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' Supplemental Memorandum in Opposition to Defendant FEC's Motion for Summary Judgment

In accordance with this Court's May 5, 2009 order, Plaintiffs Republican National Committee et al. respectfully file this supplemental memorandum in opposition to Defendant FEC's Motion for Summary Judgment ("*FEC Mem.*") (Dkt. 56) and subsequent Supplemental Memorandum ("*FEC Supp. Mem.*") (Dkt. 82). A supplemented Statement of Material Issues and Objections to Defendant's Statement of Undisputed Facts follows this memorandum.[1]

In previous briefing, Plaintiffs explained that:[2]

(a) Campaign finance laws may only regulate speech that is unambiguously campaign related (*Pls.' Mem.* at 7-18; *Pls.' Reply Mem.* at 1-10);

[1] For the convenience of the Court, a version highlighting the supplemented material is included as an attachment.

[2] Plaintiffs incorporate by reference their *Memorandum in Support of Summary Judgment* ("*Pls.' Mem.*") (Dkt. 21), *Reply Memorandum in Support of Summary Judgment* ("*Pls.' Reply Mem.*") (Dkt. 50), and *Memorandum in Opposition to Defendant Federal Election Commission's Motion to Dismiss* (*"Pls.' Op. to FEC Mot. to Dis.*") (Dkt. 27), *Memorandum in Opposition to Defendant FEC's Motion for Summary Judgment* ("*Pls.' Op.*") (Dkt. 61), and *Supplemental Memorandum in Opposition to Defendant FEC's Supplemental Motion to Dismiss* ("*Pls.' Supp. Op. to FEC Mot. to Dis.*") (Dkt. 80).

(b) Plaintiffs' intended activities are not unambiguously campaign related, and 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 (*Pls.' Mem.* at 30-45; *Pls.' Reply Mem.* at 10-25; *Pls.' Op.* at 4-8);

(c) Plaintiffs' intended activities do not directly benefit any federal candidate or officeholder (*Pls.' Mem.* at 30-45; *Pls.' Reply Mem.* at 12-18; *Pls.' Op.* at 8-13);

(d) For any gratitude on the part of federal candidates or officeholders to give rise to corruption or its appearance, the candidates or officeholders must receive a direct benefit, which here they do not (*Pls.' Reply Mem.* at 21-24; *Pls.' Mem.* at 24-27);

(e) To the extent *McConnell v. FEC*, 540 U.S. 93 (2003), found that contributions to national political parties were "suspect," irrespective of their end use, it premised this conclusion on the historical practice of national parties to provide large donors of non-federal funds with preferential access to federal candidates and officeholders (*Pls.' Mem.* at 21-24; *Pls.' Reply Mem.* at 18-21);

(f) The RNC will not provide donors of non-federal funds or state funds with preferential access to any federal candidate or officeholder and will not involve federal candidates or officeholders in the solicitation of such funds (*Pls.' Mem.* at 21-23; *Pls.' Reply Mem.* at 18-21);

(g) Plaintiffs' intended activities are too far removed from federal candidates and federal elections to be regulated (*Pls.' Mem.* at 30-45; *Pls.' Reply Mem.* at 12-18).

Plaintiffs respond here to the issues of fact and law asserted in the FEC's supplemental memorandum in support of summary judgment ("*FEC Supp. Mem.*") (Dkt. 82). As shall be shown, Plaintiffs have a concrete, consistent, well-understood policy of not giving federal-fund contributors preferential access to federal candidates and officeholders. This concrete policy will be extended to non-federal-fund donors, so that they will have neither preferential access nor "greater influence," *FEC Supp. Mem.* at 1. The evidence shows that Chairman Steele's plans for RNC activities with non-federal funds is consistent with RNC's verified intentions.

Before arguing the facts, the FEC argues that *McConnell* precludes an analysis examining how money is spent because it focused on whether a "*contribution* limit . . . prevents corruption or the appearance thereof." *FEC Supp. Mem.* at 2 n.2. *McConnell* was, of course, a facial analysis that did not distinguish whether various uses of non-federal funds were unambiguously campaign related. So it did not consider the as-applied question here.

The FEC asserts that the RNC's intended redistricting, state activities (in New Jersey and Virginia), and grassroots lobbying will "affect" or "have an impact on future elections." *FEC Supp. Mem.* at 6-7; *FEC Supp. Stmt. of Facts* at ¶¶ 62-69. But any such possible affect/impact is too remote and speculative to be cognizable, as evidenced by the actual test for regulable activity, i.e., government may only regulate "spending that is *unambiguously* related to the *campaign* of a *particular* federal candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (emphasis added). The FEC points to no *particular* candidate whose *campaign* is, or will be, *unambiguously* affected/impacted by these activities. In fact, Chairman Steele specifically testified that the state activities might have no impact on RNC's fortunes, FEC Exh. 42, *Steele*

Dep. at 98:14-99:4, which is a far cry from the required *unambiguous* relation to the *campaign* of a *particular* federal candidate.

