UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Republican National Committee, *et al*., *Plaintiffs*, v. Federal Election Commission, *Defendant*.	Civ. No. 08-1953 (BMK, RJL, RMC) THREE-JUDGE COURT

THE DEMOCRATIC NATIONAL COMMITTEE'S
MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this motion, Plaintiffs contend that they have the constitutional right to raise and spend funds, without restriction, for certain activities they contend are not "unambiguously related to the campaign of a particular federal candidate". Notwithstanding that their position is irreconcilable with Supreme Court precedent, Plaintiffs ask this Court to grant them judgment as a matter of law. Plaintiffs' entire argument rests on an ostensible constitutional standard—whether activity is "unambiguously campaign related"—that has never been adopted by the Supreme Court. In fact, Plaintiffs recognize the hopelessness of their cause under the law as it is, since they advance to this Court the erroneous proposition that the Supreme Court has overturned *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

Moreover, their suit is presented as an "as-applied" challenge when, in fact, its substance and the factual record before this Court are not materially different from those at

issue in *McConnell*. In that case, the Court ruled squarely on a virtually identical set of claims. Plaintiffs here offer nothing new: no discrete facts but, instead, only hypotheticals, conjecture, and the pledge that, whatever they do, they promise that they will not behave corruptly.

Under the governing law, Plaintiffs are not entitled to relief and their motion should be denied.[1]

ARGUMENT

I. Legal Standard

Summary judgment is proper if, based on the pleadings, depositions, and affidavits, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). In ruling upon a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Self-serving and conclusory allegations are insufficient to create a genuine issue of material fact or to demonstrate the moving party's entitlement to relief, as are opinions and legal conclusions. *See Niagara Mohawk Power Corp. v. U.S. Dept. of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999); Charles A. Wright et. al., 10B *Federal Practice & Procedure Civil* 3d § 2738 (2008).

[1] Plaintiffs' choice to challenge the Court's decision in *McConnell* in the guise of an "as applied challenge", but without alleging new, concrete, material facts, means that this Court is essentially left without true factual issues to resolve. Plaintiffs contend, in fact, that "[t]he issues [in this case] are purely legal and Plaintiffs are entitled to summary judgment." Pls.' Summary J. Mem. 7. Nevertheless, to the extent that there are such genuine issues of material fact, these have been identified by Defendant Federal Election Commission ("FEC") and Intervenor DNC adopts them and incorporates them herein by reference, for purposes of Local Civil Rule 7(h). Summary judgment in Plaintiffs' favor is also, and as necessary, properly denied on this ground. In addition, for the reasons discussed in the FEC's motion to dismiss, this case is also barred by res judicata.

II. Plaintiffs Have Fabricated a Constitutional Standard Not Adopted by the Supreme Court or Any Other Court; Under the Controlling Standard They Are Not Entitled to Judgment as a Matter of Law

A. Plaintiffs' "Unambiguously Campaign Related" Test is Simply Not the Law

Plaintiffs' entire argument for summary judgment is based on a misstatement of the legal standard for evaluating the application of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, to their activities. They contend that the "first principle of constitutional law" in the field of campaign finance is the so-called "unambiguously-campaign-related requirement." *See* Pls.' Summ. J. Mem. 11. This, they say, is "the unifying constitutional principle of the governing precedents . . .", *id.* at 15, a standard that was "applied" in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"), and *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2659, 2667, 2669 n.7 (2007) ("*WRTL II*"); "affirmed" in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978), and *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981); and "recogni[zed]," "implement[ed]" and "endorsed" in *McConnell* 540 U.S. at 167, 170, 190, 192, 206. Pls.' Summ. J. Mem. at 9-15.[2]

Plaintiffs' position is simply wrong. Not a single one of these cases even mentions an "unambiguously campaign-related requirement" in a majority opinion. Plaintiffs have manufactured this new test out of two lines of dicta in *Buckley v. Valeo,* 424 U.S. 1, 79-81 (1976). In short, their basic argument—that the Constitution does not allow Congress to regulate national party fundraising for state candidate contributions, redistricting, issue advocacy, litigation and headquarters expenses—is not remotely the law.

