United States District Court
District of Columbia

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

Plaintiffs' Memorandum in Opposition to the Federal Election Commission's Motion to Dismiss

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Introduction

Plaintiffs Republican National Committee ("RNC") *et al.* file this opposition to the Defendant Federal Election Commission's ("FEC") motion to dismiss, (Dkt. 20). On November 13, 2008, Plaintiffs filed their complaint alleging that § 101 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub L. No. 107-155, 116 Stat. 81, 82-86, codified at 2 U.S.C. § 441i, was unconstitutional as applied to their intended activities. (Dkt. 1) ("*Complaint*"). In accordance with this Court's scheduling order, (Dkt. 19), Plaintiffs filed their motion for summary judgment on January 26, 2009, (Dkt. 21). On that same day, the FEC filed its motion to dismiss, which argues that Plaintiffs' constitutional challenge is precluded by *res judicata*. Plaintiffs respond accordingly.

Facts

Plaintiffs bring an as-applied challenge to the constitutionality of portions of § 101 of the BCRA, which added a new § 323 (entitled "Soft Money of Political Parties") to the Federal Election Campaign Act ("FECA"). The challenged provisions are codified at 2 U.S.C. § 441i and will herein be called the "Federal Funds Restriction" for ease of identification.

The Federal Funds Restriction prohibits *national* committees of a political party and their officials from soliciting or using *any* non-federal funds,[1] regardless of their purpose. They may solicit and use only federal funds. 2 U.S.C. § 441i(a). The Federal Funds Restriction also

[1] "Federal funds" are those complying with federal limits, bans, and reporting requirements. 11 C.F.R. § 300.2(g). "Non-federal funds" are those that do not comply with federal limits and bans. *Id.* § 300.2(k). Depending on how a state's law compares with federal law, money raised under state law may or may not be "non-federal." As used in this brief, however, the term "state funds" – which, unlike "federal funds" and "non-federal funds," is not a term of art – means *non-federal* funds *that comply with the law of the state in question.*

prohibits *state* committees of a political party from using non-federal funds for "federal election activity." *Id.* § 441i(b). "Federal election activity" includes: (1) voter registration activity in the 120 days before a federal election; (2) "voter identification, get-out-the-vote activity or generic campaign activity" in connection with elections for federal office; and (3) public communications[2] that clearly identify and "promote," "attack," "support," or "oppose" ("PASO") a federal candidate. *Id.* § 431(20).

Following the enactment of the BCRA in 2002, a host of political parties and officers, including Plaintiffs in this action,[3] brought a facial challenge to the Federal Funds Restriction in *McConnell v. FEC*, 251 F. Supp.2d 176 (D.D.C. 2003). This Court largely struck down the Federal Funds Restriction as an impermissible infringement of Plaintiffs' First Amendment rights. *Id.* However, on appeal the Supreme Court reversed this Court's decision and upheld the Federal Funds Restriction on its face, *McConnell v. FEC*, 540 U.S. 93 (2003), finding that "in the main, [it] does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money *to influence federal elections, federal candidates, and federal officeholders*." 540 U.S. at 138 (emphasis added). Thus, the Restriction was closely drawn to the governmental interest in preventing corruption or its appearance. *Id.* at 160, 167.

The present action arises from the factual setting left in *McConnell*'s wake. The Federal Funds Restriction has greatly impaired Plaintiffs' ability to participate in a variety of activities unrelated to federal elections and campaigns. *Affidavit of Richard Clinton Beeson* (Dkt. 21, Exh.

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[2]*Defined in* 2 U.S.C. § 431(22) *and* 11 C.F.R. § 100.26.

[3]Plaintiffs Republican National Committee, California Republican Party, and Mike Duncan (in his capacity as the RNC treasurer) were named plaintiffs in *McConnell*. The Republican Party of San Diego was not.

