UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 08-1953 (BMK, RJL, RMC) REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S
REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Federal Election Commission ("Commission") respectfully submits this reply memorandum in support of its motion to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs' attempt to avoid dismissal as *res judicata* rests on extraneous submissions not properly before the Court and on the mistaken argument that a party may relitigate a case it previously lost merely by repackaging its allegations and devising new legal assertions. But none of the modified allegations or novel theories that Plaintiffs have proposed in this case change the fundamental fact that the Supreme Court unequivocally rejected the same claims of the same Plaintiffs in *McConnell v. FEC*, 540 U.S. 93 (2003). That holding precludes the Republican National Committee ("RNC"), Mike Duncan, and the California Republican Party ("CRP") from relitigating their claim that they have a constitutional right to fund certain activities with donations raised from corporations and in unlimited amounts.

I. STANDARD OF REVIEW

Preliminarily, Plaintiffs misstate the standard of review for motions to dismiss under Fed. R. Civ. P. 12(b)(6). Such motions need not demonstrate "beyond doubt that the plaintiff[s] can

prove no set of facts . . . which would entitle [them] to relief." (Pls.' Mem. in Opp'n to FEC's Mot. to Dismiss ("Pls.' Opp.") at 5 (quoting, *inter alia*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).) The Supreme Court abrogated *Conley* in 2007, holding that the "no set of facts" standard "is best forgotten." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007). The appropriate question on a motion to dismiss is whether, if the factual allegations in the complaint are assumed to be true, the complaint states a claim on which relief can be granted. *See id*. at 1964-65; *Kassem v. Wash. Hosp. Ctr*., 513 F.3d 251, 253 (D.C. Cir. 2008) (citing *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)). Under this standard, the court's inquiry is directed to the allegations actually set forth in the complaint, not towards a hypothetical "set of facts" outside the complaint.

Relatedly, Plaintiffs' reliance on affidavits to support their opposition to the Commission's motion to dismiss (*e.g.*, Pls.' Opp. at 2-4, 13) is procedurally improper. The Commission's motion is based on the allegations in the complaint and refers when appropriate to "matters about which the Court may take judicial notice," *Camp v. Kollen*, 567 F. Supp. 2d 170, 172 (D.D.C. 2008) (quotation omitted), such as Plaintiffs' filings in *McConnell*. (*See* Def.'s Mem. in Support of Mot. to Dismiss ("Def.'s Mem.") at 7 (discussing judicial notice of filings in prior cases).) In contrast, Plaintiffs introduce extraneous materials post-dating the complaint, and Plaintiffs indicate that they would not oppose the Court's converting this motion under Fed. R. Civ. P. 12(d) to a motion for summary judgment. (Pls.' Opp. 5 n.5.) But conversion would not be warranted or appropriate here, as the Court has already established a schedule that rejected Plaintiffs' attempt to skip directly from case filing to summary judgment and to deprive the Commission of its right to challenge the facial sufficiency of the complaint. (*See* Pls.' Mot. to Expedite Summ. J. Briefing Schedule (Docket No. 11) at 2.) As the Commission has noted

previously, Rule 12 protects defendants from having to engage in discovery and fact-intensive briefing regarding claims that do not state a proper cause of action, and nothing in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, removes that protection. (Def.'s Resp. to Pls.' Mot. to Expedite (Docket No. 16) at 1-2, 4-5.) Accordingly, the Commission's motion to dismiss should be decided on the face of the complaint, Plaintiffs' references to extraneous material should be disregarded, and Plaintiffs' apparent request for conversion to a Rule 56 motion should be denied. *See Herron v. Veneman*, 305 F. Supp. 2d 64, 70-71, 74 n.3 (D.D.C. 2004) (refusing to consider extrinsic material unnecessary to decision of 12(b)(6) motion); *Thomas v. District of Columbia*, 887 F. Supp. 1, 5 n.1 (D.D.C. 1995) (same).

