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.	)	SUPPLEMENTAL SUMMARY JUDGMENT MEMORANDUM

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

Pursuant to the Court's Order dated May 5, 2009, Defendant Federal Election Commission ("Commission") respectfully submits this supplemental memorandum in support of the Commission's motion for summary judgment (Docket No. 56).[1] A supplemented Statement of Material Facts ("FEC SMF") follows this memorandum.

This memorandum addresses only those issues of fact and law about which the discovery conducted pursuant to the Court's May 5 Order produced new, relevant evidence. That evidence demonstrates that Plaintiffs currently give their donors more preferential access to federal candidates and officeholders than Plaintiffs have heretofore conceded, and that the Republican National Committee ("RNC") has no concrete plans to prevent soft-money donors from exploiting their unlimited contributions to gain similar access and even greater influence. The evidence also demonstrates that some of the RNC's litigation allegations regarding the activities

[1] The Commission's other filings in connection with the parties' cross-motions for summary judgment are its Opp. to Pls.' Mot. for Summ. J. ("FEC S.J. Opp.") (Docket No. 39); Mem. in Supp. of Mot. for Summ. J. ("FEC S.J. Mem.") (Docket No. 56); and Reply Mem. in Supp. of Mot. for Summ. J. ("FEC S.J. Reply") (Docket No. 63).

that it wishes to fund with soft money are inconsistent with the plans and intentions of the RNC's Chairman.[2]

I. NEWLY OBTAINED EVIDENCE SHOWS THAT PLAINTIFFS WOULD PROVIDE SOFT-MONEY DONORS WITH PREFERENTIAL ACCESS TO FEDERAL OFFICEHOLDERS

Under Plaintiffs' theory of their case, political parties must be permitted to solicit and spend soft money if they promise, *inter alia*, not to provide soft-money donors with preferential access to federal candidates or officeholders "beyond that currently afforded to contributors of federal funds." (*See* Pls.' SMF ¶ 24; Mem. in Supp. of Pls.' Mot. for Summ. J. 22-27 (Docket No. 21).) The Commission has previously shown that — even if it were legally possible for an unverifiable, self-imposed limitation to serve as the basis for a constitutional exemption — no such exemption would be warranted by Plaintiffs' proposal, given that Plaintiffs still intend to bring federal officials and soft-money donors together in situations where the officials would know that the donors had provided massive financial support to their party. (FEC S.J. Mem. 7-11; FEC SMF ¶¶ 13-18;[3] *see also* FEC SMF ¶ 17 (citing Steele Dep.).) The recently obtained evidence further demonstrates the extent of such party-organized access to elected officeholders, and it shows that the RNC has no plans to prevent its soft-money donors from exploiting that access.

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[2] Although the evidence demonstrates the lack of any factual basis for Plaintiffs' claims in this suit, the primary fatal legal flaw with such claims is that, under *McConnell v. FEC*, 540 U.S. 93 (2003), the proper constitutional analysis of a political party *contribution* limit asks whether the limit prevents corruption or the appearance thereof. (*See* FEC S.J. Opp. 7-13.) Plaintiffs' allegations regarding how they would ultimately *spend* their soft money are, therefore, irrelevant. (*Id*.; *see also* Def. FEC's Mem. in Supp. of Mot. to Dismiss 25-29 (Docket No. 20).)

[3] Citations herein to the Commission's Statement of Material Facts refer to the supplemented Statement that follows this memorandum. For the convenience of the Court, a version of the supplemented Statement with the new material therein highlighted is being filed as an additional attachment.