1) at ¶ 17 ("*Beeson Affidavit*"); *Declaration of Bill Christiansen* (Dkt. 21, Exh. 3) at ¶¶ 12, 16. Unlike the pre-BCRA factual record before the Court in *McConnell,* Plaintiffs' intended activities are too far removed from federal candidates and officeholders to pose any threat of corruption or its appearance. Plaintiffs' intended activities involve what the Federal Funds Restriction does *other than* "*in the main*." That is, they deal with activities *not* unambiguously related to influencing federal elections, federal candidates, or federal officeholders.

The RNC intends to solicit non-federal funds and state funds into separate segregated accounts, which will be used to support a variety of activities that are not "unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). These accounts include: (1) a New Jersey Account and a Virginia Account to be used to support state candidate and state elections in those states, (2) a Grassroots Lobbying Account to pay for grassroots lobbying[4] activities on legislation and public policy issues of import to the RNC, (3) a Litigation Account to pay for litigation expenses in matters unrelated to federal candidates and campaigns, (4) State Elections Accounts for various states to support state candidates and state elections, (5) a Redistricting Account to support state redistricting efforts, and (6) a Building Account to pay for expenses relating to the upkeep of the RNC headquarters. *Complaint* at ¶¶ 16-22; *Beeson Affidavit* at ¶¶ 3-17. No federal candidates can or will be involved in soliciting funds into any of these accounts and the RNC will not grant contributors to these accounts with preferential access to any federal candidates or officeholders. *Complaint* at ¶ 26; *Beeson Affidavit*

[4] Contrary to the FEC's assertion, "grassroots lobbying" is not used interchangeably with the term "issue advocacy." *FEC Mem. in Sup. of Mot. to Dismiss* (Dkt. 20) at 13 n. 5. Rather, grassroots lobbying is properly understood as one of many forms or types of issue advocacy. In other words, while grassroots lobbying is per se issue advocacy, issue advocacy also includes a multitude of other activities that do not qualify as grassroots lobbying.

at ¶ 19. All solicitations into these accounts and disbursements for these accounts would be made in accordance with any applicable state law. The RNC is prohibited by the Federal Funds Restriction from undertaking any of these activities.

The California Republican Party and the Republican Party of San Diego County (collectively "the CRP") intend to use state funds for public communications to support or oppose California ballot initiatives. *See* 2 U.S.C. § 431(22) (defining "public communication"); 11 C.F.R. § 100.26 (same). These ballot measure activities are enhanced by associating Democratic federal candidates and officeholders with ballot measures that the CRP opposes, and by associating Republican candidates and officeholders with ballot measures that the CRP supports. In addition, referring to federal candidates on direct-mail fundraising appeals enhances their effectiveness. The CRP has developed a fundraising letter (the "Letter") that it intends to distribute that supports the qualification of a California state ballot initiative to reform the way redistricting is done. Although it is about a state ballot measure, the CRP believes its public communications will "attack" or "oppose" federal candidates, because it mentions Sen. Boxer and Rep. Pelosi. Thus, the CRP is prohibited from using state funds to distribute its letter. *See id.* § 441i(b)(1). The CRP also intends to use state funds for voter registration, voter identification, and GOTV activities in future elections. None of these activities will identify, reference, or otherwise depict any federal candidate. *Declaration of Bill Christiansen* (Dkt. 21, Exh. 3) at ¶¶ 7, 12, 16. Nonetheless, the CRP is also prohibited from using state funds to engage in these state election activities. *Complaint* at ¶¶ 23-25.

Argument

"A complaint may not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" *Wise v. Glickman*, 257 F. Supp. 2d 123, 127 (D.D.C. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).[5] All facts alleged in the complaint must be viewed in the light most favorable to the Plaintiffs and all inferences are to be decided in favor of the Plaintiffs. *Id.*

Because the doctrines of claim preclusion and issue preclusion do not bar Plaintiffs' claims, and because their claims do not fail as a matter of law, the FEC's motion to dismiss must be denied.