[2] Plaintiffs do not explain how it is true both that *WRTL II* "effectively overrules" *McConnell,* Pls.' Summ. J. Mem. 20, even while *McConnell* "implicitly endorsed" the supposed unambiguously-campaign-related

The so-called "unambiguously campaign related requirement" does not come from Article I of the Constitution, nor from the First Amendment. Rather, Plaintiffs have pulled it, out-of-context, from a discussion in *Buckley* of how to construe a disclosure requirement for *non-party* independent expenditures to avoid vagueness problems. *See Buckley,* 424 U.S. at 76-82. Ironically, that discussion started from the premise that—unlike independent expenditures made by individuals— "[e]xpenditures of candidates and of 'political committees' … can be assumed to fall within the core area sought to be addressed by Congress. *They are, by definition, campaign related*." *Id.* at 79 (emphasis supplied).

In *Buckley*, the Court observed that "when the maker of the expenditure . . . is an individual other than a candidate or a group other than a 'political committee . . . the relation of the information sought to the purposes of the Act may be too remote." *Id.* at 80. The Court solved this vagueness problem by construing the term "expenditure" "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.*; *see also McConnell,* 540 U.S. at 191-92, 202-03 (clarifying that this construction did not represent a constitutional limitation on Congressional power). "This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley,* 424 U.S. at 80.

Buckley did not use the phrase "unambiguously campaign related" to set the outer boundaries of what Congress could regulate. Instead, it used the phrase to justify *expanding* the scope of regulation *beyond* political committees and candidates: "[The statute] goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the

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standard. *Id.* at 11.

form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors." *Id*. at 81.

Thus, the term "unambiguously campaign related" and its variants were never used by the *Buckley* Court to limit Congressional power or to apply to political parties. To the contrary, they were used to *affirm* the regulation of political committees, including political parties, *see id*. at 79, and to *expand* the law's reach beyond them. *See id*. at 81. Nothing in *Buckley* even remotely supports Plaintiffs' invention of an "unambiguously-campaign-related requirement" that operates as "a first principle of constitutional law," and that shields national party activities from BCRA's financing restrictions. Pls.' Summ. J. Mem. 11.

Plaintiffs apparently wish to refashion their version of *Buckley's* "express advocacy" standard—the doctrine that held that communications cannot be regulated unless they contain express words of advocacy urging electoral action—under a different name, asking this Court to enforce it in contravention of *McConnell*. *See* 540 U.S. at 191-92, 202-03 (holding that the *Buckley* "express advocacy" test was not constitutionally compelled).[3] But there is no authority for the proposition that parties can fund without restriction any activities that do not include "express advocacy". To the contrary, and as discussed below, the Court in *McConnell* looked to the character and operation of national party committees—not the content of their communications. In fact, even prior to the enactment of BCRA, parties received and expended soft money under "allocation" rules in no way grounded in the

[3] The vast majority of courts that have used the phrase "unambiguously campaign related" have treated it as part and parcel of the "express advocacy" test and have not applied it remotely in the way Plaintiffs urge. *See McConnell,* 540 U.S. at 279-80, 283 (Thomas, J., dissenting) (arguing that the express advocacy standard was constitutionally compelled); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 383 (4th Cir. 2001); *FEC v. Furgatch*, 807 F.2d 857, 860 (9th Cir. 1987); *FEC v. Fla. for Kennedy Comm.*, 681 F.2d 1281, 1287 n.10 (11th Cir. 1982); *FEC v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 391 n.23 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir.

presence or absence of express advocacy. *See, e.g., RNC v. FEC,* 1998 WL 794896 (1998) (unpublished) (denying preliminary injunction against rules requiring political parties to pay for issue advocacy at least partly with federal funds, citing "weak evidence of irreparable harm"); *see also FEC v. California Democratic Party,* 13 F. Supp. 2d 1031 (E.D. Calif. 1998) (holding that California state party's First Amendment rights were not violated by requiring donations made to a ballot initiative committee to be paid partly with federal funds). Nothing in *WRTL II*, which was about the application of the campaign finance laws to grassroots lobbying by a corporation, altered this approach.

Moreover, none of the lower court cases cited by Plaintiffs supports the proposition that activity by political parties can be regulated only if expressly campaign related. Instead, they all, without exception, involve state law regulation of non-party actors. *See North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281-82 (4th Cir. 2008) (invalidating use of contextual factors to find election advocacy); *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs. Inc. v. Browning*, No. 08cv445, 2008 WL 4791004, at *7 (N.D. Fla. Oct. 29, 2008), *clarified on other grounds*, 2008 WL 4878917 (N.D. Fla. Nov. 02, 2008) (addressing state electioneering communications law); *Center for Individual Freedom, Inc. v. Ireland*, Nos. 08-190, 08-1133, 2008 WL 4642268, *14, *17 (S.D. W. Va. Oct. 17, 2008) (involving state law PAC definitions); *National Right to Work Legal Defense and Education Foundation, Inc. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008) (limiting scope of corporate disclosure in ballot initiative spending).[4]

1980); *FEC v. Am. Fed. of State, County, and Mun. Employees*, 471 F. Supp. 315 (D. D.C. 1979).