That this unambiguously-campaign-related analysis controls, instead of some amorphous potential "effect," is clear from *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.) (stating holding). *WRTL-II* noted that "[t]he FEC, intervenors, and the dissent below contend that *McConnell* [*v. FEC*, 540 U.S. 93 (2003),] already established the constitutional test for determining if an ad is the functional equivalent of express advocacy: whether the ad is intended to influence elections and has that effect." *Id.* at 2664. *WRTL-II* observed that "*Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates" because, given "the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, . . . analyzing the question in terms of intent and of effect would afford no security for free discussion." *Id.* at 2665 (quotation marks and citations omitted). *WRTL-II* also rejected any intent-and-effect test. *Id.* As *WRTL-II* was plainly applying the unambiguously-campaign-related principle as a means of protecting issue advocacy, it rejected any intent-and-effect test as part of it. That analysis extends to all activity to be analyzed under the unambiguously-campaign-related principle. In fact *Buckley* employed the unambiguously-campaign-related analysis precisely to narrow overbroad tests that would look at expenditures "'any expenditure . . . *relative to* a clearly identified candidate,'" 424 U.S. at 42 (citation omitted) (emphasis added), and "'for the purpose of . . . *influencing*' the nomination or election of candidates for federal office," *id.* at 77 (citation omitted) (emphasis added). With *WRTL-II*'s affirmance of *Buckley*'s rejection of any intent-and-effect test and tests based on some vague "relati[on]" or "influenc[e]," it is too late in

the day for the FEC and intervenor to be reasserting a vague effect/impact test based on some amorphous notion of possible, but uncertain, relation to or influence upon some potential, unparticularized candidate's future campaign.

WRTL-II was simply following the unambiguously-campaign-related analysis asserted and adopted in *McConnell*, 540 U.S. 93. In *McConnell*, the campaign-finance reformers (McCain-Feingold's primary sponsors and supporting counsel) argued that, although the electioneering-communication definition went beyond express advocacy, it was a constitutional "adjustment of the definition of which advertising expenditures are campaign related." *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93 ("*Reformers' Brief*") (*available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf). The reformers meant *unambiguously* "campaign related," arguing that the "[d]isclosure rules . . . 'shed the light of publicity on spending that is unambiguously campaign related but would otherwise not be reported.'" *Id.* at 58 (*quoting Buckley v. Valeo*, 424 U.S. 1, 81 (1976).[3] They urged approval of electioneering-communication regulation based on *Buckley*'s unambiguously-campaign-related analysis:

> Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not 'dissolve in practical application,' 424 U.S. at 42; and they should be 'directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*,' *id*. at 80; *see id*. at 76-82. Those are *precisely the precepts to which Congress adhered in framing Title II*.

Id. at 62 (*quoting Buckley*) (emphasis added).

[3]The reformers conceded the necessity of bright-line tests, arguing that their new "standards for defining which ads will be treated as campaign-related squarely serve a compelling interest in using clear and objective lines to frame any rule that affects speech." *Id.*

So Senators McCain and Feingold, the reform community, and Congress itself recognized (a) the dissolving-distinction problem and (b) the unambiguously-campaign-related analysis as identifying regulable communications. Their "precepts" are that the regulation be neither (1) vague nor (2) overbroad (beyond unambiguously-campaign-related activity). Counsel for the Intervenor-Defendant Van Hollen argued this in *McConnell*. *See Reformers' Brief* at inside cover (counsel list).[4]

That the unambiguously-campaign-related analysis was correct is confirmed by the fact that *McConnell* adopted the reformers' analysis to approve regulation of "electioneering communications" in addition to express advocacy. *See* OB–25-27. *McConnell* said the constitutional analysis required "avoid[ing] . . . vagueness and overbreadth," 540 U.S. at 192, and this "overbreadth" precept was "'[t]o insure that the reach' of the disclosure requirement was 'not impermissibly broad'"—citing the *Buckley* passage to which the reformers pointed for the unambiguously-campaign-related precept, *id.* at 191 (citation omitted).[5]

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[4]To rely on the unambiguously-campaign-related principle then and eschew it now is the sort of bait and switch that Chief Justice Roberts denounced in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"): "In McConnell against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and now you're telling us that it's already been decided. It's a classic bait and switch." Transcript at 25 (*available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1581.pdf).

[5]This unambiguously-campaign-related analysis has been expressly recognized by FEC Commissioners. In their *Statement of Reasons* (Dec. 16, 2003) in Matters Under Review ("MURs") 5024, 5154, and 5146 (*available at* www.fec.gov), Chair Weintraub and Commissioners Thomas and McDonald noted that *Buckley* expressed concern about reporting provisions "that might be applied broadly to communications discussing public issues which also happened to be campaign issues," and so imposed the express-advocacy construction. *Id.* at 2. "[T]he *Buckley* Court explained the purpose of the express advocacy standard," they declared, which "was to limit application of the . . . reporting provision to 'spending that is *unambiguously*

In sum, the unambiguously-campaign-related principle controls all of campaign-finance law.[6] And it requires the analysis to be based upon whether campaign-finance laws are restricted to "spending that is *unambiguously* related to the *campaign* of a *particular* federal candidate," *Buckley*, 424 U.S. at 80 (emphasis added). The effort of the FEC and Intervenor-Defendant Van Hollen to revert to a long-rejected amorphous analysis must be rejected.