II. PLAINTIFFS' CLAIMS ARE PRECLUDED BECAUSE THEY ARE BASED ON THE SAME NUCLEUS OF FACTS AS THESE PLAINTIFFS' CLAIMS IN *MCCONNELL*

In its motion to dismiss, the Commission demonstrated at length that Plaintiffs' current claims rely on the same "nucleus of facts" as did the same Plaintiffs' claims in *McConnell*.[1] (Def.'s Mem. at 10-19.) Plaintiffs' response does not take issue with the Commission's analysis of their *McConnell* claims, instead conceding that the soft-money activities Plaintiffs litigated in that case were "similar to the activities they intend to support [with soft money] now." (Pls.' Opp. at 15.) Plaintiffs argue, however, that the current "nucleus of facts" differs from *McConnell* because (a) the instant case challenges BCRA Title I "as applied" to certain activities, and (b) Plaintiffs allegedly intend not to engage in some of the practices that most troubled the *McConnell* Court. Neither of these arguments negates the *res judicata* prohibition on claim relitigation.

[1] The parties appear to agree that the resolution of the Commission's claim preclusion motion turns on application of the "nucleus of facts" test. (*See* Pls.' Opp. at 6.)

A. Plaintiffs' Request for As-Applied Relief Is a Change in Legal Theory, Not a Difference in the Nucleus of Facts

In its opening memorandum, the Commission discussed the substantial authority from this Circuit and District holding that a party is precluded from bringing suit based on the same nucleus of facts that the party raised in an earlier suit, even if the second suit propounds a different legal theory from the first. (Defs.' Mem. at 10, 19-21.) Plaintiffs do not dispute this principle. (*See* Pls.' Opp. at 6-7.) Instead, they argue primarily that the current case is an as-applied constitutional challenge to a facially valid statute, and that such challenges must be cognizable after the statute is upheld facially, or else the possibility of as-applied relief would be "illusory." (Pls.' Opp. at 7.)

Plaintiffs' assertion is relatively uncontroversial; it is also irrelevant to this motion. The Commission has never argued that *McConnell*'s facial upholding of BCRA Title I foreclosed all as-applied challenges to that portion of the Act. The argument raised in this motion is much more narrow: The same plaintiffs who claimed in *McConnell* that Title I was unconstitutional in relation to certain activities may not now re-raise claims about the unconstitutionality of Title I in relation to the same activities.[2] Such claims are textbook *res judicata*. Because there is no significant factual difference between Plaintiffs' current claims and their equivalent claims against Title I in *McConnell* (*see infra* Part II.B), it is simply irrelevant that they have moved from a theory under which they can conduct their activities because Title I is unconstitutional on its face to a theory under which they can conduct the same activities because Title I is

[2] The narrowness of this preclusive effect is demonstrated, in part, by the fact that two out of three Republican Party national committees, forty-six out of fifty Republican Party state committees, and 167 out of the 168 current members of the RNC were *not* plaintiffs in *McConnell*. *See McConnell*, 251 F. Supp. 2d at 221 (listing plaintiffs).

unconstitutional as applied.[3] Because the parties and activities at issue are the same, Plaintiffs are "simply raising a new legal theory. This is precisely what is barred by *res judicata*." *Apotex, Inc. v. FDA*, 393 F.3d 210, 218 (D.C. Cir. 2004).

In addition to arguing that *McConnell* did not foreclose all as-applied challenges to Title I, Plaintiffs assert that *McConnell* contemplated that such challenges might be brought by the *McConnell* plaintiffs themselves. (*See* Pls.' Opp. at 8-9.) But the portions of *McConnell* to which Plaintiffs cite merely note that some of the plaintiffs' arguments regarding hypothetical infirmities that might eventually develop under BCRA would more appropriately be raised as as-applied challenges if and when those infirmities arose. *See McConnell*, 540 U.S. at 157 n.52 (potential state law prohibitions on soliciting hard money), 159 (solicitations by new political parties), 173 (state parties able to show that BCRA is "so radical in effect as to . . . drive the sound of [the recipient's voice] below the level of notice"), 242-43 (potential FCC regulations and forced disclosures of strategic material).[4] Nothing in *McConnell* contemplates the parties relitigating the constitutionality of BCRA in relation to the specific, concrete activities that the Court actually addressed on the merits in its opinion. (See Def.'s Mem. at 17-19.) Because all

[3] Plaintiffs note that facial and as-applied First Amendment challenges may be assessed under different standards. (Pls.' Opp. at 7.) But the *legal* standard that would apply to this case if it were not precluded has no bearing on whether Plaintiffs' current claims share the same nucleus of *facts* as Plaintiffs' *McConnell* claims.

