United States District Court
District of Columbia

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

Plaintiffs' Reply Memorandum in Support of Summary Judgment

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Summary Judgment Reply

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Plaintiffs Republican National Committee *et al.* respectfully file this reply memorandum in support of their motion for summary judgment (Dkt. 21).

I. The Unambiguously Campaign Related Standard

In essence, Defendants and Amici assert that Plaintiffs made up the unambiguously-campaign-related standard, that it is just a ruse to reinstate the express-advocacy test as it existed before *McConnell v. FEC,* 540 U.S. 93 (2003), and that, in any event, the standard does not apply to contributions or to Plaintiffs.[1] Since all of this flows from a misunderstanding of the standard, further explanation of the standard would be helpful, keeping constitutional first principles in mind. *Pls.' Mem. in Supp. of Summ. J.* (Dkt. 21) at 7-8 ("*Pls.' Mem.*").

To ensure that a law is not "impermissibly broad," *Buckley v. Valeo* established that government may regulate political speech only when it is "unambiguously related to the campaign of a particular . . . candidate" in the jurisdiction in question, 424 U.S. 1, 80 (1976), or "unambiguously campaign related"[2] for short. *Id.* at 81.[3] As "'the distinction between discussion of issues

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[1] *Federal Election Commission's Opposition to Plaintiffs' Motion for Summary Judgment* (Dkt. 39) ("*FEC Mem.*") at 32-36; *Christopher Van Hollen Jr.'s Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment* (Dkt. 41) ("*Van Hollen Mem.*") at 21-26; *Democratic National Committee's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgement* (Dkt. 42) ("*DNC Mem.*") at 3-7; *Amicus Curiae Memorandum of Senator John S. McCain et al. in Opposition to Plaintiffs' Motion for Summary Judgment* (Dkt. 47) ("*McCain Mem.*") at 3-12; *Amicus Curiae Memorandum of Brennan Center et al. in Opposition to Plaintiffs' Motion for Summary Judgment* (Dkt. 48) ("*Brennan Center Mem.*") at 7 n. 2.

[2] All references to "unambiguously campaign related" are short for "unambiguously related to the campaign of a candidate in the jurisdiction in question" or "unambiguously related to the campaign of a particular federal candidate," as the case may be. *See Buckley,* 424 U.S. at 80.

[3] *See also North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 281 (4th Cir. 2008) ("*NCRL III*") (*quoting Buckley,* 424 U.S. at 80); *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert,* 581 F. Supp.2d 1132, 1141 (D. Utah 2008) (*quoting Buckley,* 424 U.S. at 80), 1144 (*citing Buckley,* 424 U.S. at 80); *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning,* No. 08-445, 2008 WL 4791004 at *7 (N.D. Fla. Oct. 29, 2008)

and candidates . . . may often dissolve in practical application,' *id.,* at 42, the only way to prevent the unjustified burdening of nonelection speech is to . . . regulat[e] only . . . speech that is 'unambiguously campaign related . . . .'" *McConnell,* 540 U.S. at 283 (Thomas, J., dissenting) (*quoting Buckley,* 424 U.S. at 81).

The Supreme Court has defined "unambiguously campaign related" as speech that fits one of the following three categories. In the first category, with caveats discussed below,[4] are contributions and spending by "political committees" that are under the control of a candidate, or have the major purpose of nominating or electing a candidate, in the jurisdiction in question. "Expenditures of candidates and political committees so construed … are, by definition, campaign related." *Buckley,* 424 U.S. at 79. The same is true of contributions they receive. *See, e.g., id.* at 23 n.24, 78.

In the second category, which applies to persons[5] that are not, or are not yet, political committees in the jurisdiction in question, are: (a) contributions the persons receive for the purpose of making contributions to political committees in the jurisdiction, *see id.* at 78, *quoted in FEC. v. Survival Educ. Fund,* 65 F.3d 285, 294 (2d Cir. 1995); (b) contributions the persons receive that are earmarked for spending for unambiguously-campaign-related political speech, *see id.* at 23 n.24, 78, *quoted in Survival Educ. Fund,* 65 F.3d at 294; and (c) spending for unambiguously-campaign-related political speech coordinated with a candidate, the candidate's agents, or the

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(*quoting Buckley,* 424 U.S. at 80), *clarified on other grounds,* 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008); *Center for Individual Freedom v. Ireland,* Nos. 08-190 & 08-1133, 2008 WL 4642268 at *5, 9, (S.D. W. Va. Oct. 17, 2008) ("*CFIF*"), *amended on other grounds,* (Feb. 12, 2009) (technical corrections).

[4] *Infra* Part I-C-1.

[5] References to "persons" are to legal persons, not just individuals.

candidate's committee, *see id., quoted in Survival Educ. Fund,* 65 F.3d at 294*; id.* at 80-81*,* with the law permitted to treat such coordinated speech as a contribution. *See id.* at 47-48 & n.53.

In the third category, which also applies to persons that are not, or are not yet, political committees in the jurisdiction in question, are two subcategories of spending for political speech of which the Supreme Court has allowed regulation: Express advocacy as defined in *Buckley*, *id.* at 44 & n.52, 80; *McConnell,* 540 U.S. at 281 (Thomas, J., dissenting) (*quoting Buckley,* 424 U.S. at 81), and electioneering communications as defined in the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"), whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate, *i.e.,* electioneering communications as defined in FECA that pass the appeal-to-vote test. *NCRL III,* 525 F.3d at 281 (*citing FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. ____, 127 S.Ct. 2652 (2007) ("*WRTL II*")). The express-advocacy test, *Buckley,* 424 U.S. at 44 & n.52, 80, "is directed precisely to that spending that is unambiguously related to the campaign of a particular … candidate." *Id.* at 80.[6]

A. Adhering to the Unambiguously Campaign Related Standard

Among the courts that have quoted the unambiguously-campaign-related standard are this Court, *FEC v. American Fed'n of State, County & Municipal Employees,* 471 F. Supp. 315, 316 (D.D.C. 1979) (*quoting Buckley,* 424 U.S. at 80), and the District of Columbia Circuit. *FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380, 391 & n.23 (D.C. Cir.) (*quoting*

[6] It is true that *McConnell* held that the express-advocacy test – rather than being the sole boundary around government's power *vis-à-vis* persons that are not, or are not yet, political committees in the jurisdiction in question – is a bulwark against unconstitutional vagueness and overbreadth, 540 U.S. at 190-94, and stated that neither *Buckley* nor *MCFL* "suggested that [law] that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 192. However, it does not follow that law regulating political speech is constitutional as long as the law is not vague. *See id.* That would allow *any* non-vague regulation.