Not only is the unambiguously-campaign-related principle a constitutional first-principle that must be satisfied as a threshold matter in campaign-finance law (so that it overrides other analyses), but any potential "appearance of corruption" as to activities that are not unambiguously campaign related is entirely too remote to be cognizable for constitutional analysis. As the opinion stating the holding in *WRTL-II* put it when faced with a similar stretching of "corruption" to unrecognizable lengths, "Enough is enough," *id.* at 2672 (opinion of

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related to the campaign of a particular federal candidate.'" *Id.* (emphasis in *Statement*) (*quoting Buckley*, 424 U.S. at 80). The Commissioners quoted 424 U.S. at 82: "[u]nder an express advocacy standard, the reporting requirements would 'shed the light of publicity on spending that is *unambiguously campaign related* . . . .'" *Statement* at 2 (emphasis in *Statement*). A January 22, 2009 *Statement of Reasons* in MUR 5541 (November Fund) by Vice Chair Petersen and Commissioners Hunter and McGahn emphasized the need to "fully incorporate important principles in recent judicial decisions," including *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL-II*"), "and the Fourth Circuit's persuasive decision in . . . [*North Carolina Right to Life v.*] *Leake*[, 525 F.3d 274 (4th Cir. 2008)]." *Id.* at 2 (citations omitted).

[6]The most recent decision to recognize the unambiguously-campaign-related analysis is *Broward Coalition of Condominiums v. Browning*, No. 4:08-cv-445, 2009 WL 1457972 (N.D. Fla. May 22, 2009) (order granting summary judgment to Plaintiffs). *Broward*—applying strict scrutiny to an "electioneering communications" provision imposing PAC-style burdens on groups doing ballot-initiative (and candidate) advocacy—recognized the major-purpose test, the unambiguously-campaign-related analysis, and the fact that only two types of communications may be regulated (express-advocacy and federally-defined "electioneering communications"). It held that because *WRTL-II* said the Court had "'never recognized a compelling interest in regulating ads . . . that are neither express advocacy nor its functional equivalent,'" neither would it. 2009 WL 1457972, at *5 (*quoting WRTL-II*, 127 S. Ct. at 2671).

Roberts, C.J., joined by Alito, J.). And in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), the Supreme Court unanimously rejected the notion that a broadly-worded *McConnell* holding precluded an as-applied challenge, which is the essence of the FEC's recycled argument here. If there is one obvious thing that *WRTL-I* and *WRTL-II* teach, it is that a facial *McConnell* holding does not preclude an as-applied holding that significantly narrows the facial holding. And in *Citizens United v. FEC* (No. 08-205), the Supreme Court has just ordered reargument as to whether the electioneering-communication prohibition as narrowed in *WRTL-II* is adequately protecting issue advocacy as applied or whether *McConnell*'s facial upholding of the electioneering-communication prohibition must be overruled, perhaps along with *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding corporate "expenditure" prohibition). *See* http://origin.www.supremecourtus.gov/docket/08-205.htm (Supreme Court docket with order showing topics of reargument).

I. Plaintiffs Do Not Provide Preferential Access to Any Donors.

Just as no preferential access is now provided to federal donors, the RNC will not provide non-federal donors with preferential access to any federal candidate or officeholder. *Pls.' Mem*. Exh. 1, *Beeson Affidavit* ¶ 19, 30; *FEC Mem.* Exh. 4 at 7; *FEC Mem.* Exh. 1, *Josefiak Dep*. at 126:20-130:3; FEC Exh. 42, *Steele Dep.* at 51:10-18, 55:13-22, 111:12-21. 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*. 126:20-130:3. The record from *McConnell* does not support the statement that "trading of soft money for access to federal officeholders was rampant" at the RNC prior to BCRA's enactment. The FEC's supplemented statement—that

"Chairman Steele does not plan to develop such a policy until after this lawsuit is resolved, and he does not know what the content of that policy will be"—conflates concepts and statements that may not be conflated and creates an implication that mischaracterizes the evidence. This may clearly be seen by what comes before and what comes after the supplemented material. Before the supplemented material is a statement that there is "no written policy . . . against preferential access," and following the supplemented statement is an acknowledgment of "an unwritten policy" against preferential access. FEC Exh. 42, *Steele Dep.* at 11:5-21. So there *is* a policy against "providing donors with preferential access to federal candidates and officeholders" in place, as set out in the cited evidence in this Response. Any implication that having such a policy awaits the end of this lawsuit is erroneous. Policies arising out of the scope of what this case may allow clearly must await instruction from the court, so such policies will of course be formulated after final resolution of this matter. To be clear, here is what the evidence actually shows as to RNC policies.

A. The RNC Does Not Facilitate Intimate Meetings Between Donors and Federal Candidates and Officeholders

By "preferential access" RNC does not mean merely "an opportunity to briefly speak with an officeholder" at an event, but rather "some secret cabal. You're getting some special favor . . . ." *See* FEC Exh. 42, *Steele Dep.* at 50:12-20. In *Plaintiff Republican National Committee's Discovery Responses* ("*RNC Discovery Responses*"), in response to Interrogatory 5, a question about "preferential access," the RNC said that it "does not facilitate one-on-one meetings between federal candidates and officeholders and any contributor of federal funds. Nor does the RNC encourage federal candidates or officeholders to meet one-on-one with or have

other individualized contact with any RNC contributor." FEC Exh. 4, *RNC Discovery Responses* at 7; *see also Plaintiffs' Statement of Undisputed Material Facts* at ¶ 24 (no "preferential access" with examples); *Pls' Mem*. Exh. 1, *Beeson Affid.* at ¶ 19 (same). Although the RNC does have events to which individuals are invited because they have *already* contributed federal funds at particular levels (they do not pay to attend the event and they pay their own way to get there), at such events there is only opportunity for a brief greeting, handshake, and photo-op, but not any more substantive one-on-one meeting. *See FEC Mem*. Exh. 1, *Josefiak Dep.* at 72:12-73:19; FEC Exh. 42, *Steele Dep.* at 48:8-49:22.