[4] The same holds true for the other cases that Plaintiffs cite (Pls.' Opp. at 7) for their argument regarding as-applied challenges: These decisions state only that facial validation of a statute may leave unresolved the constitutionality of some future statutory applications, not that a plaintiff is free to re-file its facial challenge under the label of an as-applied challenge. *See Gonzalez v. Carhart*, 127 S. Ct. 1610, 1638-39 (2007) (noting potential as-applied challenges to future statutory applications not presented in facial challenge); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (noting generally that facially valid statutes may be subject to as-applied challenges).

of the activities that Plaintiffs now claim they wish to undertake were so addressed,[5] there is no support in *McConnell* for Plaintiffs' attempt to render the doctrine of claim preclusion inapplicable here.

In any event, Plaintiffs' assertion that the *McConnell* Court anticipated as-applied challenges from the *McConnell* plaintiffs is not pertinent to the claim preclusion issue raised by the Commission's motion to dismiss. Plaintiffs appear to be arguing that the mere fact they were parties to *McConnell* does not permanently prevent them from challenging BCRA. The Commission, however, does not argue that the RNC, Duncan, and the CRP are precluded from bringing *any* as-applied challenge to Title I (or to BCRA in general), or that preclusion applies *only* because these Plaintiffs were parties to the facial challenge in *McConnell*.[6] Rather, claim preclusion applies here because there is an identity of parties *and* a common nucleus of factual allegations between this case and *McConnell*. Where those two elements are present (and there is no dispute as to the other prongs of the claim-preclusion test), *res judicata* protects the FEC, like all other defendants, from having to defend against a claim that it has already defeated. (*See* Def.'s Mem. at 8-10.)

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[5] The reference in Plaintiffs' brief to a "building fund" that the RNC allegedly wishes to finance with soft money (Pls.' Opp. at 3) exemplifies why affidavits should be disregarded for purposes of this motion: There is no mention of any "building fund" in the complaint, and therefore it is irrelevant to the question of whether the complaint states a claim on which relief can be granted. Nonetheless, the Commission notes that the RNC raised and lost the "building fund" claim, along with the rest of its current claims, in *McConnell*. *See, e.g.*, *McConnell v. FEC*, 251 F. Supp. 2d 176, 332 (opinion of Henderson, J.), 819 (opinion of Leon, J.) (D.D.C. 2003) ("[N]onfederal funds were used for voter registration and identification, get-out-the-vote activities, 'issue advocacy,' building funds, and national support for state and local candidates.").

[6] To the contrary, the Commission is presently litigating an as-applied constitutional challenge to BCRA Section 203 brought by an entity that challenged the same Section as a plaintiff in *McConnell*. *See generally Citizens United v. FEC*, Civ. No. 07-2240 (D.D.C.), *appeal docketed*, S. Ct. No. 08-205. Because the plaintiff in *Citizens United* is not seeking relief regarding the same nucleus of facts presented to the *McConnell* Court, the Commission has never argued in that case that the plaintiff's participation in *McConnell* precluded the current litigation.

In addition to *McConnell*, Plaintiffs also seek to draw support for their argument regarding as-applied challenges from *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"). In lieu of further reply, the Commission respectfully refers the Court to the Commission's opening memorandum, which explained, *inter alia*, that no issue of claim preclusion was raised or decided in *WRTL I* because the plaintiff in that case was not a party to *McConnell*, and the activities at issue in *WRTL I* had not been presented to the *McConnell* Court. (Def.'s Mem. at 22-24.)