Buckley, 424 U.S. at 79-80), *cert. denied,* 454 U.S. 897 (1981).[7]

B. Applying the Unambiguously Campaign Related Standard

If political speech is *not* unambiguously campaign related, government may not regulate it, and the law regulating the speech is unconstitutional. *In effect, then, the unambiguously-campaign-related standard takes some things off the table, because they are beyond what government has the power to regulate.* The next question is whether the law is unconstitutional as-applied, facially, or both. After all, laws regulating speech that is not unambiguously campaign related may regulate (1) some speech that is unambiguously campaign related, and some that is not, or (2) *only* speech that is not unambiguously campaign related.

If political speech *is* unambiguously campaign related, one proceeds to the next set of questions to determine whether the law regulating the speech is constitutional. These questions involve whether the law is unconstitutionally vague, and therefore overbroad. To the extent a law is not vague, a court also asks whether it passes the appropriate level of constitutional scrutiny.[8]

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[7] Several other federal courts have issued holdings on, or otherwise quoted, the unambiguously-campaign-related standard. *Virginia Soc'y for Human Life, Inc. v. FEC,* 263 F.3d 379, 383 (4th Cir. 2001) (*quoting Buckley,* 424 U.S. at 79-80); *FEC v. Furgatch,* 807 F.2d 857, 860 (9th Cir.) (*quoting Buckley,* 424 U.S. at 80), *cert. denied,* 484 U.S. 850 (1987); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 & n.10 (11th Cir. 1982) (*quoting Buckley,* 424 U.S. at 79-80); *FEC v. Central Long Island Tax Reform Immediately Comm.,* 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*) (*quoting Buckley*); *Vermont Right to Life Committee, Inc. v. Sorrell,* 19 F. Supp.2d 204, 215 (D. Vt. 1998) ("*VRLC I*") (*quoting Buckley,* 424 U.S. at 80), *rev'd on other grounds,* 221 F.3d 376, 386, 389-91 (2d Cir. 2000).

[8] Plaintiffs recognize that *McConnell* applied intermediate scrutiny in upholding the Federal Funds Restriction on its face. However, as noted in their opening brief, Plaintiffs believe heightened scrutiny is appropriate in this as-applied challenge. *Pls.' Mem.* at 17-18, 41-42. In the case of the RNC, by limiting contributions to accounts designated to be used for specific purposes, the Federal Funds Restriction acts as an expenditure limitation. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) ("[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."). Plaintiffs CRP and RPSD intend to spend their existing state funds for their intended activities. Thus, the Federal Funds Restriction acts as an

Before asking this next set of questions, however, a court asks whether what is regulated is unambiguously campaign related. *National Right to Work,* 581 F. Supp.2d at 1146; *see NCRL III,* 525 F.2d at 281 (*quoting Buckley,* 424 U.S. at 80). If it is not, government "simply cannot regulate it" in the first place, so vagueness and the level of scrutiny are beyond the point. *Broward Coal. of Condos.,* 2008 WL 4791004 at *6 (*citing National Right to Work,* 581 F. Supp.2d at 1146).[9] *Buckley,* for example, construed "expenditure" to reach only unambiguously-campaign-related communications *before* applying a level of scrutiny. 424 U.S. at 79-81; *see also id.* at 44-51. Thus, a court *needs* to reach this next set of questions only if political speech *is* unambiguously campaign related.[10] Nevertheless, when law regulates what is *not* unambiguously campaign

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expenditure limit on them as well. And the Supreme Court in *WRTL II* applied strict scrutiny and held that WRTL's option to use federal funds did not eliminate its right to use non-federal funds where its First Amendment activity was not unambiguously campaign related. 127 S. Ct. at 2671 n.9. Furthermore, the Supreme Court has applied strict scrutiny when analyzing laws imposing "PAC" style regulation on groups and associations, because the imposition of such reporting requirements imposes a severe burden on political speech. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 255-56 (1986) ("*MCFL*"); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990). Party committees are regulated even more stringently than political committees. *See infra* I-C. In any event, as-applied to Plaintiffs' intended activities, the Federal Funds Restriction fails both strict and intermediate scrutiny. *Infra* Part III.

[9] Of course, a law may reach beyond political speech that is unambiguously campaign related at least in part *because* the law is vague. *See, e.g., Buckley,* 424 U.S. at 79-81; *see also id.* at 44-51. In that case, vagueness is part of the unambiguously-campaign-related analysis, yet the unambiguously-campaign-related analysis still comes first.

[10] *See Machinists Non-Partisan Political League,* 655 F.2d at 391-96 (not reaching this set of questions when an alleged political committee was not under the control of a candidate in the jurisdiction in question); *American Fed'n of State, County & Municipal Employees,* 471 F. Supp. at 316-17 (not reaching this set of questions when political speech was not express advocacy); *NCRL III*, 525 F.3d at 281-86 (not reaching this set of questions when political speech was not unambiguously campaign related); *National Right to Work,* 581 F. Supp.2d at 1152-54 (same); *Virginia Soc'y,* 263 F.3d at 383, 390-92 (not reaching this next set of questions); *Furgatch,* 807 F.2d at 860, 862 (applying a level of scrutiny to disclosure provisions for what the court said was express advocacy); *Florida for Kennedy Comm.,* 681 F.2d at 1286-88 (not reaching this set of questions when an alleged political committee was not under the control of a candidate in the

related, a court *may* reach this set of questions to support, or support *further,* the conclusion that the law is unconstitutional.[11]

C. Not All Political Party Activities Are Unambiguously Campaign Related.

Defendants contend that under *Buckley,* 424 U.S. at 78-79, everything a party does is campaign related. This is incorrect for several reasons.

1. Party spending was not at issue in *Buckley*.

When *Buckley* stated that "political committee" spending was campaign related, *id.* at 80, it was not talking about *party* spending, and the regulation of political *party committees* was not before the *Buckley* Court. *See id.* FECA uniquely regulates political parties. The RNC and its officers are limited to federal funds because the RNC is a "national committee" of a political party, 2 U.S.C. § 441i(a), not because it is a "political committee." The CRP and its officers are limited to federal funds because the CRP is a "state committee" of a political party, 2 U.S.C. § 441i(b), not because it is a political committee. Regardless of a political party committee's "major purpose," *Buckley,* 424 U.S. at 79 (establishing political committee status), the Federal Funds Restriction applies to political party committees.

Both political committees and party committees are expressive associations, but an associa-

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jurisdiction in question); *Central Long Island,* 616 F.2d at 52-53 (not reaching this set of questions when political speech was not express advocacy).

[11] *See NCRL III,* 525 F.3d at 290; *National Right to Work,* 581 F. Supp.2d at 1151, 1154; *Broward Coal. of Condos.,* 2008 WL 4791004 at *4-6, 9, 12-13; *VRLC I,* 19 F. Supp.2d at 215, *rev'd on other grounds,* 221 F.3d at 386, 389-91.

