance Commissioner and Superintendent of Public Instruction are not partisan offices. Local offices are all non-partisan (Art. II, sec. 6(a), Cal. Const.). Christiansen Dec. ¶ 3.

FEC RESPONSE 32: *See supra* FEC Response ¶ 2.

33. California holds its Direct Primary on the first Tuesday after the first Monday in June and its statewide general election on the first Tuesday after the first Monday in November. California holds a standalone Presidential Primary election on the first Tuesday in February in even numbered years divisible by four. CEC § 1202. Christiansen Dec. ¶ 4.

FEC RESPONSE 33: No response.

34. California law permits local jurisdictions to set their election dates and consolidate those elections with the Direct Primary and the statewide general election, so that state and local officer elections may be held on those dates which are regular federal election dates. Candidates for state and local elective offices appear on the ballot with candidates for federal offices. Christiansen Dec. ¶ 4; Buettner Dec. ¶ 5.

FEC RESPONSE 34: No response.

35. Since the enactment of Proposition 34 in 2000, CRP has engaged in substantial support of candidates for partisan offices at the state level, and more recently in the 2006 and 2008 elections, CRP has engaged in local candidate support. This activity included contributions, coordinated expenditures, and member communication expenditures in support of candidates for state offices at elections held in 2002, 2003, 2004, 2006, and 2008, and member communication expenditures in support of candidates for local offices, most of the latter in 2006 and 2008. Christiansen Dec. ¶ 6.

FEC RESPONSE 35: No response.

36. CRP has spent little money supporting federal candidates, either before or after BCRA was adopted, because California has had very few competitive Congressional districts since 2001. As noted above, CRP does not support any federal candidates in primary elections. Christiansen Dec. ¶ 7.

FEC RESPONSE 36: The CRP has "spent . . . money supporting" federal candidates through direct and coordinated expenditures (*see* Pls.' Stmnt. ¶ 38), and through substantial sums spent on federal election activity, including voter registration, voter identification, GOTV, and generic campaign activity, *see infra* FEC Responses ¶¶ 42-45.

37. Because California's U.S. Senate seats have been held by Democrat incumbents since 1994, CRP has spent little funds on campaign activities in support of Republican nominees for those offices. CRP has not made any significant coordinated expenditures in a U.S. Senate race since 1998. Christiansen Dec. ¶ 8.

FEC RESPONSE 37: *See supra* FEC Response ¶ 36.

38. Because California's Congressional seats were redistricted in 2001 to virtually eliminate partisan competition at general elections, CRP has not engaged in any substantial contribution or "coordinated expenditures" under 2 U.S.C. § 441a(d) for 2002, 2004, 2006, and 2008. In 2002, CRP contributed $10,000 to California Congressional candidates that were not in highly contested races. CRP made "coordinated expenditures" totaling $86,275 to three candidates, one in a contested general election race (CD 22). In 2004, CRP made one $5,000 contribution in a contested California congressional race, and $72,650 in coordinated expenditures in support of David Dreier (CD 26) – a race that was not seriously contested. In 2005-2006, CRP made coordinated expenditures of $11,013 in one special Congressional race (Campbell – CD 48) and in 2006, CRP paid filing fees for 17 Congressional candidates in non-contested races totaling $27,557, and one coordinated expenditure on behalf of David Dreier (CD 26) totaling $41,775. In 2007-2008, despite spending $17,268,249 in federal funds, CRP made no contributions or independent expenditures, and only $41,660 in coordinated expenditures (Rohrabacher – CD 46) on behalf of federal candidates. Thus, between 2002 and 2008, CRP engaged in coordinated expenditure activity in fewer than four contested general election races out of 216 Congressional elections. After enactment of BCRA's FEA PASO provisions in 2002, CRP stopped including federal candidates on its slate mailings and stopped identifying federal candidates entirely in absentee ballot application, chase mailings, and similar voter communications for the 2002, 2004, 2006, and 2008 elections. Christiansen Dec. ¶ 9. 12