[4] For example, the *Herbert* case cited by Plaintiffs subverts their argument. Following the Supreme Court in Buckley, the court in *Herbert* specifically affirmed that "expenditures made by organizations whose major purpose is the nomination or election of a candidate, are by definition unambiguously campaign related." 581

As for parties—which is what this case is about—Plaintiffs either misrepresent the controlling authority, *McConnell*, or even more mysteriously, they declare it to have been overruled. But there is a case that controls here, and plaintiffs cannot explain or wish it away.

B. Under the Correct Standard, Plaintiffs Are Not Entitled to Judgment as a Matter of Law.

In advancing their unsupported "unambiguously campaign related" test, Plaintiffs have not simply egregiously misread *Buckley*. They have failed entirely to understand the basis for BCRA's regulation of the national parties, which is, in turn, the basis for the Court's holding in *McConnell*.

Plaintiffs assume that when a national party committee raises funds, it is the nature of the activities for which the party wishes to pay—and not the nature of the party itself, or the funds it raises—that drives the constitutional analysis. They claim that because they wish to pay for state election activity, redistricting, issue ads, litigation and headquarters expenses, and because, by their calculus, none of these activities are "unambiguously campaign related," then none of the funds they raise to pay for them may be regulated by federal law. But *McConnell,* 540 U.S. at 154 considered exactly this argument and found it to be "beside the point."

In *McConnell*, the Court emphasized that "[s]ection 323(a), like the remainder of § 323, regulates contributions, not activities." *Id*. "As the record demonstrates," the Court

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F. Supp. at 1142. Likewise, *Ireland* rejected a challenge to the facial constitutionality of West Virginia's PAC and political committee definitions, finding that those definitions "were unambiguously related to the campaign of a particular candidate." 2008 WL 4642268 at *17. *Browning* dealt with a state "electioneering communication" statute that was even more sweeping than the federal provision at issue in *WRTL II*. 2008 WL 4791004. And *Leake* dealt with a vague, contextual state law definition of "expenditure" that, according to Plaintiffs, threatened to sweep a wide range of actors into political committee status. 525 F.3d at 281-82.

explained, "it is the close relationship between the federal officeholders and 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." *Id.* at 154-55. Thus, *McConnell* held that the critical factor was the actor, not the extent to which the activity was related to a specific federal campaign.

Tellingly, Plaintiffs entirely ignore this binding holding—for it forecloses their claim. Instead, they argue that *WRTL II* "guts" and "effectively overrules" *McConnell* Pls.' Summ. J. Mem. 20-21. Yet, they point to no language in *WRTL II* that undermines the relevant holdings of *McConnell*—and they cannot, for the controlling opinion in *WRTL II* made clear that it was not overruling *McConnell*. *See WRTL II*, 127 S.Ct at 2664; *see also id*. at 2674 (Alito, J., concurring). Moreover, *WRTL II* was a case about non-party, non-candidate entities. Nothing in the controlling opinion remotely addressed *McConnell's* holdings as to the party-related provisions of BCRA.

As demonstrated below, Plaintiffs simply attempt to relitigate *McConnell* again by labeling it an "as-applied" challenge. Because "the first principle of constitutional law" on which Plaintiffs rely in support of their motion is indeed nothing of the sort, and because controlling law forecloses their claim, Plaintiffs are not entitled to judgment as a matter of law.

III. Plaintiffs' Challenge Is a Relitigation of their Earlier Facial Challenge and Is Foreclosed by Binding Precedent

A. An As-Applied Challenge Must Raise Facts that Are Concrete, Discrete, and Well-Defined

Plaintiffs contend that they are entitled to summary judgment, and that *McConnell* no longer applies, because their case is an as-applied challenge, rather than a facial challenge.

Simply labeling claims "as-applied," however, does not make them so—nor does it result in application of a different constitutional test.