In some actions, such as *WRTL II,* where the speech at issue was *not* unambiguously campaign related, the issue did not arise, and the Court proceeded to address the appropriate level of scrutiny. In other actions, such as *FEC v. Colorado Republican Fed. Campaign Comm*., 518 U.S. 604 (1996) ("*Colorado Republican I*"), where the speech at issue *was* unambiguously campaign related, the issue also did not arise.

tion that forms a political committee has many more options than a political party committee. For example, it is typical for expressive organizations to organize as a nonprofit 26 U.S.C. § 501(c)(4), with an educational entity under 26 U.S.C. § 501(c)(3), and to form federal and state political committees as needed, all controlled by common or overlapping boards and officers. The federal political committee entity, soliciting and spending federal funds, is just one way in which the expressive association operates. The association can then use federal funds and non-federal funds as it sees best, in compliance with the law, to express itself.

But if an expressive association becomes a political party committee, it loses all those other options because *everything* it establishes, finances, maintains, or controls is limited to federal funds by the party entity provision at 11 C.F.R. § 300.2(c). And unlike other organizations, national party committees may not have separate accounts, with federal and non-federal money for federal and non-federal activities. *See* 11 C.F.R. § 102.5(c), *cited in id.* § 106.5(a)(1) (allocation rules for national party committees).[12]

In sum, FECA regulates Plaintiffs for being party committees, not for being political committees. *Buckley* dealt with "political committee" regulation. *Buckley* did not decide the issue of what political party spending is unambiguously campaign related. And political parties need the protections afforded by the unambiguously-campaign-related principle.

2. Not all donations to political parties are campaign related.

When *Buckley* stated that contributions to political parties were campaign related, 424 U.S. at 23 n.24, 78, it was not talking about everything of value given to a party, irrespective of its

[12] *See also Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money,* 67 FED. REG. 49064, 49077 (FEC 2002) (emphasizing that Section 106.5 applies only to *national*-party committees).

purpose.[13] *See McConnell,* 251 F. Supp. 2d 176, 389-90 (D.D.C. 2003) (Henderson, J.). If what a party receives is not "for the purpose of influencing any election for [f]ederal office . . . ," then it is not a contribution. *See* 2 U.S.C. § 431(8)(A)(i). Nothing that any of the Plaintiffs want to receive through this action is for the purpose of influencing any federal election.[14] Therefore, nothing they want to receive is campaign related.[15]

3. Parties are unique expressive organizations.

Defendants' general attempt to equate "political committees" with political parties stems from a basic misunderstanding of the nature of political parties. Under our system of government, parties are special expressive organizations. Indeed, the Supreme Court has already acknowledged that, even with respect to federal candidates, government may not regulate everything that *national* parties do in every conceivable way. *See Colorado Republican I,* 518 U.S. at 613-18. This is in part because a "party has its own traditions and principles that transcend the interests of individual candidates and campaigns . . . ." *Id.* at 629 (Kennedy, J., concurring in the judgment and dissenting in part). *See also* Exhibit 1, *Deposition of Thomas J. Josefiak* (Excerpted) at 138:11-18 ("The RNC is a *national* party, and not just a *federal* party.") (emphasis added). "[P]olitical parties are unique; they are neither super multicandidate political committees formed entirely to support candidates for federal office nor political associations completely uninvolved

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[13] If it were talking about everything, then in attempting to construe the phrase "for the purpose of influencing" a federal election, the Court in *Buckley* would have been expanding the term "contribution" to include funds that have no influence on federal elections or candidates.

[14] *Infra* Part III.

[15] Morever, the RNC intends to solicit funds into separate accounts, which are designated for specific non-federal purposes. But as noted *supra*, the RNC is prohibited from having such non-federal accounts.

in candidate advocacy." *McConnell*, 251 F. Supp.2d at 766 (Leon, J.). "[P]arties encourage 'democratic nationalism' by nominating and electing candidates and by engaging in dialogues concerning public policy issues of national importance." *Id.* at 820-21. That the First Amendment protects such activity is not surprising, since parties have a unique role in promoting uninhibited, robust, and wide-open debate on public *issues, Colorado Republican I,* 518 U.S. at 629 (Kennedy, J., concurring in the judgment and dissenting in part) (citations omitted), not just in promoting candidates. *See also Pls.' Mem.* at 27-30.

D. Government May Regulate Only Political Party Activity That Is Unambiguously Campaign Related.

As discussed above, *Buckley* did not decide what activities by political parties are unambiguously campaign related. Nor did *McConnell*. *McConnell* held that the Federal Funds Restriction was not facially unconstitutional based on the record before it. 540 U.S. at 154-56. Therefore, the Court held the statute was not substantially overbroad. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). *McConnell* did not, however, define the precise constitutional line at which Congress may regulate funds received and spent by political parties.

However, the Constitution requires drawing lines. And as *WRTL II* reminds us, "it is worth recalling the language we are applying" "when it comes to drawing difficult lines in the area of pure political speech." 127 S.Ct. at 2674. *WRTL II* recited the First Amendment mandate that "'Congress shall make no law . . . abridging the freedom of speech,'" *id.* (*quoting* U.S. Const. amend. I), stating that the "Framers' actual words put these cases in proper perspective" in this line-drawing endeavor. *Id*.

Here, the first constitutional line for contributions to political parties must be drawn where

the Court has drawn it in all other contexts, *i.e.* where the activity becomes unambiguously campaign related, *see Buckley*, 424 U.S. at 80-81, by directly benefitting federal candidates. *See McConnell,* 251 F. Supp.2d at 763-74, 781 & n.63 (Leon, J.). This ensures that the Federal Funds Restriction is not "too remote," *Buckley,* 424 U.S. at 80, to the governmental authority to regulate elections and thereby "impermissibly broad." *Id.*

II. *McConnell* Does Not Decide or Preclude This As-Applied Challenge.

Just as in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), Defendants are arguing that *McConnell*'s facial upholding of a BCRA provision precludes or decides a subsequent as-applied challenge. And just as in *WRTL I*, *McConnell*'s facial upholding of the Federal Funds Restriction does not decide this as-applied challenge. *See id.* at 411-12. As Plaintiffs have set out in previous briefing, that the Federal Funds Restriction is facially constitutional does not mean it is constitutional in all its applications, particularly when the activities and fundraising practices relied on in *McConnell* are not present. Rather than reproduce these arguments, and for the sake of space, the Court is respectfully directed to this previous briefing. *Pls.' Mem.* at 19-27; *Pls.' Mem. in Opp'n to the FEC's Mot. to Dismiss* (Dkt. 27).