In its discovery responses, the RNC has verified that the policy against granting preferential access will continue. Specifically, "in regard to both federal and potential non-federal contributions, the RNC would instruct its staff not to facilitate any one-on-one meetings or other individualized contact between contributors and federal candidates and officeholders." FEC Exh. 4, *RNC Discovery Responses* at 6-7.

In its opening paragraph of Part I, the FEC reasserts the argument that it should not be "legally possible for an unverifiable, self-imposed limitation to serve as the basis for a constitutional exemption." *FEC Supp. Mem.* at 2. But that is exactly what the Supreme Court did in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), where it recognized an exemption to the prohibition on corporate express-advocacy "independent expenditures" for what are now called *MCFL*-corporation, *id.* at 263-64. That exemption was reasserted as to the electioneering-communication prohibition in *McConnell*, 540 U.S. at 209-11. The exemption was premised on the following self-imposed limitations that were no more "verifiable" than the RNC's present self-imposed policies:

> "*First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace."

McConnell, 540 U.S. at 210-11 (*MCFL* citation omitted). Specifically, the following *MCFL*-corporation policies are all self-imposed: choosing to be an ideological organization, eschewing business activities, having no economic incentives for association, and having a policy (which need not be written) of not accepting corporate or union contributions.

As to the FEC's notions that (1) new evidence demonstrates preferential access and (2) "the RNC has no plans to prevent its [non-federal-funds] donors from exploiting that access," *FEC Supp. Mem.* at 2, the evidence shows that there is, and will be, no "preferential access" because the RNC has a concrete, well-recognized, longstanding policy against allowing preferential access. Just as the FEC here attempts again to stretch the concept of "corruption" beyond recognition by insisting that there is a corruption potential in activity that is not unambiguously campaign related, *supra*, so it attempts to stretch the concept of "preferential access" beyond recognition by making it any de minimis contact. Putting these two stretches together exponentially increases the remoteness of any constitutionally cognizable corruption potential. A de minimis contact between a donor and a federal candidate or officeholder is no more constitutionally cognizable as "preferential access" than the de minimis receipt of corporate funds or de minimis business activities is cognizable in determining

MCFL-corporation status.[7] If a de minimis corporate contribution is non-cognizable for preventing so-called corporate-form corruption (recognition of this "corruption" in *Austin* is being reconsidered, *supra*), then a de minimis donor contact with a federal candidate or officeholder is non-cognizable as "preferential access" for preventing quid-pro-quo corruption that was already stretched in *McConnell* to its outer limits to encompass "gratitude," 540 U.S. at 145, and here would have to be stretched to unambiguously-campaign-related activity with no direct benefit for a federal candidate or officeholder.

The FEC claims that current contributor events are more "intimate" than the FEC previously thought. *FEC Supp. Mem.* at 3. But the examples cited still involve substantial numbers of people. And regardless of the size of the event, the evidence of actual "access" shows it to be de minimis at most. The FEC claims that the RNC's guest lists demonstrate that donors "who contribute the most to the party receive their reward in the form of time to interact" with officeholders. *Id.* This is not supported by the record. In fact, the RNC does not provide its federal funds contributors with individualized one-on-one contact, i.e., "preferential access," with federal candidates or officeholders. *Plaintiffs' Supplemented Statement of Material Issues* ("Pls.' Supp. SMI") ¶¶ 7-8, 11. The ability of contributors of federal funds and federal candidates to "interact" at RNC donor events consists of the possible opportunity for a donor to

[7] This is the holding of every federal circuit court to consider the issue. *See FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995); *FEC v. NRA*, 254 F.3d 173 (D.C. Cir. 2001); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995) (Minnesota's exemption); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997) (FEC's exemption); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (North Carolina's exemption); *cert. denied*, 528 U.S. 1153 (2000); *Beaumont v. FEC*, 278 F.3d 261 (4th Cir. 2002) (FEC's exemption), *holding not appealed in FEC v. Beaumont*, 539 U.S. 146 (2003).

ask a question during the question and answer session following the candidate or officeholder's speech. *Id.* at 8, 11; *see also id.* (*citing Josefiak Dep.* 77:8-11 (noting that donors who attend such events and express their opinions often have divergent positions on the same issue)); FEC Exh. 42, *Steele Dep*. 48:8-49:22 (noting that most donors only interact with officeholders for a few seconds). The FEC's conclusory speculation that a small number of guests invited to an event automatically leads to meaningful interaction between donors and officeholders is not supported by the record.