A. Plaintiffs Provide Their Donors Meaningful Access to Federal Officeholders

New documentary evidence demonstrates that Plaintiffs' donor events, regularly attended by federal officeholders, are far more intimate affairs than the large, impersonal events that Plaintiffs have acknowledged organizing. (*See* Pls.' Mem. in Opp. to Def. FEC.'s Mot. for Summ. J. 6 (Docket No. 61).) Although the RNC has produced its guest lists for only a small subset of its donor events (FEC SMF ¶ 7), those few lists provide a meaningful glimpse into party-facilitated interaction between high-level donors and federal officeholders. For example, at one event, the President of the United States, six U.S. Senators, and one U.S. Representative attended a dinner with just forty-nine donors — a ratio of only six donors to each officeholder. (*Id*.) The RNC has organized even smaller Presidential appearances in private homes — events at which the President has been joined by as few as thirty-nine donors. (*Id*.) And the RNC has arranged similar interactions with executive branch officials: Senior White House official Karl Rove had breakfast with twenty-eight donors, and White House Chief of Staff Joshua Bolten and a sitting Member of Congress had lunch with thirty-seven donors. (*Id*.; *see also id*. ¶¶ 29, 34 (noting evidence regarding other Plaintiffs' donor events with federal candidates and officeholders).) Such intimate meals and receptions cannot be dismissed as merely perfunctory; they are events arranged by the RNC at which those who contribute the most to the party receive their reward in the form of time to interact with the officials who wield the levers of power.

Thus, even if it were true that the RNC would provide soft-money donors with the same access to federal officeholders as it currently provides hard-money donors, that access — coupled with the fact that the officeholders would know who the biggest soft-money donors are (FEC SMF ¶¶ 13-18) — would create a significant appearance of corruption and the opportunity for actual corruption. Because this was one of the primary rationales for the Supreme Court's

upholding of the soft-money ban in *McConnell v. FEC*, 540 U.S. 93 (2003), and it applies here with equal force, Plaintiffs' acknowledgement that they would give million-dollar donors prized access to federal officials is fatal to Plaintiffs' claims. (*See* FEC S.J. Mem. 7-11.)

B. The RNC and Chairman Steele Have No Concrete Plans to Prevent the RNC from Providing Soft-Money Donors with Preferential Access to Federal Officials

Not only would the RNC, even under its own allegations, provide its soft-money donors with significant preferential access, but the RNC's claim that it would abide by its hypothetical, self-imposed policies regarding such access is itself belied by the supplemented factual record. Most importantly, as both the RNC and Chairman Steele have acknowledged, the RNC has no written policy whatsoever against the RNC's providing its donors with preferential access. (FEC SMF ¶ 11.) In fact, Chairman Steele initially testified at his deposition that he was not aware of any policy, written or unwritten, against arranging for meetings between officeholders and candidates. (*See* Steele Dep. 52:15-53:1 ("I'm not aware of any policy of the RNC.").) Upon his counsel's later suggestion that such a policy exists (*id*. at 111:12-13), Chairman Steele stated that there was a "preexisting policy" when he took office (*id*. at 111:16-17), but that he has taken no steps to disseminate or further that policy (*id*. at 112:14-22), which he has never seen in writing (*id*. at 113:5-17).

To the extent that the RNC claims to have an *un*written policy against arranging individualized meetings between officeholders and donors, it is the same policy that was in effect before *McConnell* (FEC SMF ¶ 11) — a policy about which Chairman Steele, despite having been a member of the RNC and its executive committee at the time, admits he was unaware. (*Id*.) Even as Chairman, Steele has taken no steps to ensure that RNC staff is aware of the alleged unwritten policy on facilitation of meetings, relying instead on the employees to

"intuitively know[ ]" the appropriate procedures. (*Id*. (quoting Steele Dep. 109:20-110:3).) Crucially, Chairman Steele does not intend to develop any more overt or formal policy against providing donors access to federal candidates and officeholders until this lawsuit is concluded, and he does not know what that future policy might permit or prohibit. (*Id*.)