I. Plaintiffs' As-Applied Claims Are Not Precluded

A. Claim Preclusion Is Not Applicable

The doctrine of claim preclusion provides that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. U. S.*, 440 U.S. 147, 153 (1979). This "forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (citation omitted).[6] "[V]irtually all federal courts" have adopted the transactional approach to determine whether two suits involve the same cause of action. WRIGHT

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[5] Plaintiffs recognize that by citing to facts outside of the complaint in this opposition, the motion to dismiss may be treated as one for summary judgment. *See* Fed. R. Civ. P. 12(d).

[6] As noted by the FEC, there is no dispute that RNC, CRP, Duncan, and the FEC were parties in *McConnell,* that jurisdiction was proper in *McConnell*, and that *McConnell* was decided by a valid judgment on the merits. *FEC Mem.* at 9.

& MILLER, FEDERAL PRACTICE AND PROCEDURE, *Definition of Claim or Cause of Action*, 18 F.P.P.§ 407 (2008) (transactional approach is "the predominant federal rule"). *See Boateng v. InterAmerican University*, 210 F. 3d 56, 61-62 (1st Cir. 2000); *Waldman v. Village of Kiryas Joel*, 207 F.3d 105 (2nd Cir. 2000); *CoreStates Bank v. Huls American, Inc*., 176 F.3d 187, 194 (3rd Cir. 1999); *Pittston Co. v. U.S.,* 199 F.3d 694, 704 (4th Cir.1999); *Lafreniere Park Foundation v. Broussard*, 221 F. 3d 804 (5th Cir. 2000); *J.Z.G. Resources, Inc. v. Shelby Ins. Co.,* 84 F.3d 211, 215 (6th Cir. 1996); *Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996); *Poe v. John Deere Co.,* 695 F.2d 1103, 1106 (8th Cir. 1982); *U.S. ex rel. Barajas v. Northrop Corp.,* 147 F. 3d 905, 910-911 (9th Cir. 1998); *Hatch v. Boulder Town Council,* 471 F. 3d 1142, 1149 (10th Cir. 2006); *Ragsdale v. Rubbermaid, Inc.,* 193 F.3d 1235, 1239 & n.8 (11th Cir. 1999).

The "transactional" approach examines whether a claim arises from the "same nucleus of facts" as a previous claim. *Page v. U.S.*, 729 F.2d 818, 820 (D.C. Cir. 1984). "Federal law is clear that post-judgment *events* give rise to new claims, so that claim preclusion is no bar." *Stanton v. District of Columbia Court of Appeals,* 127 F.3d 72, 78 (D.C. Cir. 1997). And "[claim preclusion] does not bar parties from bringing claims based on material facts that were not in existence when they brought the original suit." *Apotex, Inc. v. Food & Drug Admin. et al.*, 393 F.3d 210, 218 (D.C. Cir. 2004).

The FEC argues that the Supreme Court's facial upholding of the Federal Funds Restriction in *McConnell*, 540 U.S. 93, precludes Plaintiffs' current claims. Plaintiffs, the FEC asserts, are "'simply raising a new legal theory'" based on the same nucleus of facts at issue in *McConnell*. *FEC's Mem. in Sup. of Mot. to Dismiss* (Dkt. 20) at 20 (citation omitted) ("*FEC Mem.*"). The FEC's argument is without merit. The availability of future as-applied challenges,

which was expressly contemplated in *McConnell*, would be wholly illusory if such challenges were barred by claim preclusion. Furthermore, Plaintiffs' as-applied claims arise from a nucleus of facts that did not exist and was not considered in *McConnell*.

i. As-Applied Challenges Are Available Remedies

The plaintiffs who facially challenged the Federal Funds Restriction in *McConnell* are not precluded from bringing a subsequent as-applied challenge to that same provision. So contrary to the FEC's argument, the distinction between facial and as-applied challenges is not "legally irrelevant." *FEC Mem.* at 20.