III. Plaintiffs' Intended Activities Are Not Unambiguously Campaign Related and the Federal Funds Restriction Fails the Relevant Level of Scrutiny.

As set out below, Plaintiffs' intended activities are not unambiguously campaign related, because they do not directly benefit federal candidates. Because of this, and because the RNC will not provide non-federal donors with preferential access to federal officeholders or candidates, these activities are too far removed from federal candidates and elections to be regulated. Furthermore, as applied to Plaintiffs' intended activities, the Federal Funds Restriction is not

narrowly tailored or closely drawn to any compelling or important government interest in preventing corruption or its appearance. *Cf. FEC v. National Conservative Political Action Comm.,* 470 U.S. 480, 496-97 (1985) ("*NCPAC*").

Nevertheless, Defendants argue that Plaintiffs' intended activities *do* directly benefit federal candidates. *Van Hollen Mem.* at 35; *FEC Mem.* at 38.[16] And moreover, Defendants assert it is irrelevant whether (1) these activities benefit federal candidates, (2) federal candidates solicit the funds themselves, or (3) the RNC facilitates preferential access to federal candidates and officeholders. This is so, it is argued, because even in the absence of all these facts, officeholders and candidates will nonetheless be grateful or feel obligated to non-federal donors, which gives rise to an appearance of corruption. *FEC Mem.* at 16-24, 27; *Van Hollen Mem*. at 9-15, 26-30.

The reach of Defendants' arguments is stunning. Indeed, Defendants' arguments would justify

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[16] In addition to arguing that such activities would directly benefit federal candidates or officeholders, Defendants say that because money is fungible, any contribution to the RNC for its intended activities would in turn free up other money that the RNC could use to benefit directly federal candidates. *Van Hollen Mem.* at 42.

But what would be wrong with that? The other money would be *federal* money, which the RNC may use for federal activities, *see* 2 U.S.C. § 441i(a), and government may not limit spending for political speech here. *See Randall v. Sorrell,* 548 U.S. 230, 240-46 (2006); *Buckley,* 424 U.S. at 54-58. In addition, Defendants ignore the fact that the RNC is not doing many of the activities for which it would use state and non-federal money, because (1) the RNC may raise only federal money, 2 U.S.C. § 441i(a), (2) federal money is harder to raise than other money, and (3) federal money is needed in other areas. *See FEC Mem.* Exh. 1 (Josefiak Dep.) at 141:13-144:14; *see also FEC Mem.* Exhibit 4. Therefore, the RNC's receiving and spending non-federal money will hardly result in any more federal money for the RNC to spend on activities directly benefitting federal candidates. Instead, it will enable the RNC to engage in additional non-federal activities.

More fundamentally, the fungibility argument is clever, but it has no stopping point. *Cf. United States v. Lopez,* 514 U.S. 549, 600 (1995) (Thomas, J., concurring). Under this argument, *no* organization with an account for federal money could establish a non-federal account, because that would allow the organization to spend more of its federal money on federal activities. But the law already contemplates organizations other than national party committees having federal and non-federal accounts for federal and non-federal activities. *See* 11 C.F.R. § 102.5.

federal regulation of nearly all state and local election activities, including contributions to the campaigns of state and local candidates. "Enough is enough." *WRTL II,* 127 S.Ct. at 2672.

A. Plaintiffs' Activities Will Not Directly Benefit Federal Candidates.

1. New Jersey Account and Virginia Account

The RNC intends to use the New Jersey Account and the Virginia Account to support state candidates in those states in the upcoming 2009 elections. No federal candidates will appear on the 2009 ballot in these states. Support for state candidates would include direct contributions to state candidates, advertising to support state candidates, get-out-the-vote ("GOTV") activities, and voter registration drives. *Plaintiffs' Statement of Undisputed Material Facts* ("SUF") ¶¶ 8-12.

Despite the state nature of these activities, Defendant Van Hollen argues that these activities "will directly benefit federal officeholders and candidates." *Van Hollen Mem*. at 35.[17] Van Hollen alleges that, even in non-federal elections, voter identification and voter registration efforts provide the RNC with information that can be used as a "building block" for similar efforts in future federal elections in those states. *Id.* And he notes that "[a] Republican registered in a contest in which only state candidates are on the ballot is free to vote in all future federal elections." *Id.*

Van Hollen overreaches. Van Hollen fails to demonstrate how these alleged benefits are "direct." And to the extent this information is stored by the RNC, it has little *if any* value for use

[17] An FEC Advisory Opinion (AO) has held that 2 U.S.C. § 441i(e) did not prevent members of Congress from raising money for state ballot initiatives when the ballot had nonfederal candidates, *e.g.*, http://www.at-la.com/@la-gov/electold.htm (click on "November2005 Municipal"); *contra FEC Mem.* at 35 n. 16, but no federal candidates. AO 2005-10 at 2 (FEC Aug. 22, 2005) (*Berman-Doolittle*). In addition, the speech at issue in AO 2005-10, like the speech at issue in this action, was not unambiguously campaign related, *see supra* Part I.A, and did it directly benefit federal candidates.

in future elections. *Van Hollen Mem.* Exh. 11 (Josefiak Dep.) at 246:2-13, 19-22 (noting that such information is "worthless" absent continuing enhancement process). Moreover, his analysis would justify federal regulation of *all* voter identification and voter registration efforts, in *any* state or local election, by *any* person or party. Surely the *federal* government may not regulate a local party's voter identification and voter registration efforts for a local mayoral race in an election where no federal candidate is on the ballot. *Cf. Buckley,* 424 U.S. at 13 & n.16. Yet this is precisely where Van Hollen's argument leads. Furthermore, Defendants make no argument that contributions to state candidates, advertising for state candidates, and GOTV in state elections directly benefit federal candidates. Indeed, Defendant FEC's own expert in *McConnell* noted that contributions to state candidates in odd-numbered years do not affect federal elections. *See* 251 F. Supp. at 830 (Leon, J.) (*citing* Cross Exam. of Defense Expert Mann at 71). The RNC's New Jersey Account and Virginia Account will not directly benefit any federal candidate.

2. Redistricting Account

Defendants argue that the RNC's intended support of redistricting activities "directly benefit" federal elections. *Van Hollen Mem.* at 33; *FEC Mem.* at 40. Defendants cite no authority for this assertion. Rather, they cite to a *McConnell* expert opining as to the importance of redistricting generally. *Van Hollen Mem.* at 33. Supporting redistricting does not "directly" benefit federal candidates. *McConnell*, 251 F. Supp.2d at 831 (Leon, J.). Redistricting is the province of the states, which have assigned the task to legislatures, non-partisan commissions, or both. Defendants do not explain how assisting these people directly benefits any federal candidate or officeholder. And a donor contributing to the Redistricting Account would have no control over what state's redistricting efforts those funds may reach.