In general, an as-applied challenge should raise facts that are "discrete and well-defined." *See Gonzales v. Carhart*, 127 S.Ct. 1610, 1639 (2007). An evidentiary record, containing more than mere speculation and conclusory assertions, is necessary. For example, in *Washington State Grange v. Washington State Republican Party*, 128 S.Ct 1184, 1193-94 (2008), the Supreme Court emphasized that a statutory provision could not be struck down "on the mere possibility of voter confusion." Rather, there must be an "evidentiary record against which to assess the[] assertions that voters will be confused." *Id*. (citations omitted). Mere speculation was insufficient. *Id*. at 1194. Similarly, in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610, 1622 (2008), the Court cited the lack of "concrete evidence" in rejecting the facial challenge to Indiana's photo identification statute.

Thus, an as-applied challenge can succeed only if it is supported by more than hypotheticals and imaginary cases. *See Washington State Grange*, 128 S.Ct. at 1193 (citing *Yazoo & M.V.R. Co.v. Jackson Vinegar Co*., 226 U.S. 217, 219 (1912) ("[T]his court must deal with the case in hand and not with imaginary ones"); *Pullman Co. v. Knott*, 235 U.S. 23, 26 (1914) ("A statute 'is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are.")). Moreover, as with any motion for summary judgment, a movant cannot prevail on the basis of self-serving and conclusory allegations. *See Niagara Mohawk Power Corp.*, 169 F.3d at 18; Charles A. Wright et. al., 10B *Fed. Practice & Procedure Civil 3d* § 2738 (2008).

B. Plaintiffs Fail to Raise Concrete, Discrete Facts or New Applications but Rather Seek to Relitigate Issues Decided by *McConnell*

The controlling opinion in *WRTL II*, in permitting an as-applied challenge, emphasized that "*McConnell*'s analysis was grounded in the evidentiary record before the

Court." The *WRTL II* plaintiffs could prevail because they presented new discrete facts about specific proposed advertisements. Here, in contrast, Plaintiffs have presented no new, discrete facts; rather they seek to relitigate the same challenges they brought in *McConnell* on the same evidentiary record—relying wholly on their newly fabricated constitutional standard. Indeed, their Summary Judgment Motion openly states that they are not relying on specific, discrete facts. Rather, they contend, "[t]he issues are purely legal and Plaintiffs are entitled to summary judgment." In short, though they label the current suit an-applied challenge, *see* Complaint ¶¶ 16-25, Plaintiffs' current challenges are to generic categories of activities that they already litigated—and lost—in *McConnell*.

1. State Accounts

Plaintiffs claim that 2 U.S.C. § 441i(a) is unconstitutional "as-applied" to their activity to support state candidates. Specifically, they want to create a "New Jersey Account" to support candidates for New Jersey office, a "Virginia Account" to support candidates for Virginia office, and other "State Accounts" to support state and local candidates in elections where only state candidates appear on the ballot and in elections where both federal and state candidates appear on the ballot. *See* Complaint ¶¶ 16, 17, 20. But Plaintiffs raised identical claims in *McConnell,* including those regarding New Jersey and Virginia: In their *McConnell* complaint, Plaintiffs (the RNC and Duncan) alleged that BCRA impermissibly "restrict[ed] [the] activities of national party committees in state and local elections," including the RNC's ability to "provid[e] support and mak[e] contributions to state and local candidates, pursuant to applicable state law." Def.'s Mot. to Dismiss, Ex. 1, ¶¶ 38; 47; *see also id.* ¶¶ 36-37; and in their District Court brief, they expressly argued that BCRA was unconstitutional in relation to the receipt of soft money for participation in state and local elections in odd-numbered years "when no federal candidates appear on the ballot," and that BCRA impacted their planned activities in New Jersey and Virginia. Def.'s Mot. to Dismiss,

Ex. 3, RNC 6, 25-26. All three panel judges discussed Plaintiffs' state election activity in their opinions. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 336 (D.D.C. 2003) (opinion of Henderson, J.); *id*. at 464, 523 (opinion of Kollar-Kotelly, J.); *id*. at 830 (opinion of Leon, J.).

Before the Supreme Court, Plaintiffs again discussed their intended state-election activities at length, and argued that 441i(a) would inhibit their activity supporting state candidates in Virginia and New Jersey specifically. Def.'s Mot. to Dismiss, Ex. 7, 11-12; *see also McConnell*, 540 U.S. at 154-55 (describing Plaintiffs' argument "that § [441i(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") (internal citations and footnote omitted)).