Plaintiffs' intended activities pose no threat of corruption or its appearance. Gratitude on the part of candidates and officeholders, which contributors might try to exploit to gain undue influence, can only exist where a direct benefit is conferred on the candidate or officeholder. Absent a direct benefit, any gratitude on the part of candidates and officeholders is too attenuated to pass constitutional muster. The FEC fails to demonstrate how contributions earmarked for and used for activities that do not directly benefit any federal candidate or officeholder give rise to undue influence. *Pls.' Reply Mem.* at 21-24; *Pls.' Op.* at 8-13. And if such attenuated levels of gratitude may give rise to regulation, the breadth of federal campaign finance regulation would be limitless because such a theory would justify Congress directly regulating state elections, including contributions given directly to state candidates, state party or charitable organizations by donors, because federal candidates might be grateful for them. Furthermore, the failure to do so now makes the current law underinclusive. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

Plaintiffs have stated repeatedly that they will not provide non-federal-fund donors with preferential access to any federal candidate or officeholder. SMF ¶ 11. The FEC relies on the fact that RNC Chairman Steele, testifying as an RNC officer and not on behalf of the organization, stated that he has not created a policy to prevent such access. *FEC Supp. Mem.* at 5. But RNC representatives have testified that no preferential access is currently granted to any donor and no preferential access will be granted to any donor in the future. Pls.' SMF ¶ 11. This is a concrete, longstanding policy to which nothing is added by putting it in writing.

B. Only Federal Donors Will Have Access to Events with Federal Candidates and Officeholders

As stated in its discovery responses, the "RNC does provide contributors of federal funds with certain opportunities and invitations to certain events not offered to the public at large." FEC Exh. 4, *RNC Discovery Responses* at 7. However, access to these donor events at the various levels is now and will continue to be based only on federal funds, not non-federal funds. At such a time as RNC is able to accept non-federal funds, those will not be counted toward these major-donor, federal-fund clubs. Membership in a donor club is a perk available only to donors of federal funds. There may be events for donors of only non-federal funds, but there will be no federal candidates or officeholders at such events, *Pls' Reply Mem.* Exh. 1, *Josefiak Dep.* at 208:2-209:3; *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19, nor will federal candidates solicit non-federal funds, since that has been made illegal by another unchallenged provision of the BCRA.

C. Federal Candidates and Officeholders Will Not Solicit Non-Federal Funds

As stated above, federal candidates or officeholders cannot and will not solicit non-federal funds. *Pls' Reply Mem.* Exh. 1, *Josefiak Dep.* at 208:2-209:3 ("federal officers, office

holders and candidates would not be involved in these fund-raising efforts, period."); *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19 ("the RNC will not use any federal candidates or officeholders to solicit funds for any of the Accounts."). Therefore, the RNC will "not include federal candidates in the [non-federal] fund-raising event at all or officeholders." *Pls' Reply Mem.* Exh. 1, *Josefiak Dep.* at 208:7-9.

II. Plaintiffs' Planned Activities Are Supported by Facts.

The FEC argues that RNC's intended activities "are defined so vaguely that . . . it would retain nearly unfettered authority to decide for itself which activities constitute permissible uses of its [non-federal funds]." *FEC Supp. Mem.* at 5. This is not true. First, the intended activities are clearly described in the *Amended Complaint* (Dkt. 67), which language is repeated in the *Beeson Affidavit* and in briefing, all of which was *for* RNC. Moreover, Thomas Josefiak as RNC's designated spokesperson for deposition, reiterated the activities in which RNC wishes to engage. *FEC Mem.* Exh. 1, *Josefiak Dep*. at 157:11-160:20, 162:8-14. Second, the FEC's evidence cited does not support its assertion, as shall be discussed. Third, this Court's opinion will, of course, define the parameters of permissible activity, and Chairman Steele has repeatedly said that once a decision is issued he will assure complete compliance with its parameters. FEC Exh. 42, *Steele Dep.* at 59:16-19, 78:2-8, 79:9-17.

The FEC argues that Richard Beeson's affidavit is no longer evidence because he has been replaced as political director and Chairman Steele was unfamiliar with Beeson's affidavit. *FEC Supp. Mem.* at 6. But Beeson's affidavit spoke to what the *RNC*, the lead plaintiff here, intended to do at the timing of filing and currently intends to do if permitted by the Court. He said "I have personal knowledge of RNC and its activities," *Beeson Affid.* at ¶ 2, and he

repeatedly says "[t]he *RNC* intends to . . . ," *id.* at ¶¶ 3, 5, 8, 10, 11, 12, 13 ("plans" instead of "intends"), 15, 16 (emphasis added). *See also id.* at ¶¶ 18 ("The RNC is ready and able to do all these activities . . . ."), 19 ("The RNC will not aid contributors . . . ."). And the language of Beeson's affidavit stating intended activities is drawn directly from the *Amended Complaint*, in which *RNC* is a plaintiff, not Beeson. There is no evidence that RNC no longer wishes to do these intended activities, so the intent still stands, along with the clear description of the activities.

The FEC's argument as to Chairman Steele's deposition alters none of these verified facts as to RNC. Nowhere does he say anything that conflicts with the established facts of RNC's intent. While Steele is the new chairman, Thomas Josefiak spoke for the RNC in its Rule 30(b)(6) deposition. In any event, Chairman Steele's deposition answer addressed the problem of not knowing whether there would be a favorable ruling and, if so, when it might be issued, giving rise to "speculation" at the present as to further specificity. So he said that what might be practically possible "[i]f the ruling comes next week" differs from what would be possible "two weeks before the general election," and "I wouldn't speculate as to what we would do until I know what I can do." FEC Exh. 42, *Steele Dep.* at 69:22-70:9. The same is true about his deposition statement about not having thought about how he would go about non-federal funds fundraising, to which the FEC points, *FEC Supp. Mem.* at 7, i.e., the timing would affect what one might do and there is no point to spending valuable time on further specifics until RNC knows whether it can do its intended activities. Chairman Steele's statements contradict nothing previously asserted.