Facial challenges are greatly disfavored, *see United States v. Salerno,* 481 U.S. 739 (1987), and, in the context of the First Amendment, in order to succeed on such a challenge, a plaintiff must prove that the law is "impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Rep. Party*, 128 S. Ct. 1184, 1190 n. 6 (2008) (citation omitted). In contrast, a plaintiff in an as-applied challenge must merely show that the law is unconstitutional when applied to a specific course of conduct or fact pattern. *See FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

The Supreme Court has routinely permitted parties to bring subsequent as-applied challenges to laws that it has facially upheld. *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1638-39 (2007) (upholding law facially but noting availability of future as applied challenges: "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop"); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (where overbreadth challenge fails, "whatever

overbreadth may exist should be cured through case-by-case analysis of the fact situations to which" a statute, "assertedly, may not be applied").

Likewise, *McConnell* also expressly contemplated future as-applied challenges to the BCRA by the same plaintiffs who were parties there. *See, e.g.*, 540 U.S. at 157 n. 52 (leaving open as-applied challenges to § 323(a), even by the same plaintiffs, if a state's law interferes with federal funds contributions), 159 (allowing a minor parties to bring as-applied challenges to §323(a) if they are unable to amass the necessary resources for effective advocacy), 173 (allowing state and local parties to bring as-applied challenges to § 323(b) if it reduces the party's ability to effectively advocate), 242 (leaving open the possibility of the *McConnell* plaintiff's bringing a challenge to §504 as interpreted by the FCC, or as otherwise applied), 243-44 (allowing for future as-applied challenges to § 504). The fact that the Court left open the possibility of as-applied challenges (a) to the exact provisions facially challenged in *McConnell,* (b) by the exact same plaintiffs as were in *McConnell*, shows that a previous facial challenge does not preclude a subsequent as-applied challenge such as this one.

For example, the national party plaintiffs in *McConnell*, including the RNC, argued that the Federal Funds Restriction's prohibition on soliciting non-federal funds and state funds was unconstitutional on its face. *Id.* at 157. The Court upheld the provision noting that under the BCRA political parties remained free to solicit federal funds. However, the *McConnell* plaintiffs had argued that the option of soliciting federal funds to state candidates was "illusory" because many states prohibited candidates from maintaining a separate federal account, which thereby prohibited state candidates from receiving federal funds. *Id.* at 157 n.52. In response, the Court stated:

> [T]he challenge we are considering is a facial one, and on its face [the Federal Funds Restriction] permits solicitations. The 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. Thus, despite its facial holding, the Court assumed the availability of future as-applied challenges to the plaintiffs there, including the RNC.

Similarly, the *McConnell* state party plaintiffs, including the CRP, argued that the Federal Funds Restriction was unconstitutional on its face because it impaired their ability to engage in effective advocacy in state elections. *Id.* at 173. The Court, however, stated that the state party's evidence was "'speculative'" and that "political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities." *Id.* Thus, the Court held, "on its face" the law was "closely drawn to match [] important governmental interests . . . ." *Id.* Nonetheless, the Court noted that "as-applied challenges remain available" so plaintiffs, including the CRP, could subsequently present new evidence demonstrating the Federal Funds Restriction's impact on them. *Id*.

So *McConnell* expressly contemplated that as-applied challenges remained available to the same plaintiffs who had facially challenged the law. But under the FEC's expansive view of claim preclusion, such future as-applied challenges would be barred. This cannot be correct, for the Supreme Court cannot be presumed to have engaged in such a game of bait-and-switch, *i.e.* state that as-applied challenges remain available when they would be barred by claim preclusion. The fact that Plaintiffs challenged the Federal Funds Restriction on its face in *McConnell* does not preclude them from bringing a subsequent as-applied challenge to that same provision.

ii. Different Nucleus of Facts

Not only is claim preclusion inapplicable because this is an as-applied challenge, but it is also inapplicable because Plaintiffs' as-applied claims arise from a different nucleus of facts than were at issue in *McConnell.*