FEC RESPONSE 38: No response, except to the final sentence of the paragraph. As to the final sentence, the CRP appears to imply that "BCRA's FEA PASO provision[ ]" prohibits

the CRP from using state funds to finance certain "voter communications" that "identify[ ] federal candidates." However, (a) to the extent these "voter communications" constitute "voter identification, get-out-the-vote activity, or generic campaign activity" in connection with an election in which federal candidates are on the ballot, but do not PASO a federal candidate, the communications must be funded at least in part with federal funds regardless of whether they identify any federal candidate, *see* 2 U.S.C. § 431(20)(A)(ii); (b) a communication is subject to the "PASO provision," 2 U.S.C. § 431(20)(A)(iii), only if it "promotes or supports . . . or attacks or opposes" a candidate, not merely "identif[ies]" a candidate; (c) BCRA did not take effect until after the 2002 elections; and (d) in any event, the CRP *does* include 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).)

39. In 2002, CRP spent $6,467,968 supporting 16 candidates for state elective offices with endorsement communications (mailings, party slate cards, broadcast and cablecast communications). In 2003-2004, CRP spent $5,680,352 supporting 46 candidates for state elective offices with endorsement mailings, broadcast and cablecast communications and non-advocacy issue oriented mailings. In 2005-2006, CRP spent $8,787,102 supporting 36 candidates for state elective offices with endorsement mailings, member communication mailings, broadcast communications, and non-advocacy issue-oriented mailings as well as supporting several dozen candidates for local offices with member communication mailings. In 2007-2008, CRP spent $5,710,795 supporting 11 candidates for state elective offices with endorsement mailings, member communication mailings, broadcast communications, and non-advocacy issue-oriented mailings, as well as supporting nearly 100 candidates for local offices with member communication mailings. CRP's expenditures for the support of state and local candidates in four elections totaled $26,646,217. Christiansen Dec. ¶ 10.

FEC RESPONSE 39: No response, except to note (a) that this paragraph 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" does affect candidate elections, *see supra* FEC Response ¶ 16; and (b) that the CRP 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).

40. From 2003 to 2008, CRP spent barely more than 1% of the total of $26,942,147 spent on all candidates for federal candidate support. Christiansen Dec. ¶ 11.

FEC RESPONSE 40: *See supra* FEC Response ¶ 36.

41. CRP has eschewed including any communications that clearly identify federal candidates and contain words that promote, attack, support, or oppose such federal candidates in its state and local candidate support communications, or in its state and local ballot measure endorsement communications, because of BCRA's requirement that such communications would have to be paid entirely with federal funds under 2 U.S.C. § 441i(b)(2)(B) and 2 U.S.C. § 431(20). According to Bill Christiansen, the Chief Operating Officer of the CRP, using only federal funds for such communications would virtually eliminate CRP's ability to engage in such state and local candidate and ballot measure activity because of the severe, adverse impact on these fundamental state and local campaign programs. Christiansen Dec. ¶ 12.

FEC RESPONSE 41: The CRP does not allege in this case that it would like to use soft money to fund "state and local candidate support communications" that PASO federal candidates, and so the assertions in this paragraph relating to such communications are irrelevant. In any event, the CRP does clearly identify and promote federal candidates in some of its state and local candidate support communications. *See supra* FEC Response ¶ 38. As to ballot initiative activity, *see infra* FEC Response ¶ 63. Should the CRP ever develop an interest in undertaking any of the activities described in paragraph 41, the declarant's conclusory assertion that "using only federal funds" for such communications "would virtually eliminate" CRP's ability to pay for them due to an unexplained "severe, adverse impact" is unsupported and controverted by the considerable sums of federal money the CRP raises each election cycle. (*See* Pls.' Stmnt. ¶ 44.)

42. CRP spent $7,768,683 on voter registration activities from 2003 to 2008, as reflected on its FEC reports. Of this, a substantial portion, in excess of the federally required minimum percentage, was paid with hard federal dollars. Christiansen Dec. ¶ 13.