III. Plaintiffs' Recent Testimony Supports Their Prior Position

The FEC makes several points in Part III, which are essentially irrelevant to the required constitutional analysis in this case. The FEC points to Chairman Steele's statement that redistricting affects federal elections, but that sort of effect has no more to do with the requisite unambiguously-campaign-related analysis than other things that more remotely "affect" elections. For example, RNC has a prolife plank, which if implemented as law in a particular state might conceivably "affect" population numbers upwards and thus "affect" redistricting, which in turn could "affect" elections in a remote sense. But if the RNC wants to run ads promoting the prolife position, federal government may not restrict that issue advocacy since it is not unambiguously related to a federal candidate's campaign.

Conclusion

For the reasons stated, the FEC's motion for summary judgment should be denied.

Respectfully submitted,

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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' Supplemented Statement of Material Issues and Objections to Defendant's Statement of Undisputed Facts

Plaintiffs' RNC et al. submit the following statement of material issues in opposition to the Federal Election Commission's ("FEC") supplemented statement of undisputed material facts. LCvR 7(h). The following numbered paragraphs correspond with the FEC's numbered paragraphs.[1]

1. **Response:** "The RNC is a *national* party, and not just a *federal* party." *Pls.' Reply Mem*. Exh. 1, *Josefiak Dep*. at 138:11-18 (emphasis added).

> As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the federal, state and local levels. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views at the federal, state and local levels.

[1] Plaintiffs' Exhibits 1-5 were attached to Plaintiffs' motion for summary judgment (Dkt. 21). Plaintiffs' Exhibits 6-7 were attached to Plaintiffs' initial statement of material issues. Plaintiffs' exhibit attached to their reply memorandum in support of summary judgment (Dkt. 50) is herein referred to as *Pls. Reply Mem*. Exh. 1. Defendant FEC's Exhibits 1-25 were attached to its memorandum in opposition to Plaintiffs' motion for summary judgment, (Dkt. 39), and Defendant FEC's Exhibits 26-41 were attached to the FEC's motion for summary judgment. (Dkt. 56).

McConnell, 251 F. Supp. 2d at 335 (Henderson, J.) (citations omitted). These activities in state and local elections "are substantial both in their importance to the RNC's mission and in their resource commitment." *Id.* "Even for elections in which there is no federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities." *Id.* at 336. Furthermore, a political "party has its own traditions and principles that transcend the interests of individual candidates and campaigns . . . ." *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 629 (1996) ("*Colorado I*") (Kennedy, J., concurring in the judgment and dissenting in part). Parties have a "unique role in serving" First Amendment principles. *Id.* "[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 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.

2. **Response:** *See supra* Response ¶ 1.

3. **Response:** *See supra* Response ¶ 1.

4. **Response:** *See supra* Response ¶ 1.

5. **Response:** When the President of the United States is a Republican, he will offer a suggestion of a chairperson to the RNC. This person must then receive an independent majority vote of the 168 members of the RNC in order to become the chairperson. The members may choose not to accept the President's suggestion. FEC Exh. 1, *Josefiak Dep*. 193:2-194:5. When

the President is a Republican, the White House cooperates with the RNC, but the President maintains no control over the RNC and the RNC alone decides how it will spend its resources. *Id*. at 194:6-12.

6. **Response:** The RNC has, on occasion, entered into name-for-name list exchanges with campaigns, which may include voter preference information and/or donor information. *See* FEC Exh. 1, *Josefiak Dep*. 98:8-14. The FEC's statement that RNC "assists Members of Congress by distributing their 'message point[s]' to the party's 'base," mischaracterizes Chairman Steele's statement. First, the statement omits the context, which is as to "purposes" for "initiat[ing] contact with federal officeholders." Second, "assists" implies a regular event, when "they've been very few." Third, he said the purpose was "to have them get us information on a subject," which he elaborated to be "their message point," i.e., "the issue," especially in the context of legislation so as to "have the understanding of what it is they want, what they're trying to do." When asked why he would "seek to gain that understanding," he responded that the purpose would be to "educate our base as to [cited public issues] and the solutions that legislative leaders are looking to propose . . . ." *See* FEC Exh. 42, *Steele Dep.* at 29:5-22. So the evidence is that there are occasional calls to federal officeholders about issues, such as legislation, to understand what the proposed legislation is to accomplish. The FEC's statement implies regular contact for the purpose of obtaining and communicating an officeholder's undefined "message point[s]," creating the impression that these might be some sort of political talking points under discussion, instead of a discussion about public issues.