1. Nucleus of Facts in *McConnell*

As set out in *Plaintiffs' Memorandum in Support of Summary Judgment* (Dkt. 21) at 21-27, *McConnell* sustained the Federal Funds Restriction against a facial overbreadth challenge based on the pre-BCRA factual record before the Court. As described more fully below, the Court determined that this record indicated that **(1)** political parties were using non-federal funds and state funds to influence federal elections and **(2)** national parties were employing fundraising practices that provided large donors of non-federal funds with special access to federal candidates and officeholders. 540 U.S. at 145-52. Based on these facts in the record, *McConnell* concluded that the means by which national parties used the relationship between themselves and federal officeholders rendered "all large soft-money contributions to national parties *suspect*." *Id.* at 155 (emphasis added).[7] Thus, as the FEC describes, *McConnell* found that the Federal Funds Restriction was "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." *FEC Mem.* at 17-18.

Similarly, in regard to the Federal Funds Restriction's limitations on state parties, *McConnell* concluded that by prohibiting state and local parties from using non-federal funds and state funds for "federal election activity" the Federal Funds Restriction was "narrowly focused"

[7] The term "soft money" is often used to describe "non-federal funds" and "state funds."

to "those contributions to state and local parties that can be used to benefit federal candidates *directly*." *Id.* at 167 (emphasis added).

So what material facts in the record did *McConnell* rely on as justifying the Federal Funds Restriction? First, pre-BCRA, non-federal funds and state funds were "in many cases solicited by the candidates themselves. . . . ." *Id.* at 125. *McConnell* noted that "federal officeholders [] commonly asked donors to make soft-money donations to national and state committees 'solely in order to assist federal campaigns,' including the officeholder's own." *Id.* at 146 (citation omitted). "Parties kept tallies," *McConnell* continued, "of the amounts of soft money raised by each officeholder, and the amount of money a Member of Congress raise[d] for the national political committees often affect[ed] the amount the committee g[a]ve to assist the Member's campaign.'" *Id.* (citation omitted). And national political parties and candidates "often teamed" up in "joint fundraising" efforts, so that candidates could "'rais[e] soft money for use in their own races." *Id.* at 146-47 (citation omitted). By prohibiting federal candidates and officeholders from soliciting non-federal funds, 2 U.S.C. § 441i(e), the BCRA effectively eliminated these practices.

Second, *McConnell* relied on "the manner in which parties ha[d] *sold* access to federal candidates and officeholders. . . ." 540 U.S. at 153-54. The Court found that the pre-BCRA record was "replete with [] examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150. "[T]he six national party committees actually furnish[ed] their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access." *Id*. at 151. National parties regularly offered meetings with officeholders in return for large donations

of non-federal funds, and parties encouraged officeholders to meet with large donors. *Id.* at 151-52.

Third, *McConnell* relied on political party's historical use of non-federal funds and state funds to influence federal elections. The Court found that under the pre-BCRA regulatory scheme, "parties were able to use vast amounts of soft money in their efforts to elect federal candidates." *Id*. at 142. "[A]s long as [donors] directed the money to the political parties, donors could contribute large amounts of soft money for use in activities *designed to influence federal elections*." *Id.* at 142 (emphasis added). In addition to using such funds themselves, national parties also transferred non-federal funds to their state party counterparts for use in influencing federal elections. *Id.* at 124.

Particularly troublesome to both Congress and the Court was the use of non-federal funds for "sham issue ads." *McConnell* looked to a 1998 Senate Committee on Governmental Affairs report, many recommendations from which were adopted by Congress in the BCRA. *Id.* at 130. The report indicated that "[i]n 1996 both parties began to use large amounts of soft money to pay for issue advertising designed to influence federal elections." *Id.* at 131. These sham issue ads "accomplished the same purposes as express advocacy," but unlike express advocacy, parties could use non-federal funds to pay for such ads. *Id.* at 131. Thus, the Court determined, unions, corporations, and wealthy individuals were circumventing contribution limits by giving large non-federal donations to political parties. *Id.*

In short, "[u]nder [the pre-BCRA] system, corporate, union, and wealthy individual donors [were] free to contribute substantial sums of soft money to the national parties, which the

parties [could] spend for the specific purpose of influencing a particular candidate's federal election. *Id.* at 145.