B. Plaintiffs' Allegation that Federal Candidates and Officeholders Will Not Directly Solicit Soft Money Does Not Alter the Nucleus of Facts Underlying Plaintiffs' Claims

Plaintiffs attempt to distinguish the factual nucleus of their current claims from their *McConnell* claims based on the allegation in the instant complaint that "no federal candidate or officeholder will solicit, receive, or spend funds in connection with any of the Plaintiffs' activities described [in the complaint]" (Compl. ¶ 26).[7] Even taking this implausible allegation as true for purposes of the instant motion, it does not distinguish the nucleus of facts in this case from *McConnell*.[8]

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[7] The citation in Plaintiffs' brief (at 13) to paragraph 19 of the complaint for this proposition appears to be mistaken.

[8] Plaintiffs provide three additional "facts" that they assert distinguish this case from *McConnell*. (See Pls.' Opp. at 13-14 (citing affidavits regarding soft-money donors receiving preferential access to federal candidates or officeholders, citing affidavit stating that fundraising has been "impaired" by such factors as "the explosion of internet fundraising," and asserting that "none of Plaintiffs' intended activities will support any federal candidate or campaign").) None of these assertions appear anywhere in the complaint, and, accordingly, they are not appropriately considered in the context of the Commission's motion to dismiss. *See supra* Part I. If the instant motion is not granted, the Commission will respond to these extraneous factual assertions where they belong, namely in the Commission's opposition to Plaintiffs' motion for summary judgment and in the Commission's own motion for summary judgment, to be filed promptly after additional record development. In any event, for the same reasons stated below regarding candidate and officeholder involvement, consideration of these extraneous assertions would not change the result of this motion.

The Commission agrees with Plaintiffs that the *McConnell* Court was, in part, concerned with federal candidates' and officeholders' involvement in the soft-money process when it upheld the Act. (*See* Def.'s Mem. at 3-4, 18.) But that was only a single factor among the wealth of facts that were important when the Court rejected Plaintiffs' claims and arguments in *McConnell* and upheld Title I. In its opening brief, the Commission set forth the enormous overlap between Plaintiffs' current complaint and the complaint and substantive briefs in *McConnell*. (Def.'s Mem. at 11-17.) None of the common facts detailed there have anything to do with federal candidates or officeholders soliciting soft money. (*See id.*) And the Supreme Court made clear that the corruptive effect of soft-money donations to political parties was not dependent on direct participation by federal officeholders and candidates, for "even when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors." *McConnell*, 540 U.S. at 147. Thus, "whether they like it or not," a political party that receives massive donations becomes the *de facto* agent of those donors in relation to federal candidates and officeholders affiliated with the party. *See id.* at 145. The Court accordingly rejected Justice Kennedy's argument in dissent that only contributions made "at the behest of" federal candidates should be constitutionally subject to regulation:

> This crabbed view of corruption . . . ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.
>
> Justice Kennedy's interpretation of the First Amendment would render Congress powerless to address more subtle but equally dispiriting forms of corruption. Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation. The evidence set forth above,

> which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions to political parties carry with them just such temptation. . . .
>
> In sum, there is 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 152-54. The Court thus rejected the plaintiffs' and the dissent's argument that soft money contributions must be solicited by a federal candidate or officeholder to be corrupting. Instead, the key nucleus of facts in *McConnell*'s upholding of Title I concerned the inherent corruptive potential posed by political parties' ability to accept unlimited soft-money contributions. *See id*.[9]

Regardless of Plaintiffs' allegations about who would solicit their soft money going forward, the entirety of their instant complaint, like *McConnell*, revolves around the political parties' receipt and spending of soft-money contributions. At heart, Plaintiffs' factual allegations are that Plaintiffs would like to receive soft money and spend it on certain activities — just as they claimed in *McConnell* — and in both cases Plaintiffs characterize the activities they wish to finance with their unlimited donations as involving state elections, mixed state-and-federal elections, redistricting activity, "issue advertising," and "federal election activity" under 2 U.S.C. § 431(20). (*See* Def.'s Mem. at 11-17.) This is the nucleus of facts in each case, and Plaintiffs' allegation of future voluntary restrictions on soft-money solicitation by federal candidates and officeholders is merely a modification to one subsidiary factual consideration that is clearly insufficient from the plain language of the Court's opinion to alter the outcome. Because