7. **Response:** The RNC provides its contributors of federal funds with certain opportunities and invitations to events not offered to the public at large. FEC Exh. 4, *RNC*

Discovery Responses at 7. 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 Exh. 1, *Josefiak Dep*. at 73:3-77:4 (describing RNC fundraising events for federal funds contributors). No matter the size of the event, the RNC does not facilitate individualized one-on-one contact between federal funds contributors and federal officeholders or candidates. FEC Exh. 4, *RNC Discovery Responses* at 7; FEC Exh. 1, *Josefiak Dep*. at 73:3-77:4, 126:20-130:3; FEC Exh. 42, *Steele Dep.* at 51:10-18. Where a contributor attends an event at which the contributor might have opportunity to speak with a federal officeholder or candidate, "[t]ypically these conversations are about three to seven seconds long: Hi. How are you." FEC Exh. 42, *Steele Dep.* at 48:15-17. The RNC does not encourage federal officeholders to meet with contributors of federal funds. FEC Exh. 4, *RNC Discovery Responses* at 7; FEC Exh. 42, *Steele Dep.* at 46:1-4. Nor does the RNC pass on to candidates or officeholders requests from donors to meet with such candidates or officeholders. FEC Exh. 1, *Josefiak Dep.* at 127:1-128:1. The RNC also does not arrange for contributors to participate in conference calls with federal candidates or officeholders. FEC Exh. 42, *Steele Dep.* at 46:8-12.

8. **Response:** *See supra* Response ¶ 7. To the extent "an attending donor has an opportunity to inform the federal candidate or officeholder about the donor's opinion on legislation or other issues," it would occur by the possible opportunity to ask the candidate a question during the question and answer session following a candidate or officeholder's speech. FEC Exh. 1, *Josefiak Dep*. 75:22-77:8-11 (noting that donors who attend such events and express their opinions often have divergent positions on the same issue).

9. **Response:** No response.

10. **Response:** *See infra* Response ¶¶ 11, 16.

11. **Response:** *See supra* Response ¶ 7. Just as no preferential access is now provided to federal donors, the RNC will not provide non-federal donors with preferential access to any federal candidate or officeholder. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 19, 30; *FEC Mem.* Exh. 4 at 7; FEC Exh. 1, *Josefiak Dep*. 126:20-130:3; FEC Exh. 42, *Steele Dep.* at 46:1-19, 51:10-18, 55:13-22, 111:12-21. 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 Exh. 1, *Josefiak Dep*. 126:20-130:3. The record from *McConnell* does not support the statement that "trading of soft money for access to federal officeholders was rampant" at the RNC prior to BCRA's enactment.

The FEC's supplemented statement—that "Chairman Steele does not plan to develop such a policy until after this lawsuit is resolved, and he does not know what the content of that policy will be"—conflates concepts and statements that may not be conflated and creates an implication that mischaracterizes the evidence. This may clearly be seen by what comes before and what comes after the supplemented material. Before the supplemented material is a statement that there is "no written policy . . . against preferential access," and following the supplemented statement is an acknowledgment of "an unwritten policy" against preferential access. FEC Exh. 42, *Steele Dep.* at 11:5-21. So there *is* a policy against "providing donors with preferential access to federal candidates and officeholders" in place, as set out in the cited evidence in this Response. Any implication that having such a policy awaits the end of this lawsuit is erroneous. Policies arising out the scope of what this case may allow clearly must await instruction from the court, so such policies will of course be formulated after final

resolution of this matter. To be clear, here is what the evidence actually shows as to RNC policies.

(1) The RNC does not and will not facilitate intimate meetings between donors and federal candidates and officeholders. By "preferential access" RNC does not mean merely "an opportunity to briefly speak with an officeholder" at an event, but rather "some secret cabal. You're getting some special favor . . . ." . *See* FEC Exh. 42, *Steele Dep.* at 50:12-20. In *RNC Discovery Responses*, in response to Interrogatory 5, a question about "preferential access," the RNC said that it "does not facilitate one-on-one meetings between federal candidates and officeholders and any contributor of federal funds. Nor does the RNC encourage federal candidates or officeholders to meet one-on-one with or have other individualized contact with any RNC contributor." FEC Exh. 4, *RNC Discovery Responses* at 7 at 7; *see also Plaintiffs' Statement of Undisputed Material Facts* at ¶ 24 (no "preferential access" with examples); *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19 (same). Although RNC does have events to which individuals are invited because they have *already* contributed federal funds at particular levels (they do not pay to attend the event and they pay their own way to get there), at such events there is only opportunity for a brief greeting, handshake, and photo-op, but not any more substantive one-on-one meeting. *See* FEC Exh. 1, *Josefiak Dep.* at 72:12-73:19; FEC Exh. 42, *Steele Dep.* at 48:8-49:22.

In its discovery responses, the RNC has verified that the policy against granting preferential access will continue. Specifically, "in regard to both federal and potential non-federal donations, the RNC would instruct its staff not to facilitate any one-on-one meetings or

other individualized contact between contributors and federal candidates and officeholders." FEC Exh. 4, *RNC Discovery Responses* at 6-7.

(2) As stated in its discovery responses, the "RNC does provide contributors of federal funds with certain opportunities and invitations to certain events not offered to the public at large." FEC Exh. 4, *RNC Discovery Responses* at 7. However, access to these donor events at the various levels is now and will continue to be based only on federal funds, not non-federal funds. At such a time as RNC is able to accept non-federal funds, those will not be counted toward these major-donor, federal-fund clubs. Membership in a donor club is a perk available only to donors of federal funds. There may be events for donors of only non-federal funds, but there will be no federal candidates or officeholders at such events, and they will not solicit non-federal funds. *Pls.' Reply Mem*. Exh. 1, *Josefiak Dep.* at 208:2-209:3; *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19.