2. Nucleus of Facts in this Case

The material facts in this as-applied challenge are significantly different than the material facts considered by, and relied upon, in *McConnell.* First, no federal candidates or officeholders will solicit funds in any of Plaintiffs' intended activities at issue here. *See Complaint* ¶ 19; *Beeson Affidavit* at ¶ 19. So unlike in *McConnell*, there is no danger that candidates will be soliciting funds to parties to be used to assist their campaigns. Therefore,"tallying" and similar practices that existed in the pre-BCRA record before *McConnell* are no longer present.

Second, unlike the pre-BCRA record in *McConnell*, large donors can no longer procure preferential access to federal candidates or officeholders through their donations. In the activities at issue in this case, the RNC will not provide any contributor of non-federal funds or state funds with preferential access to federal candidates or officeholders, *i.e.* they will not treat donors of non-federal funds and states funds any differently than contributors of federal funds. 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. *Beeson Affidavit* at ¶ 19. *Affidavit of Robert M. "Mike" Duncan* (Dkt. 21, Exh. 2) at ¶ 6. Thus, the suspect fundraising practices in the *McConnell* record that were relied on by the Court are no longer present.

Third, unlike the pre-BCRA record in *McConnell*, none of Plaintiffs' intended activities will support any federal candidate or campaign. On the contrary, the RNC intends to solicit funds into separate segregated accounts, and to use those funds exclusively for non-federal campaign purposes. For example, the RNC intends to solicit funds into a Virginia Account to be used exclusively to support candidates for state office in Virginia. And all such funds will be solicited and spent in accordance with Virginia state law.

Finally, in the wake of the BCRA, the RNC activities have been affected to a greater degree than it could have anticipated in *McConnell*. For example, the rise of "527" advocacy groups, the explosion of internet fundraising, and the BCRA's barriers between the RNC and state party committees have impaired the RNC's activities to a greater degree than it could have expected. *Beeson Affidavit* at ¶ 21.

It is true that *McConnell* facially upheld the Federal Funds Restriction despite the fact the record indicated that the RNC spent up to 30% of its non-federal funds and state funds on state and local election activities. *FEC Mem.* at 17. However, the FEC incorrectly presumes that the RNC's as-applied claims rest solely on how it intends to spend non-federal funds and state funds. *Id.* ("In its decision on the merits, the Court first rejected the plaintiffs' premise that the constitutionality of Title I – which is the statutory limit on contributions to political parties – should be judged based on the activities for which the contributed funds would ultimately be spent").

On the contrary, as discussed above, there are a host of important factual distinctions that give rise to Plaintiffs' cause of action. The absence of federal candidates and officeholders in fundraising, the elimination of preferential access given to large donors, and the manner in which

the RNC intends to solicit non-federal funds and state funds, presents a markably different factual record than was considered in *McConnell*. So the simple fact that prior to the BCRA the RNC used non-federal funds and state funds to support activities similar to the activities they intend to support now, is not dispositive.

Plaintiffs' cause of action arises from an entirely different factual setting than the pre-BCRA situation considered in *McConnell*. Claim preclusion "does not preclude claims based on facts not yet in existence at the time of the original action. *Drake v. F.A.A.*, 291 F.3d 59, 67 (D.C. Cir. 2002). As this Circuit has stated:

> Litigation of the validity of one past course of conduct is not the same 'claim' as either (1) litigation over the validity of similar conduct occurring after the acts covered by the initial litigation; or (2) litigation challenging a rule in anticipation of its possible application to similar events occurring or expected to occur after the earlier lawsuit.

Stanton, 127 F.3d at 79 (internal citations omitted). Plaintiffs' cause of action does not arise from the same nucleus of facts present in *McConnell,* and claim preclusion is thereby inapplicable.

In sum, the doctrine of claim preclusion is no bar to this action. This action arises from a different nucleus of facts than those present in *McConnell* and as-applied challenges remain as available remedies.