Furthermore, just as in the case of the New Jersey Account and Virginia Account discussed above, Defendants' arguments have broad reaching implications. If redistricting directly benefits federal candidates and officeholders, and poses a threat of corruption or its appearance, then federal regulation of contributions to state legislators and state gubernatorial[18] candidates might well be justified also. For example, because state officials are tasked with redistricting, and if redistricting affects federal elections, contributions to such state officials' campaigns could be deemed a direct benefit to federal candidates. But of course, some indirect and tangential effect on federal elections cannot justify federal regulation. *See, e.g., McConnell,* 251 F. Supp.2d at 763-74, 781 & n.63 (Leon, J.). Federal elections are decided by voters, not by redistricting. The RNC's Redistricting Account will not directly benefit any federal candidate.

3. Litigation and Building Accounts

Defendants make no effort to argue that the RNC's disbursements from a Building Account would directly benefit federal candidates. However, Defendant Van Hollen argues that the RNC's use of the Litigation Account will "in substance, affect federal elections." *Van Hollen Mem*. at 35. But again, Defendants offer nothing more than a conclusory statement from an expert presuming to know the RNC's intent behind litigation involving vote counts. *Id.*[19] And De

[18] Governors participate in redistricting in some states. For example, Indiana requires its General Assembly to complete the redistricting process immediately following the U.S. Census. Ind. Code § 3-3-2-1. However, if the Assembly cannot complete the process, state law provides for a redistricting commission to complete the process, one of whose members is appointed by the Governor. Ind. Code § 3-3-2-2.

[19] Van Hollen's argument is further belied by FEC regulations. The FEC has long exempted from the definitions of "contribution" and "expenditure" loans, gifts, and payments regarding recounts in federal elections. 11 CFR §§ 100.91, 100.151. And the definition of "election" does not include recounts. 2 U.S.C. § 431(1); 11 CFR § 100.2(a).

Further, the FEC has just said a national party committee may have an account for federal election contests and recounts. While this account may have only federal money, it also has its

fendants fail to grasp that in our republic, it is the voters who decide elections. Nor do Defendants even attempt to explain how litigation challenging the constitutionality of various campaign laws (like the present case) directly benefit any federal candidate or officeholder. In defending the constitutionality of a federal law, Defendants must prove their assertions rather than nakedly stating conclusions. *See WRTL II,* 127 S.Ct. at 2664 (rejecting the FEC's contention that the speaker has the burden of proof in an as-applied challenge (*citing First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978)). The RNC's Litigation Account would not directly benefit any federal candidate.

4. Grassroots Lobbying

Defendants argue that the RNC's use of non-federal funds for grassroots lobbying will "open the door to precisely the same kind of 'issue advertising designed to influence federal elections' about which Congress and the Supreme Court were concerned." *FEC Mem*. at 43 (*quoting McConnell*, 540 U.S. at 131); *see also Van Hollen Mem*. 34-45 ("RNC's present desire to spend soft money on issue advertising, through the guise 'grassroots lobbying,' reveals itself as no more than a thinly veiled attempt to use soft money to influence federal elections"). Interestingly, Defendants ignore the text of the RNC's grassroots lobbying advertisements altogether. SUF ¶ 16. Similarly, Defendants omit any mention of *WRTL II*. Instead, Defendants quote at length excerpts from the *McConnell* record concerning alleged "sham issue ads." *FEC Mem.* at 43, *Van Hollen Mem*. at 34. And the FEC points to the fact that the RNC identified as genuine grassroots lobby-

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own contribution limit separate from other party accounts. Advisory Op. ("AO") 2009-04 at 2-3 (*Franken*) (FEC March 20, 2009) (all AOs and related documents available at http://saos.nictusa.com/saos/searchao). Thus, in effect, the FEC allows persons to double what they contribute for such activities, which further belies Van Hollen's argument that such activities pose a threat of corruption.

ing two ads that this Court in *McConnell* found to be "electioneering advertisements." *FEC Mem* at 43.

However, both the "Card Check" and "Freedom of Speech" ads that the RNC intends to broadcast with non-federal funds, SUF ¶ 16, and the "More" and "Taxed too Much" ads previously identified by this Court as "electioneering," plainly fit the description of what the Supreme Court has subsequently described as "genuine issue advocacy." *WRTL II*, 127 S. Ct. at 2667. As set out in Plaintiffs' opening brief, *Pls.' Mem.* at 35-37, the Supreme Court in *WRTL II* provided the means to distinguish alleged bogus issue ads from genuine issue advocacy. Under *WRTL II,* ads such as "Card Check" and "Freedom of Speech" are genuine issue ads, not "electioneering" advertising or "campaign speech." *See* 127 S. Ct. at 2559, 2667, 2669 n. 7; *see also Pls.' Mem.* at 36 (applying *WRTL II* to the RNC's ads). As such, *WRTL II* held that no corruption interest extends to such ads. *Id.* at 2672. So the RNC's genuine grassroots lobbying ads are not the type of alleged "bogus issue ads" designed to influence federal elections identified by the Supreme Court in *McConnell*. Genuine grassroots lobbying ads do not directly benefit any federal candidate. Such ads' "impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions." *Id.* at 2667. The RNC's Grassroots Lobbying Account will not directly benefit federal candidates.

5. CRP's Ballot Initiative Advocacy

Defendants similarly argue that CRP's[20] proposed ballot measure advocacy, SUF ¶ 64, directly benefits federal candidates. *FEC Mem* at 42; *Van Hollen Mem* at 36. Here, Defendant FEC

[20] Plaintiffs California Republican Party and Republican Party of San Diego are collectively referred to as "CRP."

attempts to distinguish away *WRTL II* because it was in the context of BCRA's prohibition on "electioneering communications," and it did not address § 431(20)(A)(iii)'s definition of "promote, support, attack, or oppose" ("PASO") communications. *FEC Mem.* at 42. And the FEC points out that the speaker in *WRTL II* was a corporation, not a political party. *Id.*

But *WRTL II*'s holding did not rest on the nature of the speaker, but rather on the nature of the communication.[21] As set out above, *WRTL II* distinguished genuine issue advocacy from sham issue ads. CRP's Letter qualifies as the former. *Pls.' Mem*. at 42-44 (applying *WRTL II* to CRP's letter). It is true that in facially upholding § 431(20)(A)(iii)'s definition of PASO communications, *McConnell* stated that the "overwhelming tendency" of such ads was "to benefit directly federal candidates. . . ." 540 U.S. at 170. However, the Court pointed to evidence concerning "bogus issue advertising" to support that facial holding. *Id.* In the wake of *WRTL II,* it is apparent that CRP's letter is not "bogus issue advertising," but is instead genuine issue advocacy. As such, it does not directly benefit any federal candidate.