FEC RESPONSE 42: *See infra* FEC Response 45. 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, Sep. 1, 2004 (FEC Exh. 16) ("[C]hairman of the California Republican Party . . . said Republican registration gains are creating a Bush-friendly environment.").) The RNC has acknowledged that effect, as well:

> 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).)

43. CRP spent $619,372 on voter identification and GOTV activities from 2003 to 2008, as reflected on its FEC reports. All or virtually all of these payments were made with federal funds or federal Levin funds. Christiansen Dec. ¶ 14.

FEC RESPONSE 43: *See infra* FEC Response 45. 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.) The RNC has acknowledged this as well.

> 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).)

44. Between 2003 and 2008, CRP spent $51,673,117 from its federal account, according to FEC reports. During this same time it spent $94,395,279 from its non-federal account, of which $18,595,745 was for transfers to the federal account for allocable activity expenses. Christiansen Dec. ¶ 15.

FEC RESPONSE 44: No response.

45. CRP intends to use state funds to participate in GOTV, voter identification, and voter registration activities, as defined in 2 U.S.C. § 431(20), in future elections for state and local candidates. None of this "Federal election activity" would be targeted to any federal candidate, *i.e*., it would not reference, describe, or otherwise depict any federal candidate. This activity is prohibited by 2 U.S.C. § 441i(b). Absent the requested judicial relief CRP will not engage in these activities. Christiansen Dec. ¶ 16.

FEC RESPONSE 45: The generic activities the CRP plans to conduct with soft money through these accounts can directly help federal candidates and influence their election. In *McConnell*, the Supreme Court found that voter registration, voter identification, GOTV, and generic campaign activity as defined by BCRA "clearly capture activity that benefits federal candidates" and that "funding of such activities creates a significant risk of actual and apparent corruption." 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.

The views of the CRP and RPSD are consistent with "common sense" and the "undisputed" record in *McConnell*. *See supra* FEC Responses ¶¶ 42, 43 (discussing purpose and effect of voter registration, voter identification, and GOTV activities). 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).)

In addition, 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").

Finally, the activity described in this paragraph is not "prohibited" by 2 U.S.C. § 441i(b) or any other provision. BCRA merely requires that this federal election activity be financed by the CRP at least in part with federal funds.

46. CRP has spent $18,130,187 in support of or opposition to statewide ballot measures since 2002. Christiansen Dec. ¶ 17.

FEC RESPONSE 46: *See infra* FEC Response ¶ 63.

47. CRP believes that the endorsement and opposition of ballot measures are enhanced by the ability freely to associate Democrat federal officeholders with ballot measures that CRP opposes, and to associate Republican officeholders with CRP endorsed ballot measures. Christiansen Dec. ¶ 18.

FEC RESPONSE 47: *See infra* FEC Response ¶ 63.

48. At the September 7, 2007 CRP Convention Meeting in Indian Wells, CRP endorsed or opposed a number of ballot measures for the 2008 statewide ballots. In September 2008, it endorsed or opposed several measures that have already qualified to appear on the June 3, 2010 statewide election ballot; and it is likely to endorse and oppose some of the current measures placed on the June 2010 statewide ballot at the February, 2009 Convention Meeting in Sacramento. Christiansen Dec. Memorandum (Jan. 15, 2009).

FEC RESPONSE 48: *See infra* FEC Response ¶ 63.

49. San Diego Republican Party ("SDRP") supports Republican nominees for partisan elective offices nominated at the Direct Primary. (California Elections Code § 316). However, SDRP does not support candidates for partisan elective offices, including federal Congressional and U.S. Senate offices, in contested partisan primary elections. Buettner Dec. ¶ 3.

FEC RESPONSE 49: *See supra* FEC Response ¶ 3.

50. Local offices are all non-partisan (Art. II, sec. 6(a), Cal. Const.), and SDRP actively supports candidates for local offices, including candidates for city councils, member of the county board of supervisors, and local school districts. Buettner Dec. ¶ 4.