The Supreme Court unequivocally rejected Plaintiffs' contentions regarding activities in support of state candidates, including in New Jersey and Virginia. *Id*. It reasoned that "national committees of the two major parties are both run by and largely composed of federal officeholders and candidates." *Id*. at 155. "Given this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id*. at 155.

Plaintiffs now claim that their challenge to § 441i(a) is "as-applied." However, they present no new, concrete facts that change the record in any way. They have merely provided an affidavit—sworn by a lone employee—indicating that the RNC plans to create several "State Elections Accounts," raise soft money into these accounts, and spend these funds to support state candidates in elections where only state candidates appear on the ballot, and in elections where both federal and state candidates appear on the ballot. *See* Pls.' SUF ¶¶ 17-18; *see also* Pls.' SUF ¶¶ 8-11 (stating that the RNC plans to raise and spend soft

money to support candidates in Virginia and New Jersey in years during which there is no federal election). Yet, these same facts were before the Court in *McConnell*.

2. Redistricting, Grassroots Lobbying Accounts, and Litigation and Building Accounts

Similarly, Plaintiffs provide no new, concrete facts with respect to their proposed "Redistricting Account"—and this too was decided by *McConnell*. In that case, the RNC introduced evidence that it used soft money "to support redistricting efforts, including redistricting litigation." *McConnell*, 251 F. Supp. 2d at 338 (opinion of Henderson, J.); *id.* at 462 (opinion of Kollar-Kotelly, J.); *id.* at 831-32 (opinion of Leon, J.). In response, Judge Kollar-Kotelly concluded that state redistricting efforts have an effect on federal elections. *See id*. at 468, 687. Before the Supreme Court, Plaintiffs took issue with Judge Kollar-Kotelly's conclusion, and asked the court to strike down 441i(a) as it restricted receipt of soft money in relation to redistricting activities. Def.'s Mot. to Dismiss, Ex. 5, 8 & n.3. The Court declined to do so.

In the instant challenge, Plaintiffs merely reassert that they plan to create an account to support political activity, analysis, and litigation related to redistricting. Pls.' SUF ¶ 14. But they have failed to introduce any concrete, discrete facts to support an as-applied challenge or to differentiate their claim from the one decided in *McConnell*. Indeed, their legal analysis as to why 441i(a) is unconstitutional as applied to their Restricting Account does not contain a single citation to the factual record. See Pls.' Summ. J. Mem. 33-34.

Nor do Plaintiffs provide concrete facts to challenge the ordinance "as-applied" to their proposed Grassroots Lobbying Accounts or Litigation Accounts. The RNC states that it intends to use this account to pay for "radio, television, and internet grassroots lobbying advertisements on relevant public-policy issues." Pls.' SUF ¶ 16. Plaintiffs also vaguely identify a plan to create a Litigation Account and a Building Account, Pls.' SUF ¶¶ 20-22,

and they assert that "every dollar of federal funds used for [building maintenance] takes away from the RNC's ability to reach out directly to voters." *Id.* ¶ 22. But, beyond these assertions, they have not introduced any facts to support an as-applied challenge.

And, again, their motion for summary judgment does not contain a single citation to the factual record, other than a vague promise that they will not aid contributors in obtaining preferential access to federal candidates. *See* Pls.' Summ. J. Mem. 39 (citing Pls.' SUF ¶ 24). Plaintiffs essentially dress up as fact their conclusion that their activities will cause no corruption. But legal conclusions cannot be the basis of a successful summary judgment motion, particularly when they conflict with controlling law.

3. Solicitation of Soft Money for State Candidates

Plaintiffs' argument about solicitation of soft money fares no better. Plaintiffs contend that 2 U.S.C. § 441i(a) is unconstitutional "as-applied" to Chairman Duncan's solicitation of funds for state candidates and state parties. Pls.' Summ. J. Mot. 39. Again, this claim is identical to the one brought—and rejected—by the Supreme Court in *McConnell* and the record contains nothing that renders this a new as-applied challenge or that changes the constitutional analysis.