[9] Even if the removal of solicitations by federal officeholders could be viewed as single-handedly distinguishing the current claims from plaintiffs' earlier claims, Justice Kennedy's opinion, *see* 540 U.S. at 298-307, demonstrates beyond dispute that such a claim could have been brought when the same nucleus of facts were litigated in *McConnell*. (*See* Def.'s Mem. at 10 (discussing cases holding that plaintiffs are precluded from bringing claims that that they could have litigated — but chose not to — in an earlier action).)

Plaintiffs lost the underlying argument in *McConnell*, they cannot force the Commission to litigate it again here.

In addition to arguing that the nucleus of facts of this case differs from *McConnell*, Plaintiffs maintain that their current complaint is not barred by *res judicata* because it is "'based on material facts that were not in existence when they brought the original suit.'" (Pls.' Opp. at 6 (quoting *Apotex*, 393 F.3d at 218), 15.)[10] This argument is difficult to fathom, given that nearly every factual allegation (material or otherwise) in Plaintiffs' complaint is duplicative of the facts Plaintiffs asserted in *McConnell*. Plaintiffs cite as an example of their purportedly post-*McConnell* activity the RNC's plan to "solicit funds into a Virginia Account to be used exclusively to support candidates for state office in Virginia." (*Id*. at 14.) Yet Plaintiffs asserted this same fact in *McConnell* — not merely that the RNC planned in general to spend soft money on state elections where no federal candidates were on the ballot, but that the RNC wished to do so specifically in Virginia. (FEC Exh. 3 at RNC 6, 25-26; Exh. 7 at 11-12.) This is more than a shared nucleus of fact; it is *exactly* the same fact. Plaintiffs themselves recognized such overlap in arguing to this Court that the Commission would not require discovery here because "prior activities of the Plaintiffs were fully investigated and included in the *McConnell* record." (Pls.' Reply in Support of Mot. to Expedite (Docket No. 18) at 2.) Thus, because all of Plaintiffs'

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[10] Plaintiffs also cite *Stanton v. Dist. of Columbia Ct. of App.*, 127 F.3d 72, 79 (D.C. Cir. 1997), but the earlier action in that case involved a retrospective adjudication of an individual's earlier conduct, not a facial challenge. The *Stanton* court explicitly distinguished earlier facial challenges, noting that in constitutional litigation, "a party raising a facial challenge . . . should reasonably be viewed as seeking a judgment on all future applications, except as future facts may vary." *Id*. at 79. Plaintiffs' complaint raises no facts varying materially from those presented to the *McConnell* Court, with both cases involving challenges to prospective applications of the statute. *See also Wise v. Glickman*, 257 F. Supp. 2d 123, 130 & n.9 (D.D.C. 2003) (distinguishing *Stanton* and noting that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, *even . . . if seeking a different remedy*." (internal quotation marks omitted; emphasis added)).

allegedly new activities are materially identical to the activities they sought to continue by bringing *McConnell* (*see* Def.'s Mem. at 11-17), Plaintiffs have not put forward the type of new facts that would render claim preclusion inapplicable. *See Apotex*, 393 F.3d at 218 (holding claim preclusion applicable where plaintiff's suit related to government action regarding the same activity).

III. PLAINTIFFS ARE PRECLUDED FROM RELITIGATING THEIR ARGUMENT THAT THE CONSTITUTIONALITY OF BCRA TITLE I DEPENDS ON THE ACTIVITIES THAT THE PLAINTIFFS WISH TO FUND WITH SOFT MONEY

Plaintiffs are precluded from contesting here the Supreme Court's conclusion that "it is irrelevant" for purposes of determining whether BCRA Title I is constitutional how a political party wishes to spend its soft money. *See McConnell*, 540 U.S. at 138-39, 154-56. As the Commission discussed in its opening brief, that legal determination by the Court — made over fierce opposition by the current Plaintiffs — precludes the argument that underlies the entire instant complaint, *i.e.*, that the *contribution* limit in Title I is unconstitutional in relation to certain *spending*. (Def.'s Mem. at 24-28.)