B. Issue Preclusion Is Not Applicable

Not only is this action not barred by the doctrine of claim preclusion, but it is also not barred by the doctrine of issue preclusion. Under issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Issue preclusion is applicable when (1) the same issue being raised by a

party was raised in a previous case, (2) the issue was decided by a court of competent jurisdiction, and (3) preclusion would not work a basic unfairness. *Yamaha Corp. of America v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992).

Just like claim preclusion, "changes in facts essential to a judgment will render [issue preclusion] inapplicable in a subsequent action raising the same issues." *Montana*, 440 U.S. at 159. Issue preclusion is "confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *C.I.R. v. Sunnen*, 333 U.S. 591, 600 (1948). "[I]f the relevant facts in the two cases are separable, even though they be similar or identical, [issue preclusion] does not govern the legal issues which recur in the second case." *Id.* at 601.

Much of the discussion above in regard to claim preclusion is also applicable in regard to issue preclusion. For example, because there is a different nucleus of facts in this case than was in *McConnell*, different issues are also at stake in the two cases. Further, whether the Federal Funds Restriction is unconstitutional facially is a different issue than whether it is unconstitutional when applied to a specific course of conduct.

i. ***McConnell* Did Not Decide Future As-Applied Challenges**

While facially upholding the Federal Funds Restriction, *McConnell* did not decide the issues in this as-applied challenge. In *Wisconsin Right to Life, Inc. v. FEC,* 546 U.S. 410 (2006) ("*WRTL I*"), the Supreme Court unanimously held that, by facially upholding the BCRA's electioneering-communication prohibition, the Court did not decide future as-applied challenges to that provision. *Id.* at 412. In upholding the BCRA's prohibition on "electioneering communications," *McConnell* had stated that it "uph[eld] stringent restrictions on *all* election-

time advertising that refers to a candidate because such advertising will *often* convey [a] message of support or opposition." 540 U.S. at 239 (emphasis in original). Thus, when WRTL sought to challenge the electioneering communication prohibition as-applied to its anti-filibuster ads, the FEC argued that *McConnell*'s facial holding had already decided the issue. The Supreme Court in *WRTL I*, however, held that *McConnell*'s facial holding "did not purport to resolve future as-applied challenges." *Id.* at 412. *WRTL I* showed that broad facial analysis language about "*all*" electioneering communications being subject to prohibition did not mean that the Court would not protect electioneering communications that were genuine issue advocacy in a subsequent as-applied challenge. *See* 546 U.S. at 411-12.

Despite the FEC's attempt to distinguish it, *FEC Mem.* at 22-24, *WRTL I* is analogous to the present case. As described by the FEC, the issue in *WRTL I* "was [] whether *McConnell* had already decided the constitutional questions raised by WRTL (as the Commission argued), or whether M*cConnell* had left that question to be decided at a later time (as WRTL argued)." *Id*. at 22. Here, just like in *WRTL I*, the FEC is arguing that *McConnell* has decided the issue in this case because it held that "all relevant aspects of Title I were constitutional because they were contribution limits closely drawn to match the government's important interest in preventing actual and apparent corruption, regardless of how contributed funds would be disbursed." *Id.* at 27. And, as discussed below, just like *WRTL I*, broadly worded facial-analysis language in *McConnell* does not preclude the present as-applied claims. Indeed, *McConnell* itself warned against an overbroad reading of the language of a particular case: "We have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise

facts to which it is to be applied for the nature of judicial review constrains us to consider the case that is actually before us," 540 U.S. at 192 (citation and internal quotation marks omitted).

ii. *McConnell*'s Facial Holding

In upholding the Federal Fund Restriction against the national party plaintiffs' substantial overbreadth challenge, *McConnell* looked to the "close connection and alignment of interests" between national parties and the federal officeholders and candidates who raised money for them to find that "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 (emphasis added). Thus, in this substantial overbreadth context, the Court found that even those contributions to national parties ultimately "spent on purely state and local elections in which no federal office is at stake" were "*suspect*." *Id.* at 154-55 (emphasis added).