In *McConnell*, the RNC and Duncan contended that section 441i(a) unconstitutionally limited Duncan's right to solicit funds on behalf of state candidates. Def.'s Mot. to Dismiss, Ex. 1, ¶ 37. Plaintiffs then stated that BCRA "prohibits RNC fundraising assistance to state and local candidates. For example, [section 441i(a)] prohibits the Chairman of the RNC . . . even from sending a fundraising letter on behalf of a gubernatorial candidate, since funds contributed in response to such a solicitation would benefit a state, not federal, candidate." *Id.* And Plaintiffs introduced substantial evidence that the RNC and Duncan—then its treasurer—worked to raise money for state candidates, and that the RNC raised soft money for state candidates through its "Victory Plans." *McConnell*, 251 F. Supp. 2d at 339-40

(opinion of Henderson, J.); *id*. at 522-23 (opinion of Kollar-Kotelly, J.); *id*. at 833-35 (opinion of Leon, J.). Plaintiffs raised the same claim in their Supreme Court merits brief. Def.'s Mot. to Dismiss, Ex. 8, 1, 34, 43-44.

The Supreme Court rejected Plaintiffs' argument, specifically citing Plaintiffs' "Victory Plan" activity. *McConnell,* 540 U.S. at 160. The Court held that the provision was justified because "[a] national committee is likely to respond favorably to a donation made at its request regardless of whether the recipient is the committee itself or another entity." *Id*. at 157-58. And the Court noted that the provision was not overly restrictive because the national parties were still free to solicit hard money on behalf of state and local candidates and parties, and because the provision did not restrict a party officer or agent from soliciting soft money in his or her personal capacity. *Id*. at 157, 160.

Here, Plaintiffs have not introduced any concrete facts to support an "as-applied" challenge or to change the *McConnell* Court's analysis: They merely reassert that Duncan intends to solicit funds for state candidates in his official capacity as Chairman of the RNC. Pls.' SUF ¶¶ 28-29; Pls.' Summ. J. Mem. 39-40. Indeed, their claim is even *less* detailed than the one they presented in their *McConnell* merits brief. Again, Plaintiffs are attempting to relitigate an issue controlled by *McConnell,* by relabeling their challenge "as-applied" and applying their new constitutional test.

4. Use of Soft Money for Voter Registration, Voter Identification, Get-Out-The-Vote, and Generic Campaign Activity, and for Communications that Promote, Attack, Support, or Oppose Federal Candidates

Plaintiffs' attempt to relitigate their challenge to section 441i(b)'s requirement that state and local party committees must pay for "Federal election activity" with federally permissible funds, 2 U.S.C. § 441i(b)(1),[5] suffers the same fatal flaw. The California

[5] Federal election activity includes, inter alia, (i) voter registration activity that occurs within 120 days before the date of a regularly scheduled Federal election; (ii) voter identification, "get-out-the-vote" ("GOTV") activity, or generic campaign activity conducted in connection with a Federal election; and (iii) communications that promote, support, attack, or oppose a candidate for federal office. 2 U.S.C. § 434(20)(A). An exception to

Republican Party ("CRP") and the San Diego Republican Party ("SDRP") contend that section 441i(b) is unconstitutional "as-applied" to their voter registration, voter identification, get-out-the-vote ("GOTV"), and generic campaign activities in elections where both state and federal candidates appear on the ballot and if the activities are not "targeted" to any federal candidate or campaign. *See* Complaint ¶¶ 25, 53. This is precisely the same challenge CRP raised in *McConnell*.

In *McConnell,* CRP claimed that section 441i(b) unconstitutionally limited its right engage in voter registration, voter identification, GOTV and generic campaign activity that did not mention the name of a federal candidate. Def.'s Mot. to Dismiss, Ex. 2, ¶¶ 3, 50-51, 109. CRP introduced substantial evidence that it spent soft money on these types of activity. *McConnell*, 251 F. Supp. 2d at 342-47 (opinion of Henderson, J.), 460-62 (opinion of Kollar-Kotelly, J.), 836-39 (opinion of Leon, J.). CRP also introduced evidence that it focused the majority of its resources on state and local candidates, *id*., in part because there were few contested congressional races in the state. *Id*. at 838 (opinion of Leon, J.). Plaintiffs reiterated their argument in their brief to the Supreme Court, arguing that 441i(b) impermissibly "[s]ubject[ed] to pervasive federal regulation voter registration and [GOTV] efforts by state and local political parties—even when those efforts name only state or local candidates or ballot measures—just because those efforts occur during a federal election year." Def.'s Mot. to Dismiss, Ex. 8, 1. Specifically, CRP argued that its "voter registration and GOTV activity such as direct mail, telephone banks, and door-to-door canvassing are all primarily directed at state and local elections." *Id*. at 15-16. According to CRP, 441i(b) was unconstitutional because spending money on these activities could not lead to the corruption of federal candidates. *Id*. at 50-54.