Plaintiffs devote only one sentence of their response to the particular legal determination in question (*see* Pls.' Opp. at 20), and they make no attempt to refute the Commission's showing that Plaintiffs litigated and lost this issue in *McConnell*. Instead, as they do with motions to dismiss in general, Plaintiffs misstate the relevant standard. Contrary to Plaintiffs' assertion, the Commission need not show that the issue presented here is "'identical in all respects with that decided in the first proceeding.'" (*Id*. at 16 (quoting *C.I.R. v. Sunnen*, 333 U.S. 591, 600 (1948).) As the D.C. Circuit noted almost three decades ago, this "aspect of *Sunnen* is no longer good law," *Am. Med. Int'l, Inc. v. Sec'y of Health, Educ. and Welfare*, 677 F.2d 118, 120 (D.C. Cir. 1981) (per curiam), having been superseded by *Montana v. United States*, 440 U.S. 147 (1979),

and its progeny. Under the proper standard, minor differences between a first and second case do not defeat an issue preclusion defense. (*See* Def.'s Mem. at 27-28 (citing, *inter alia*, *Stonehill v. IRS*, 534 F. Supp. 2d 1, 6-8 (D.D.C. 2008), and *Newdow v. Bush*, 355 F. Supp. 2d 265, 275 (D.D.C. 2005)).) Thus, because the question of whether Title I might be unconstitutional in relation to Plaintiffs' spending is the same issue presented by Plaintiffs' current complaint, Plaintiffs' presentation of it here in an as-applied challenge does not avoid the application of issue preclusion.

Plaintiffs' other counterarguments (Pls.' Opp. at 16-20) rely on the same faulty reasoning discussed previously regarding purported factual differences between this case and *McConnell*, and the same mischaracterization of *WRTL I*. *See supra* Part II. The only new argument Plaintiffs assert in relation to issue preclusion is that the true "issue" in this case is whether Title I is consistent with a statement in *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). (See Pls.' Opp. at 19-20.) Given that *Buckley* was decided twenty-seven years before *McConnell* — which upheld Title I and cited *Buckley* literally hundreds of times — this is, to say the least, a novel argument. But if raising a novel argument, no matter how tenuous, were sufficient to defeat issue preclusion, almost any new legal assertion could render the doctrine a nullity. The protections of *res judicata* are not so easily dismissed. As the Commission discussed in its opening brief, the test for issue preclusion is satisfied here because Plaintiffs' complaint is premised on a legal argument that Plaintiffs actually litigated and lost in *McConnell*, and their allegations regarding their desire to fund activities with soft money therefore fail to state a claim on which relief can be granted.

IV. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW

Although Plaintiff Republican Party of San Diego County ("RPSD") was not a party to *McConnell*, its claims, like those of the other Plaintiffs, rely on the assumption that allegations regarding Title I's effects on particular categories of spending state a viable claim. Because that assumption is untenable, for the reasons discussed *supra* Part III, the RPSD's claims are subject to dismissal as a matter of law along with those of the other Plaintiffs.

V. CONCLUSION

Underlying Plaintiffs' response is a suggestion that because they have raised constitutional issues that they consider important, the standard protections against burdensome and duplicative litigation afforded to defendants should not apply here. Nothing could be further from the truth. In cases such as this, where a decision on the merits might have an enormous effect on the entire American political system, it is particularly important that the action be properly bought and otherwise adhere to the rules that courts have developed to ensure equitable and consistent adjudication. The doctrine of *res judicata* is at the core of such jurisprudence, and it applies no less to this case than to any other action.

For all of the foregoing reasons, the Commission respectfully requests that the Court dismiss this action.

Respectfully submitted,

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