FEC RESPONSE 50: No response.

51. For state offices, under the California Political Reform Act ("CPRA"), political parties are permitted by state policy to support candidates for state elective offices with unlimited contributions, "coordinated expenditures" and "member communications" on their behalf. (CGC §§ 85400(c), 85312.) Political parties are permitted to make unlimited contributions to local candidates where local law does not impose limitations, and unlimited "member communications" on behalf of such candidates, coordinated with the local candidates, irrespective of any local limitations on contributions or independent expenditures. (CGC §§ 85312, 85703.) SDRP has an active program to endorse and support local candidates using member communications and where available, direct contributions. Buettner Dec. ¶ 6; Christiansen Dec. ¶ 5.

FEC RESPONSE 51: No response.

52. For local offices, some jurisdictions have their own local campaign law regulations. San Diego, for example, prohibits business entities including corporations from making any contributions to city candidates or to committees that support city candidates, whether those committees make direct contributions or "independent expenditures." San Diego Municipal Code § 27.2947. Buettner Dec. ¶ 7.

FEC RESPONSE 52: *See infra* FEC Response ¶ 58.

53. Since the enactment of Proposition 34 in 2000, SDRP has engaged in substantial support of candidates for partisan offices at the state level and local non-partisan candidates. This activity has included a smaller amount of contributions, coordinated expenditures and member communication expenditures in support of statewide candidates on the ballot in 2003, 2004, 2006, and 2008 and state candidates whose jurisdictions include San Diego County, and member communication expenditures for candidates for local offices in all elections since 2001. Buettner Dec. ¶ 8.

FEC RESPONSE 53: No response.

54. Because California's U.S. Senate seats have been held by Democrat incumbents since 1994, SDRP has not spent any funds on campaign activities in support of Republican nominees for those offices. Buettner Dec. ¶ 9.

FEC RESPONSE 54: The RPSD has spent funds supporting candidates for the United States Senate through federal election activity, including voter registration, voter identification, GOTV, and generic campaign activity, *see infra* FEC Response ¶ 62.

55. Because California's Congressional seats were redistricted in 2001 to virtually eliminate partisan competition at general elections, SDRP has not engaged in any substantial contribution or "coordinated expenditures" under 2 USCA §441a(d) for 2002, 2004, 2006, and 2008. Buettner Dec. ¶ 10.

FEC RESPONSE 55: The RPSD has spent funds supporting candidates for the United States House of Representatives through independent expenditures (Pls.' Stmnt. ¶ 57) and federal election activity, including voter registration, voter identification, GOTV, and generic campaign activity, *see infra* FEC Response ¶ 62.

56. SDRP inaugurated a local candidate support program in 2002 and has endorsed hundreds of candidates for local offices on endorsement mailings or party slate cards during the elections from 2002-2008. At the November 4, 2008 general election, SDRP endorsed over one hundred candidates for local offices on its endorsement slate mailings. None of these endorsement mailings included any federal candidates because of the restrictions of BCRA, 2 U.S.C. §441i(b)(2)(B) and 2 U.S.C. § 434(20). Buettner Dec. ¶ 11.

FEC RESPONSE 56: FECA does not prohibit the RPSD from "includ[ing] any federal candidates" in slate endorsement mailings or in any other communications; in fact, the RPSD has distributed material promoting federal and state candidates together in every election cycle since BCRA was enacted. (*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).)

57. SDRP spent $861,269 (or 61%) of its $1,408,617 in expenditures on state and local candidate support activities in 2006. That election cycle did not include a San Diego City mayoral or city attorney race, unlike 2004 and 2008. In 2004, it spent $1,257,842 (or 69%) of its total of $1,816,055 in expenditures that election year. In 2008, SDRP spent $1,927,970 of its

$2,717,753 total expenditures on expenditures related to state and local candidate support, while it spent only $2,384 in federal candidate support activity. None of the state and local candidate support activity unambiguously relates to any federal election or candidate. The very limited amount of SDRP's federal candidate support included independent expenditures on behalf of 5 county-jurisdiction congressional candidates (including two safe seats, one open but safe seat, and two Democrat-incumbent seats) and $550 in contributions to McCain for President. Spending on federal candidates in the 2008 Presidential election amounted to 9/100ths of 1% of the total 2008 expenditures, and 1/10th of 1% of combined federal and state or non-federal expenditures. Buettner Dec. ¶ 12.