6. Non-targeted federal election activity.

Finally, Defendants argue that Plaintiffs' GOTV, voter identification, and voter registration efforts in elections where both state and federal candidates are on the ballot, but which will not be targeted to any federal candidate or federal race, directly benefit federal candidates. *FEC Mem*. at 38; *Van Hollen Memo* at 36. Such activities may take two different forms. First, are voter registration, voter identification, and GOTV efforts that are targeted to only state candidates or to specific state races and which do not name or reference any federal candidate. Second,

[21] The Court stated that neither the corporate form interest nor any interest in preventing *quid pro quo* corruption extended to genuine issue ads such as WRTL's. *WRTL II*, 127 S. Ct. at 2672.

are voter registration, voter identification, and GOTV efforts that are generic in nature, *i.e*. they do not target any state or federal race and do not mention any state or federal candidates, but rather target Republican voters generally. Neither category of activities is "unambiguously related to the campaign of a particular federal candidate." *Buckley,* 424 U.S. at 80.

In the first category, activities targeted to state candidates and state races do not directly benefit federal candidates. The simple fact that a state holds its elections on the same day as a federal election should not have the effect of federalizing all such state election activities. Any effect on federal candidates and officeholders would be indirect and tangential. In the second category, generic activities not targeted to either state or federal candidates and races also do not directly benefit federal candidates. Plaintiffs recognize that *McConnell* stated that such activities (in the context of federal elections) "directly [a]ffect" federal elections. 540 U.S. at 168. However, any such activities that are not targeted to a federal candidate or campaign are not "unambiguously related to the campaign of a particular federal candidate." *Buckley,* 424 U.S. at 80.

B. Plaintiffs Will Not Provide Preferential Access to Non-Federal Donors

In addition to arguing that Plaintiffs intended activities directly benefit federal candidates, Defendants also argue the ultimate use to which contributions are put is irrelevant. *Van Hollen Mem*. at 16; *FEC Mem*. 10-12. Rather, Defendants assert, it is the "close relationship between federal officeholders and national parties, as well as the means by which parties have traded on that relationship," which creates an appearance of corruption justifying the Federal Funds Restriction's prohibitions on national parties. *FEC Mem.* at 10 (*quoting McConnell*, 540 U.S. at 154-55); *Van Hollen Mem.* at 26 ("[P]olitical parties are inseparable from their elected officials and candidates. Regardless of how large political contributions are actually used, large financial con-

tributions to the parties risk[] creating an appearance that those contributors will receive special treatment by the elected officials whom the parties represent and serve.").

It is true that the *McConnell* majority recognized the governmental interest in preventing the appearance of corruption could extend to reach contributions irrespective of their end use. *See* 540 U.S. at 154-55, 156.[22] However, as set out in Plaintiffs' opening brief, *Pls.' Mem.* at 21-24, this holding was premised on the historical practice of national parties to facilitate preferential access to federal officeholders and candidates in exchange for large contributions of non-federal funds. *McConnell*, 540 U.S. at 154 ("[I]t is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence"); *id.* at 155 ("Access to federal officeholders is the most valuable favor the national party committee are able to give in exchange for large donations."). Pointing to evidence of this practice, the Court stated that "large soft-money donations to national party committees are likely to buy donors preferential access to federal officeholders no matter the ends to which their contributions are eventually put." *Id.* at 156. Thus, "Congress had sufficient grounds to regulate the appearance of undue influence *associated with this practice*." *Id.* (emphasis added).

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[22] This limited interest in regulating contributions irrespective of their end use was recognized only in context of national parties. In regard to state and local party committees, which are required to use federal funds for "federal election activity," the Court facially upheld the Federal Funds Restriction because it was narrowly focused on regulating "those contributions to state and local parties that can be used to benefit federal candidates directly." *McConnell*, 540 U.S. at 167. To the extent the Court discussed such parties' relationships with federal candidates and officeholders as justifying regulation, it did so only *in addition* to the fact that the activities directly benefitted federal candidates. *Id.* at 156 n. 51 ("Thus, in upholding § 323(b) . . . we rely not only on the fact that [it] regulate[s] contributions used to fund activities influencing federal elections, but also that [it] regulate[s] contributions to or at the behest of entities uniquely positioned to serve as conduits for corruption"). Because CRP's activities do not directly benefit federal candidates, *supra*, evidence regarding CRP's relationship with federal candidates and officeholders is irrelevant.

So to the extent that *McConnell* found contributions to national parties posed a threat of corruption, *irrespective of their end use*, it did so because of the national parties practice of facilitating preferential access to federal candidates and officeholders.[23] In the present case the RNC will not provide non-federal donors with preferential access to any federal candidate or officeholder.[24] SUF ¶¶ 24, 30; *FEC Mem.* Exh. 4 at 7; *FEC Mem.* Exh. 1 (Josefiak Dep.) at 126:20-130:3. Regardless of the amount of non-federal funds or state funds a contributor may give to any of the RNC's accounts, they will receive no preferential access to any federal candidate or officeholder in return. *FEC Mem.* Exh. 1 (Josefiak Dep.) at 126:20-130:3.

It is true that some non-federal contributors might also be contributors of federal funds. As noted by the FEC, *FEC Mem.* at 23, 31, federal funds contributors who have also contributed

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[23] It must be noted that this expansion of the governmental interest in preventing *quid pro quo* corruption was strongly criticized by the *McConnell* dissenters. Justice Kennedy described the expansion as "a quick and subtle shift, and one that breaks new ground." *Id.* at 295 (Kennedy, J., dissenting). Morever, Justice Kennedy continued,

> [t]he majority [] ignores that in *Buckley,* and ever since, those party contributions that have been subject to congressional limit were not general party-building contributions but were only contributions used to influence particular elections. That is, they were contributions that flowed to a particular candidate's benefit, [] posing a *quid pro quo* danger. And it ignores that in *Colorado II,* the party spending was that which was coordinated with a particular candidate, thereby implicating *quid pro quo* dangers.
> * * *
> [T]he majority breaks the necessary tether between *quid* and access and assumes that access, all by itself, demonstrates corruption and so can support regulation.
> * * *
> By equating vague and generic claims of favoritism or influence with actual or apparent corruption, the Court adopts a definition of corruption that dismantles basic First Amendment rules, permits Congress to suppress speech in the absence of a *quid pro quo* threat, and moves beyond the rationale that is *Buckley's* very foundation.

Id. at 296.