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the rule allows state and local parties to pay for the first two types of "Federal election activity" with a mix of hard money and so-called "Levin funds," which may be raised within an annual limit of $10,000 per year person. 2 U.S.C. § 441i(b)(2).

The Court in *McConnell* rejected this argument wholesale. First, the Court rejected the contention that "Federal election activity" could not be regulated merely because these activities also impacted campaigns for nonfederal office. 540 U.S. at 166-67. Second, the Court reasoned that "[441i(b)] is premised on Congress' judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption." The Court found that 441i(b) was "reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the types of activities that pose the greatest risk of corruption by benefiting federal candidates. *Id*. at 167. The Court cited specific record evidence that voter registration, GOTV, and similar activity before a Federal election "has a significant effect on the election of federal candidates," and that federal officeholders "are grateful for contributions to state and local parties that can be converted into GOTV-type efforts." *Id*. at 168 (quotation and citation omitted). Thus, the Court concluded, the prohibition on the use of soft money in connection with these activities was closely drawn to meet an important governmental interest. *Id*. at 169.

In the instant challenge, Plaintiffs provide no discrete and concrete facts beyond those considered by the Court in *McConnell.* Plaintiffs claim that they will not use voter registration, voter identification, GOTV and generic campaign activities to "target" any federal candidate or campaign. SUF ¶¶ 45, 62. They contend that the effect that voter registration, voter identification, GOTV and generic campaign activities have on federal elections is too attenuated to be supported by the government's interest in preventing corruption. Pls.' Summ. J. Mem. 45. But, again, this is the same argument made and rejected in *McConnell*. *See* Def.'s Mot. to Dismiss, Ex. 8, 1.

Plaintiffs' claim regarding public communications that promote, support, attack, or oppose a candidate for federal office suffers from the same problem. *See* Complaint ¶¶ 23-

24; SUF ¶¶ 63, 64 (arguing that section 441i(b) is unconstitutional "as-applied" to communications that they plan to distribute, which support a ballot measure, but which they believe "attack" or "oppose" federal candidates under the definition of section 434(20)(A)(iii)). In their Supreme Court brief in *McConnell*, Plaintiffs challenged 441i(b), alleging that it would unconstitutionally regulate communications aimed at influencing a state election, but which also promote, attack, support, or oppose a federal candidate as well. *See* Def.'s Mot. to Dismiss, Ex. 8, 55-57. *McConnell* rejected the argument that such regulation was unconstitutional, concluding that a public communication that promotes or attacks a clearly identified federal candidate "directly affects the election in which he is participating." 540 U.S. at 170. And, as described above, the Court rejected the contention that "Federal election activity" could not be regulated merely because it also impacted campaigns for nonfederal office. 540 U.S. at 166-67.

To support their "as-applied" challenge, Plaintiffs now introduce a hypothetical communication that will promote, attack, support or oppose a federal candidate under BCRA. But the same scenario was presented, and deemed to be permissibly regulated, in *McConnell*. *See* Def.'s Mot. to Dismiss, Ex. 8, 55-57. If the communication promotes, supports, attacks, or opposes a federal candidate, the communication must be paid for with hard money. If it does not promote, support, attack, or oppose a federal candidate, it is not subject to this requirement.

C. Plaintiffs Have Not Demonstrated Any Concrete Inability to Fund Their Activities Adequately, nor that the Holding of *McConnell* Is Inapplicable

Arguably, Plaintiffs' Statement of Undisputed Facts contains several assertions, not cited in their Memorandum, that might bear upon their claim that 441i(b) is unconstitutional as applied to certain Federal election activity. First, several paragraphs contain statistics on the CRP and SDRP's spending, indicating that most of its budget is devoted to state, not

federal elections. *See, e.g.*, SUF ¶¶ 40. But the same assertions were raised, and rejected, in *McConnell*. *See* Def.'s Mot. to Dismiss, Ex. 8, 12. Second, CRP and SDRP claim that the soft money limits are preventing it from engaging in "Federal election activity" that it would otherwise engage in. SUF ¶¶ 51, 58. Plaintiffs in *McConnell* made the same assertion, *see* Def.'s Mot. to Dismiss, Ex. 8, 61-64, and the Court in *McConnell* rejected it as "'speculative and not based on any analysis.'" 540 U.S. at 174 (quoting *McConnell*, 251 F. Supp. 2d at 524 (opinion of Kollar-Kotelly, J.)).