In sum, the RNC's constitutional claim relies on a self-imposed policy regarding some forms of donor access to federal officials, while its Chairman reserves the right to determine the contents of that policy after this Court rules.[4] This claim is legally and factually untenable. As a legal matter, there is no precedent supporting the RNC's argument that the meaning of the First Amendment — or a limitation on the power of Congress — can be dependent on a private party's unverifiable pledge to comport itself in accordance with a code of conduct that it will determine for itself at some point in the future. (*See* FEC S.J. Opp. 27-32.) And, as a matter of fact, such circular and amorphous allegations devoid of concrete support in the record demonstrate that Plaintiffs are not entitled to relief.

II. NEW TESTIMONY SHOWS THAT THE RNC'S ALLEGATIONS REGARDING ITS PLANNED ACTIVITIES LACK ANY BASIS IN FACT

The RNC seeks a constitutional exemption to the soft-money ban as applied to the party's intended spending on certain activities. In addition to the reasons discussed in the Commission's prior briefs as to why this claim fails on its face (FEC S.J. Opp. 10-13; *see also* Def. FEC's Mem. in Supp. of Mot. to Dismiss 25-29 (Docket No. 20)), Chairman Steele's testimony makes clear that the activities at issue are defined so vaguely that, if the RNC were to prevail, it would

[4] Although the contours of the RNC's eventual anti-access policy are undefined, Chairman Steele's understanding of the activity that would be covered by such a policy is extremely narrow: "Typically access is some — some secret cabal. You're getting some special favor . . . ." (Steele Dep. 50:13-20.) Thus, according to the Chairman, arranging for federal candidates and officeholders to meet with donors does not constitute providing those donors with "access" to the candidates and officeholders unless a "special favor" is received. (*See id*.)

retain nearly unfettered authority to decide for itself which activities constitute permissible uses of its soft money.

The RNC's primary source for its description of the activities it wishes to finance with soft money is the affidavit of Richard Beeson, who was the RNC's political director at the time he submitted his testimony. (*See* Beeson Aff. (Pls.' SMF Exh. 1).) Chairman Steele, however, has since hired a new political director (Steele Dep. 21:20-22:6), and Beeson no longer has any authority at the RNC (*see id*. at 23:16-24:8). Indeed, Chairman Steele repeatedly testified that he was not even familiar enough with what Mr. Beeson's intentions had been to compare them to the RNC's current plans. (*See id*. at 50:1-6, 58:10-19, 85:20-86:1.) Thus, none of the allegations in the Beeson affidavit provide evidence as to the RNC's actual intended spending, and the record is devoid of any other factual showings as to what the RNC now considers to be within the scope of the activities that it would like to finance with unlimited and corporate donations.

Nonetheless, Chairman Steele's testimony belies any suggestion that the RNC's desired relief would encompass only limited, well-defined categories of conduct. For example, the RNC alleges that it would spend soft money to finance "grassroots lobbying," but Chairman Steele acknowledges that he cannot determine which types of advertising or which specific ads would constitute "grassroots lobbying" under the RNC's own definition of that term. (FEC SMF ¶ 63.) Similarly, although the RNC has alleged that it would use soft money in the 2009 New Jersey elections for activities such as "communications expressly advocating the election and defeat of state candidates, contributions to . . . state candidates, and contributions to the political parties involved" (Am. Compl. ¶ 16), Chairman Steele does not necessarily intend to limit the RNC's spending to those activities; in fact, he will not decide how to direct soft money to be spent in the New Jersey election until this court action is concluded. (FEC SMF ¶ 59.1; *see also id*. ¶ 61

(noting that RNC has not considered imposing restrictions on use of soft money transferred to state candidates, such as preventing it from being used for federal purposes).)[5]

Likewise, the Chairman has not decided — or even considered — *any* of the issues regarding how he would go about raising soft money if he were permitted to do so. (*Id.* ¶ 38.1 (quoting Steele Dep. 66:7-11 ("I have not thought about how I would raise the money.")).) Thus, there is no concrete evidence in the record as to what either the RNC's soft-money fundraising or spending actually would entail during Chairman Steele's regime, nor does the RNC's primary decisionmaker intend to decide such questions until the soft money has already begun flowing in. Many of the assertions in the RNC's Complaint and Plaintiffs' briefs thus appear to be unsupported by any relevant evidence. In short, granting the RNC's request for relief "as applied" to ill-defined categories of spending would allow the RNC to write the rules governing its own conduct — a result unwarranted by *McConnell* or any other pertinent authority. (FEC S.J. Opp. 27-32 (discussing Supreme Court's inclination towards bright-line rules in campaign finance context).)