In regard to state and local committees, the Court facially upheld the Federal Funds Restriction as "a closely-drawn means of countering both corruption and the appearance of corruption." *Id.* at 167. *McConnell* stated that the Restriction was "narrowly focused on regulating contributions that pose the greatest *risk*" of corruption: "those contributions to state and local parties that can be used to benefit federal candidates directly." *Id.* (emphasis added). More specifically, in regard to the Restriction's prohibition on the use of state funds for communications that "promote," "oppose," "support," or "attack" federal candidates, 2 U.S.C. § 431(20)(A)(iii), the Court held that the "*overwhelming tendency*" of such communications to "benefit directly federal candidates" justified facially upholding the provision. *McConnell,* 540 U.S. at 170 (emphasis added).

While these findings were sufficient to uphold the law facially, they are not sufficient to uphold the law in every application, *i.e.* when the activities do not pose any risk of corruption and do not directly benefit federal candidates. In other words, by holding that all large contributions of non-federal funds and state funds to national parties were "suspect," *id.* at 155, *McConnell* did not hold that every such contribution *does in fact* pose a threat of corruption or its appearance. And simply because PASO communications might have the "overwhelming tendency" to directly benefit federal candidates, does not mean that every PASO communication poses a risk of corruption. So just like *WRTL I* held in respect to the electioneering communication prohibition, *McConnell* "did not purport to resolve future as-applied challenges" to the Federal Funds Restriction. *WRTL I,* 546 U.S. at 412.

iii. Issues in This Case

In this as-applied challenge Plaintiffs allege that the Federal Funds Restriction is unconstitutional applied to their intended activities, which are not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80, and are thereby too far removed from federal candidates and elections to pose any risk of corruption or its appearance. As set out more fully in *Plaintiffs' Memorandum in Support of Summary Judgment* (Dkt. 21) at 8-18, *Buckley*'s unambiguously-campaign-related requirement is the governing constitutional principle in the area of campaign finance regulation. As Judge Wilkinson has described it:

> The *Buckley* Court [] recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by demarcating a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular ... candidate."

North Carolina Right to Life v. Leake, 525 F.3d 274, 281 (4th Cir. 2008) (citations omitted).

Whether the Federal Funds Restriction can constitutionally be applied to Plaintiffs' intended activities was not "actually and necessarily determined" in *McConnell*. *Yamaha*, 961 F.2d at 258. As set out above, the material facts relied on in *McConnell* are not present in this case. *McConnell*'s holding was premised on the fact that (1) political parties were using non-federal funds and state funds to influence federal elections and (2) national parties were employing fundraising practices that provided large donors of non-federal funds with special access to federal candidates and officeholders. 540 U.S. at 145-52. Neither of these concerns is present in this as-applied challenge. In Plaintiffs' intended activities (1) no federal candidates or officeholders will participate in fundraising, (2) no preferential access to federal candidates or officeholders will be provided to contributors, and (3) Plaintiffs will not use non-federal funds or state funds to support any federal candidate of campaign. Therefore, the issue in this case was not decided in *McConnell*.

Contrary to the FEC's argument, Plaintiffs' claims are not "premised on [a] precluded argument regarding the way that [the] money will be spent . . . ." *FEC Mem*. at 28. Rather, it is the absence of federal candidate and officeholder involvement in *both* the fundraising practices at issue here and in the activities to be supported that demonstrates these activities are not unambiguously-campaign-related. In sum, issue preclusion is not applicable because *McConnell*'s facial holding did not decide the issue in this as-applied challenge.

II. Plaintiffs' Claims Do Not Fail As a Matter of Law

In *Plaintiffs' Memorandum in Support of Summary Judgement* (Dkt. 21), and above, Plaintiffs demonstrate at length why *McConnell* neither decided nor precludes their as-applied claims. Therefore, Plaintiffs claims do not fail as a matter of law.

Conclusion

Because Plaintiffs claims are not precluded the FEC's motion to dismiss should be denied.

Respectfully submitted,

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