FEC RESPONSE 57: In addition to the independent expenditures and contributions to federal candidates noted in this paragraph, the RPSD has supported federal candidates through federal election activity, including voter registration, voter identification, GOTV, and generic campaign activity, *see infra* FEC Response ¶ 62. The RPSD also makes available to some candidates for the House or Representatives the RPSD's file containing voter information. (Buettner Dep. 89:9-90:2 (FEC Exh. 3).)

58. Because SDRP is required to spend significant federal funds and Levin funds for "Federal election activity," *see* 2 U.S.C. 441i(b), and those same dollars are prized for local uses because of the City of San Diego prohibitions (SDMC 27.2947), SDRP has been precluded from engaging in more local candidate support activity than done from 2003 to 2008. Buettner Dec. ¶ 13.

FEC RESPONSE 58: The SDRP has not been "precluded" from engaging in more local candidate support due to any contribution limit. The SDRP is free to allocate its resources as it sees fit; contribution limits place no cap on the amount that it may spend on any particular activity. To the extent that allowable contributions under City of San Diego's campaign finance laws are comparable to the federal laws, the RPSD has acknowledged that the similarity of the local and federal restrictions means that freeing the RPSD to spend more of its funds on city elections (by permitting the use of soft money for other activities) necessarily means freeing the RPSD to spend more funds on federal elections as well. (*See* Buettner Dep. 84:11-24 (FEC Exh. 3).)

59. SDRP occasionally has endorsed, supported and opposed state and local ballot measures on its member communication mailings that have featured state and local, but not federal candidates. On occasion, SDRP has considered whether or not to include statements that support or attack a federal candidate in order to persuade voters of San Diego County to vote for or against the SDRP position on such ballot measures. However, SDRP has declined to include such language due to the BCRA requirement that such communications, even related to state or local ballot measures, must be paid wholly with hard federal dollars. Buettner Dec. ¶ 14.

FEC RESPONSE 59: *See infra* FEC Response ¶ 63.

60. SDRP would like to support and oppose state and local ballot measures in the future. As part of this effort, SDRP intends to use public communications which clearly identify federal candidates and contain words promoting or opposing such candidates. Tetlow Dec. ¶ 3.

FEC RESPONSE 60: *See infra* FEC Response ¶ 63.

61. SDRP believes that the endorsement and opposition of ballot measures are enhanced by the ability freely to associate Democrat federal officeholders with ballot measures that CRP opposes, and to associate Republican officeholders with SDRP endorsed ballot measures. Tetlow Dec. ¶ 4.

FEC RESPONSE 61: *See infra* FEC Response ¶ 63.

62. SDRP intends to use state funds to participate in GOTV, voter identification, and voter registration activities, as defined in 2 U.S.C. § 431(20), in future elections for state and local candidates. None of this "Federal election activity" would be targeted to any federal candidate, *i.e.* it would not reference, describe, or otherwise depict any federal candidate. This activity is prohibited by 2 U.S.C. § 441i(b). Absent the requested judicial relief, SDRP will not engage in these activities. SDRP intends to use state funds in materially similar situations in the future, if permitted. Tetlow Dec. ¶ 5.

FEC RESPONSE 62: *See supra* FEC Response ¶ 45. As noted above, the RNC and the CRP acknowledge that voter registration, voter identification, GOTV, and generic campaign activity are intended to influence federal elections and do influence such elections. *Id*. ¶¶ 42-45. The RPSD similarly concedes that the purpose of these 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).) The statement that the RPSD "will not engage in these activities" "[a]bsent the requested judicial relief" is inaccurate: 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.)