[24] If it receives the requested relief, the RNC asserts that if it were to provide a non-federal donor with preferential access to a federal candidate or officeholder in contravention to the RNC's factual statements made in this case, then any contribution from such a donor would be illegal and in violation of FECA.

non-federal funds could still attend various events organized for contributors of federal funds. However, their additional contribution of non-federal funds, irrespective of the amount, will not afford them any additional access or opportunities.[25] Moreover, even to the extent that the RNC currently provides contributors of federal funds with opportunities not available to the public at large, the RNC does not facilitate individualized contact between federal funds contributors and federal officeholders or candidates. *FEC Mem.* Exh. 4 at 7, *FEC Mem.* Exh. 1 (Josefiak Dep.) at 73:3-77:4, 126:20-130:3. On the contrary, these opportunities involve nothing more than attending events at which federal candidates and officeholders sometimes speak, and do not involve any one-on-one contact or other special access. *FEC Mem.* Exh. 1 (Josefiak Dep.) at 73:3-77:4 (describing RNC fundraising events for federal funds contributors). Nor does the RNC encourage federal officeholders to meet with contributors of federal funds. *Id.*[26]

In sum, the practice of national parties facilitating preferential access, which *McConnell* found to justify the regulation of contributions irrespective of their end use, is not present here.

C. Gratitude Requires A Benefit.

As discussed above, Plaintiffs' intended activities (a) do not directly benefit federal candidates and (b) the RNC will not facilitate preferential access to federal candidates or officeholders. But Defendants dismiss both of these facts as irrelevant, *Van Hollen Mem.* at 8; *FEC Mem*. at 27,

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[25] The RNC may create additional donor programs for non-federal candidates. However, such programs would involve only *state* officeholders or candidates. *See* Pls.' Exh. 1. (Josefiak Dep.) at 206:3-209:3.

[26] Defendant Van Hollen cites to testimony from the *McConnell* record *quoting* a Democratic United States Senator describing being required by his national campaign committee to meet with donors whom he had not met before. *Van Hollen Memo*. at 29 n. 24 (*quoting McConnell*, 251 F. Supp. 2d at 501 (Kollar-Kotelly, J.) (*quoting* Wirth Decl. Ex. A. ¶ 15). But of course, facilitating such access is precisely what the RNC will not do.

and seek to extend the corruption interest found in *McConnell* even further. Defendants assert that contributors will make their non-federal contributions known to candidates and officeholders to secure influence over them, and that federal officeholders and candidates will feel "obliged" to such contributors. *FEC Mem.* at 16-24, 27; *Van Hollen Mem*. at 9-15, 26-30. What Defendants fail to grasp is that for federal officeholders and candidates to be grateful or "obliged" to contributors, the contribution in question must directly benefit them. Absent such benefit, and absent the RNC's facilitating preferential access, gratitude (if it exists at all) is far too attenuated to give rise to the appearance of corruption. Thus, far from irrelevant, the two factual assertions above are dispositive in this case.

Defendants quote *McConnell*'s statement that the close relationship between national parties and federal candidates and officeholders "has placed national parties in a unique position, 'whether they like it or not,' to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders." *FEC Mem.* at 16 (*quoting McConnell*, 540 U.S. 145 (*quoting FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 452 (2001) (*"Colorado Republican II"*))); *see also Van Hollen Mem.* at 29 (same). But the relevant language quoted from *Colorado Republican II* involved contributions to parties used to make coordinated expenditures, 533 U.S. at 437, which directly benefit federal candidates.

Similarly, Defendants cite to numerous other references from *McConnell* to show that candidates and officeholders will become grateful to contributors of non-federal funds, which contributors will seek to exploit to gain influence or access. However, this is also premised on the assumption that the contributions in question directly benefit federal candidates and officeholders. For example, the FEC cites to a statement by former Senator Paul Simon in which he described a

fellow senator urging him to factor into a legislative vote "who is buttering *our* bread," *FEC Mem.* at 17 (*quoting McConnell*, 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.) (emphasis added)); *see also Van Hollen Mem.* at 14 n. 12 (same), and to a statement by former Senator Warren Rudman that "the federal candidates who *benefit* from state party use of [non-federal] funds will know exactly who[] their benefactors are. . . ." *FEC Mem.* at 21-22 (*quoting McConnell*, 540 U.S. at 165 (citation omitted) (emphasis added)).

Defendant Van Hollen cites to a statement by Simon that he would return the calls of a "donor to *my campaign*" before returning other calls because "[y]ou feel a sense of gratitude for their support," *Van Hollen Mem.* at 13-14 n. 11 (citation omitted) (emphasis added), and to testimony alleging "closed-door meetings in which Members of Congress informed their colleagues of large corporations' commitment to support future *campaigns* in exchange for a certain legislative outcome on pending legislation. *Van Hollen Mem.* at 14 (citation omitted) (emphasis added). *See also Van Hollen Mem*. at 19 n. 16 (*quoting* Judge Leon's opinion from *McConnell* for the proposition that candidates are grateful for contributions used for PASO communications that "directly benefit[]" them).

All of the above examples illustrate that gratitude or obligation on the part of a federal officeholder and candidate depends on the candidate or officeholder receiving some benefit. Indeed, to the extent that *McConnell* discussed gratitude on the part of candidates, which "donors would seek to exploit," it did so only in the context of non-federal funds used "for the specific purpose of influencing a particular candidates's federal election." *McConnell*, 540 U.S. at 146. After all, the Federal Funds Restriction was enacted "to address Congress' concerns about the increasing use of soft money . . . *to influence federal elections*." *Id.* at 132 (emphasis added).

Because Plaintiffs intended activities do not directly benefit federal candidates or officeholders, *supra* at 11-16, there is no threat of donors gaining undue influence.[27]

Defendants further worry that a federal officeholder might "listen harder" to a federal funds contributor who has also contributed non-federal funds. *Van Hollen Mem*. at 30. And the FEC argues "it defies common sense" that officeholders "can strike from their consciousness, for example, that a donor has given not only $30,000 in hard money to the RNC, but another $100,000 or $500,000 in soft money." *FEC Mem.* at 23. However, an officeholder's knowing of a contribution to, for example, the RNC's Virginia Account, would be no different than the same officeholder's knowing of a donor's contribution to the campaign of a Virginia state candidate. If a *federal* officeholder's knowing of donations to a *state* candidate's campaign creates an appearance of corruption, then there would seem to be no limit to the reach of federal campaign finance law. Indeed, such an interest would justify *federal* regulation of contributions to the campaigns of *state* candidates.

Thankfully, however, this hypothetical remains just that. In the absence of a national party facilitating preferential access, contributions to political parties that do not directly benefit federal candidates pose no risk of corruption or its appearance.