III. NEW TESTIMONY CONFIRMS OTHER KEY ASPECTS OF THE UNDISPUTED FACTUAL RECORD

Chairman Steele's testimony provides further factual support for several additional aspects of the Commission's motion for summary judgment.

First, because the statutory soft-money restriction in no way limits how the RNC spends its funds or how much money the RNC can spend (*see* FEC S.J. Opp. 7-10; FEC S.J. Reply 5 n.4), the RNC's choice not to spend its hard money on state campaigns or other activities at issue

[5] The RNC's Chairman has ultimate authority over the party's spending decisions. (Steele Dep. 68:22-69:6.)

here — as confirmed by Chairman Steele — is attributable solely to the RNC's strategic decisions regarding how to allocate its resources. (FEC SMF ¶ 53.)

Similarly, because there is no legal barrier to Chairman Steele's raising soft money for state parties and candidates in his individual capacity — or raising hard money for them in his official capacity — his admitted choice not to raise funds for state parties and candidates is attributable solely to his own decisions regarding fundraising strategy. (FEC SMF ¶ 38.)

Third, Chairman Steele acknowledges that the redistricting process following the next census will determine "[t]he composition of the House of Representatives for the next 10 to 12 years or maybe even beyond that." (FEC SMF ¶ 68 (quoting Steele Dep. 76:13-17).)[6] This is consistent with the other Plaintiffs' prior acknowledgements regarding the effect of redistricting activity on federal elections. (*Id*. ¶ 69.)

Fourth, although the RNC has claimed that "the explosion of internet fundraising" has placed the RNC at a "fundraising disadvantage" necessitating the party's receipt of soft money (*see* Pls.' SMF ¶ 26), Chairman Steele was unable to state any reason why the RNC will not be able to raise as much as the Democratic Party through email and internet fundraising in the future. (FEC SMF ¶ 50 (quoting Steele Dep. 92:20-94:8 ("I don't know what the future holds for fundraising on the Internet.")). Plaintiffs' assertions of fundraising disadvantages are in any event contradicted by the factual record, and, regardless, one political party's lack of proficiency at a particular fundraising method cannot state a claim under the First Amendment. (FEC S.J. Mem. at 5-6.)

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[6] The RNC has already commenced its redistricting activities. (*See* Steele Dep. 24:20-25:9, 89:4-9.) These activities presumably are being funded with hard money, and — because the RNC did not produce during discovery any documents relating to redistricting — there is no evidence in the record showing why the RNC would be constitutionally burdened by having to use hard money to continue them.

Finally, Chairman Steele provides additional confirmation of the "special relationship and unity of interest" between the national parties and federal candidates and officeholders, *McConnell*, 540 U.S. at 145. Specifically, he notes the RNC's and his own frequent provision of strategic advice regarding congressional races, their assistance to Members of Congress in transmitting "message points" to the party's "base," and other frequent communications between the party and its federal elected officials. (FEC SMF ¶¶ 1, 6 (quoting Steele Dep.); *see also id.* ¶ 21 (noting Steele's testimony regarding close relationship between RNC and state parties).)

IV. CONCLUSION

The new evidence discussed above confirms that the Commission is entitled to summary judgment. For those reasons and the reasons set forth in the Commission's prior memoranda, the Commission respectfully requests that the Court grant the Commission's motion for summary judgment and deny Plaintiffs' motion.

Respectfully submitted,

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