63. CRP and SDRP intend to support efforts to change the way Congressional redistricting is done in California. To that end, CRP and SDRP intend to use state funds to distribute a Letter which will qualify as a public communication, 2 U.S.C. § 431(22) ("public communication" definition). Although "attack" and "oppose" are undefined in the definition of "federal election activity," 2 U.S.C. § 431(20)(A)(iii), CRP and SDRP believe that this public communication will "attack" or "oppose" Nancy Pelosi and Barbara Boxer, as these terms are used in the definition of "federal election activity," and so they are prohibited from using state funds for this communication. 2 U.S.C. § 441i(b)(1). Absent the requested judicial relief, CRP and SDRP will not undertake this activity. CRP and SDRP intend to use state funds in materially similar situations in the future, if permitted. Christiansen Dec. ¶ 19; Tetlow Dec. ¶ 6.

FEC RESPONSE 63: In *McConnell*, the Supreme Court addressed the contentions of state and local parties — including the CRP — regarding BCRA's requirement that any advertising that promotes, attacks, supports, or opposes a federal candidate by such party committees be funded with hard money. The Court found that, as to the direct effect of such advertising on federal elections, "[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.

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).) Regarding the other assertions in this paragraph, *see supra* FEC Response ¶¶ 13 (redistricting), 16 (grassroots lobbying).

The CRP and SDRP's decision not to send out the proposed letters is the preferred allocation of those entities' accumulated federal funds, rather than the result of any requirement of BCRA.

64. The text of the Letter that CRP and SDRP wish to distribute is:

Dear *****:

Nancy Pelosi and Barbara Boxer don't want you to read this letter. They want to keep California voters from effectively choosing their Congressional representatives.

The Democrats seek to preserve their stranglehold on California's government and perpetuate the gerrymandered Congressional districts that allow fifty thousand voters to elect a Democrat to Congress from District 43 while over one hundred and twenty thousand voters are required to elect a Republican to Congress in each of Districts 2, 3, 4, 22, 24, 46, and 48 – ample proof of the maxim that under our current, scandalous redistricting system in California "the voters don't choose their representatives, the representatives choose their voters."

The California Constitution allows State Legislators to draw the political boundaries in the state. This means Legislators get to draw the boundaries for the Assembly, State Senate, and Congressional districts. In essence, this allows the Legislators to determine what voters they want to represent in order to guarantee themselves, and their political party, re-election.

Political boundaries are re-drawn every ten years. In 2001, the State Legislators used new, hi-tech computers to draw up the political boundaries and guarantee themselves and their party re-election year after year. These computers did such a good job that a seat has switched hands from one political party to another only 3 times in the last six years, despite the fact that the People of California have a less favorable opinion of the State Legislature and Congress than at any other point in modern history.

When politicians are guaranteed re-election, they stop listening to the People and act out of their own self-interest. A lack of competitive elections has led to do-nothing legislative grid-lock and Legislators overspending our tax dollars in order to pay back their political contributors.

We need to make a change, but Nancy Pelosi and Barbara Boxer will do everything they can to stop a change from happening. Help us take a stand for fairness and accountability in California elections. Support us in our effort to qualify a ballot measure that will give the power of drawing political boundary lines to the People and make elections competitive again. Help bring democracy back to California.

You can help the California Republican Party in this effort by making your contribution to our initiative qualification efforts. Please give $100, $25, or whatever you can to support this effort. With your help, we can begin the process of making California government about the People, not the politicians. Christiansen Dec. Memorandum and Letter (Jan. 15, 2009); Tetlow Dec. ¶ 6.

FEC RESPONSE 64: *See supra* FEC Response ¶ 63.

Respectfully submitted,

Thomasenia P. Duncan (D.C. Bar No. 424222)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

/s/ Adav Noti
Steve N. Hajjar
Greg J. Mueller (D.C. Bar No. 462840)
Adav Noti (D.C. Bar No. 490714)
Attorneys

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

Dated: March 9, 2009