It is not enough that Plaintiffs might prefer to draw all the funds they would like to have, from all the sources they believe to be available. The Court explained in *McConnell* that "[t]he question is not whether sec. 323(b) reduces the amount of funds available over previous election cycles, but whether it is 'so radical in effect as to … drive the sound of [the recipient's] voice below the level of notice.' If indeed . . . parties can make such a showing, as-applied challenges remain available." 540 U.S. 93, 173 (2003) (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000)).

These Plaintiffs have made no such showing. Rather, data compiled and made public by the Federal Election Commission shows that the Republican National Committee raised close to a half of a billion dollars, 63 per cent more than the Democratic National Committee, for the entire 2007-2008 cycle. *See* FEC, National Republican Party Financial Activity through Twenty Days Prior to the General Election, Oct. 29, 2008, *available at* http://www.fec.gov/press/press2008/20081029party/2repsummary2008.pdf. And if it is the claim of the RNC that its financial position cannot keep pace with its needs after the enactment of the soft money provisions at issue, this, too, is belied by the FEC data. The Republican National Committee has achieved an 86% increase in its fundraising from the Presidential election year prior to the enactment of BCRA, through the first Presidential election held afterwards, in 2004. *Id.* And the RNC raised still more for the 2008 election

than for the previous 2004 Presidential election. The same robust increase can be shown in fundraising, pre-and post-BCRA, for mid-term elections, with the RNC experiencing a 38% increase from 2002, the year BCRA passed, through the 2006 Congressional and state elections. *Id.*[6]

Similarly, they cannot obtain judgment as a matter of law on their own self-serving assertions that they will not be corrupted by soft money donations. *See, e.g.*, Pls.' SUF ¶ 24, 30. These conclusory statements are both improper as the basis for summary judgment and are not discrete, new facts that can serve as the basis for Plaintiffs' as-applied challenge. *See supra*, at 8-9.

Furthermore, these statements encapsulate the Plaintiffs' confused position on the controlling law. The affidavits from party officials, pledging that they will behave appropriately in avoiding corruption, miss fundamentally the Court's reasoning in *McConnell*. The Court there was concerned with the close relationship of parties to federal candidates and officeholders; it related the money that parties raised to its effect on elected officials, not party officials.

So the professed good faith of a party official is wholly immaterial to this case in two ways. First, for purposes of a summary judgment motion and an "as applied" challenge, generalized commitments that the affiants will behave properly in the future and conclusions

[6] Nor can Plaintiffs' case rest, as a constitutional matter, on their perspective on their inter-party competitive position at any given time. News reports around the time of this action and since have underscored Plaintiffs' immediate objective of improving their competitive position following disappointment at the polls. One prominent commentator summed up the challenge that the RNC posed for itself when electing a new leader: "The RNC chair has two main duties over the next several years. He… has to harness the technological advances of the [opposition Presidential candidate] to increase the efficiency of Republican fundraising and outreach." Marc Ambinder, *A Cheat Sheet to Today's RNC Race*, The Atlantic, Jan. 30, 2009, *available at* http://politics.theatlantic.com/2009/01/a_cheat_sheet_to_todays_rnc_race.php (last visited Mar. 9, 2009); *see also* Reid Wilson, *RNC sinks millions into campaign arms,* The Hill, Mar. 5, 2009, *available at* http://thehill.com/leading-the-news/rnc-sinks-millions-into-campaign-arms-2009-03-05.html (party leader commends newly elected RNC Chair for his commitment to "strengthening and modernizing our fundraising operations") (last visited Mar. 9, 2009). Political competition, however—not a specious constitutional claim—is the answer to whatever competitive difficulties Plaintiffs may be currently experiencing or perceiving.

about the effect of the affiants' own behavior can be given little if any weight. Second, under *McConnell*, these commitments fail utterly to answer the Court's core concern about the relationship between donors and candidates or officeholders. It is perhaps with the understanding that their position is at odds with the law that the Plaintiffs suggest to this Court that the controlling law—the *McConnell* case—exists no more, and that a new legal standard, never before adopted by the Supreme Court, should be imposed.

CONCLUSION

Plaintiffs have failed to demonstrate that they are entitled to judgment as a matter of law. The DNC respectfully requests that the Court deny their motion.

Dated: March 9, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert F. Bauer, a member of the bar of this Court, hereby certify that on March 9, 2009, I served a true and correct copy of the Democratic National Committee's Opposition to Plaintiffs' Motion for Summary Judgment by means of electronic service on:

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