D. The Federal Funds Restriction is Unconstitutional As-Applied

Plaintiffs activities are too far removed from federal candidates and federal elections to be

[27] Defendants argue that Plaintiffs cannot control the independent actions of donors and officeholders. *FEC Mem.* at 27. Therefore, they point out, if Plaintiffs receive the requested relief, nothing will prohibit donors of non-federal funds and state funds from making their donations known to federal officeholders and candidates. *Id.*; *Van Hollen Mem.* at 29. But Defendants again miss the point that candidates and officeholders will only (if ever) feel obligated to a donor when the contribution directly benefits the candidate or officeholder.

regulated. In short, they are not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. In addition, as applied to Plaintiffs' intended activities, the Federal Funds Restriction is not tailored to any sufficient governmental interest in preventing corruption or its appearance. The Federal Funds Restriction is unconstitutional as applied.

Conclusion

Far from a "carefully calibrated" response to parties' use of non-federal funds to influence federal elections, *Van Hollen Mem.* at 27, the Federal Funds Restriction was a sledgehammer. Despite *McConnell*'s facial holding, as-applied challenges such as this one remain available to cure the overbreadth that exists. Plaintiffs' motion for summary judgment should be granted. [28]

Respectfully submitted,

/s/ James Bopp, Jr.

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[28] Defendant Van Hollen's apparent objection to Plaintiffs' deponent designees is baseless. *Van Hollen Mem.* at 36-37. In accordance with Federal Rule of Civil Procedure 30(b)(6) these deponents were chosen by their respective organizations to represent the organizations. That they are not current officers of these organizations is entirely irrelevant.

Exhibit 1

Certified Copy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, et al.,	:	
	:	Civ. No: 08-1953
Plaintiffs	:	(BMK, RJL, RMC)
-vs-	:	Pages 1 - 266
FEDERAL ELECTION COMMISSION,	:	
Defendant	:	

Deposition of Thomas J. Josefiak
Washington, D.C.
Tuesday, March 3, 2009

Reported by: Kathleen M. Vaglica, RMR
Job No: 30029

March 3, 2009

(1:03 p.m.)

Deposition of Thomas J. Josefiak, held at the offices of:

Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Pursuant to notice, before Kathleen M. Vaglica, RMR, a Notary Public in and for the District of Columbia.

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CONTENTS

E X H I B I T S

*Exhibit E was marked in the Confidential portion of the transcript.

which state candidates to support financially?

A. It would be like any other candidate support issue. It would be a process taking many forms, but the process generally being a political decision based on competitive races based on the ability at that point in time and budgetary constraints to be able to designate monies for certain campaigns based on what was available.

17:20:05 17:20:10 17:20:13 17:20:16 17:20:19 17:20:24

Q. Why does the RNC support state candidates at all?

17:20:27 17:20:35

A. The RNC is a national party and not just a federal party, and even though it's currently restricted to federal fund raising and there is the need and an indication of in a lot of these races to show that this is not only receiving local support, but national support, and it's a decision to further elect Republicans across the board from the courthouse to the White House, and --

17:20:37 17:20:41 17:20:44 17:20:51 17:20:57 17:21:00 17:21:06 17:21:09

Q. Does the decision to support a particular state candidate ever relate to any federal election?

A. I don't understand your question.

Q. Does the RNC ever decide to support a

would be informed of any grass roots lobbying effort that the RNC was going to be conducting.

19:20:23 Q. If the RNC were to win this lawsuit, would you solicit donations from different sources than you -- would you solicit donations from corporations?

19:20:51 A. Yes.

19:20:51 Q. If the RNC won this lawsuit, would it hold separate fund raisers for federal and nonfederal funds?

19:21:22 A. The monies would have to be raised separately in the sense of, if they were event driven or mail driven or web driven, but because the monies would be going into separate entities and, obviously, if it were event driven, you have the issue of nonfederal -- you have the issue of federal office holders and candidates. And I believe the RNC is sensitive to the issue of making them distinct efforts to avoid any sort of impact on federal office holders.

Q. So, even if they weren't featured speakers or VIP guests, would federal candidates and office

holders be allowed to attend the fund raisers for nonfederal funds?

19:22:33 A. Concept of the events themselves is
19:22:41 determined by whether or not the RNC would be
19:22:44 permitted to raise the soft dollars in the first
19:22:47 place and what sort of restrictions were placed on
19:22:51 the ability to do it. Would the restrictions be
19:22:54 similar to a state party that can raise both federal
19:22:57 and nonfederal funds together and then allocate the
19:23:01 cost based on where the monies are deposited, but,
19:23:04 again, there are other issues that pertain to the
19:23:10 national parties that have been excluded from state
19:23:13 parties, and, until there is some clarification in
19:23:17 the state of the law with regard to this, it's
19:23:20 difficult to answer that question because there are
19:23:22 restrictions and roadblocks in place right now that
19:23:26 would have to be eliminated in order for that kind
19:23:31 of concept to be available to the RNC.

Q. But potentially then the RNC would be looking to have fund raisers with that federal candidates or office holders attended and allocate the funds raised between federal and, between

federal and nonfederal accounts?

A. My understanding that any nonfederal fund-raising effort would not include federal candidates.

Q. Okay. And does that mean they wouldn't even be allowed to attend an event?

A. My understanding is they would not include federal candidates in the fund-raising event at all or office holders.

Q. No, I understand that, but would they be allowed to attend it even if they weren't invited?

A. I think that's a speculative question because, until it's permitted and under what rules it's permitted, it's difficult to answer that question. All I can say is that, as far as it's been put forward at this point in time, federal officers, office holders and candidates would not be involved in these fund-raising efforts, period. The issue of attendance, like they can attend other nonfederal events, has not been, to my knowledge, has not been discussed or considered. It was a more broad prohibition of not involving federal

candidates in this effort. As the affidavit from former Chairman Duncan said, it was his intention to
19:25:27 solicit and raise these funds.
19:25:29 Q. That is incredible timing.
19:25:34 MR. NOTI: Would you please mark that as
19:25:36 Exhibit M?
(Deposition Exhibit No. M, Affidavit of Robert M. "Mike" Duncan, was marked for identification and retained by counsel and retained
19:25:56 by counsel.)
19:25:56 BY MR. NOTI:
19:25:57 Q. Are you familiar with this document?
19:25:58 A. Yes, I am.
19:25:59 Q. This is a document with this case's
19:26:05 caption entitled Affidavit of Robert M. "Mike"
19:26:09 Duncan. Are all of the statements in this affidavit
19:26:19 true for the new Chairman?
19:26:26 A. To my understanding, yes.
Q. And there are no exceptions?
A. Correct.
Q. Okay. So each solicitation that Chairman Duncan stated that he wished to make in the manner