(3) Federal candidates or officeholders cannot and will not solicit non-federal funds. *Pls' Reply Mem*. Exh. 1, *Josefiak Dep.* at 208:2-209:3 ("federal officers, office holders and candidates would not be involved in these fund-raising efforts, period."); *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19 ("the RNC will not use any federal candidates or officeholders to solicit funds for any of the Accounts."). Therefore, the RNC will "not include federal candidates in the [non-federal] fund-raising event at all or officeholders." *Pls' Reply Mem*. Exh. 1, *Josefiak Dep.* at 208:7-9.

12. **Response:** Donors contribute to the RNC "because they want to assist the Republican National Committee." FEC Exh. 1, *Josefiak Dep.* 74:18-75:2.

13. **Response:** No response.

14. **Response:** The FEC points to no evidence that prior to the enactment of the BCRA federal officeholders solicited funds on behalf of the RNC. As for the RNC's intended activities in this case, no federal candidate or officeholder will solicit funds to any of the RNC's intended accounts. *Pls.' Mem.* Exh. 1, *Beeson Aff.* ¶ 19.

15. **Response:** The RNC does not distribute donor lists or donor information to federal candidates or officeholders, Pls.' Exh. 6, *Josefiak Dep*. 95:6-96:13, with the exception of the exchanges referenced in Response ¶ 6.

16. **Response:** Gratitude on the part of candidates and officeholders, which contributors might try to exploit to gain undue influence, can only exist where a direct benefit is conferred on the candidate officeholder. Absent a direct benefit, any gratitude on the part of candidates and officeholders is too attenuated to pass constitutional muster. Plaintiffs' intended activities do not directly benefit any federal candidate or officeholder and thereby pose no threat of corruption or its appearance. To the extent that *McConnell* discussed corruption arising from 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).

17. **Response:** *See supra* Response ¶¶ 7, 16. To the extent donors inform federal candidates or officeholders of contributions to the RNC's intended Accounts, it would be no different than if they informed the officeholder of their contribution to a state candidate, state party, or charitable organization of the officeholder's liking. *See* FEC Exh. 42, *Steele Dep.* at

61:4-62:13 (stating that the RNC does not have the right to prevent donors from independently informing officeholders of their contributions to the intended Accounts). The FEC mischaracterizes Chairman Steele's testimony by the use of "would," saying that donors "would" attend . . . and contact officials in other ways," when "could" would be correct.

18. **Response:** *See supra* Response ¶¶ 7, 11-12,16.

19. **Response:** No response.

20. **Response:** No response.

21. **Response:** There is regular communication between the RNC and all its members because the members "make up the Republican National Committee." FEC Exh. 1, *Josefiak Dep.* 200:20-201:1. There is no "near-constant strategic communication between state parties and the RNC." *Id*. 200:13-201:16.

22. **Response:** A political "party has its own traditions and principles that transcend the interests of individual candidates and campaigns . . . ." *See Colorado I*, 518 U.S. at 629 (Kennedy, J., concurring in the judgment and dissenting in part). Parties have a "unique role in serving" First Amendment principles. *Id*. "[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 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.

23. **Response:** No response.

24. **Response:** No response.

25. **Response:** No response.

26. **Response:** *See supra* Response ¶ 22.

27. **Response:** No response.

28. **Response:** No response.

29. **Response:** In regard to state and local party committees, which are required to use federal funds only for "federal election activity," *McConnell* 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*." 540 U.S. at 167 (emphasis added). To the extent the Court discussed such parties' relationships with federal candidates and officeholders as justifying regulation, it applied this analysis only when 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"). Nevertheless, the FEC mischaracterizes statements made by CRP's representatives regarding their relationship with federal candidates as indicative of preferential access. Because CRP's intended activities do not directly benefit federal candidates and because CRP does not give preferential access to any donor, evidence regarding CRP's relationship with federal candidates and officeholders is irrelevant.

30. **Response:** *See supra* Response ¶ 29.

31. **Response:** *See supra* Response ¶ 29.

32. **Response:** *See supra* Response ¶ 29.

33. **Response:** *See supra* Response ¶ 29.

34. **Response:** *See supra* Response ¶ 29. The FEC mischaracterizes the statement of the CRP Chairman in this letter. As stated in regards to the RNC in Response ¶11, a mere introduction does not rise to the level of "preferential access." The FEC fails to establish that the CRP has a practice of providing donors with preferential access.

35. **Response:** *See supra* Response ¶ 29.

36. **Response:** *See supra* Response ¶ 16. No federal candidates will directly benefit from Plaintiffs' intended activities and so this statement is irrelevant. To the extent that *McConnell* discussed corruption arising from 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.

37-45. **Response**: No response.

46. **Response:** Expenditures by committees and organizations not parties to this suit are irrelevant.

47-50. **Response:** No response.

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

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[2] "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.*

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[3] that clearly identify and "promote," "attack," "support," or "oppose" ("PASO") a federal candidate. *Id.* § 431(20). The Supreme Court has noted that limiting the amount of contributions "in turn" limits expenditures. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) ("*CARC*"). In *CARC*, the Supreme Court employed "exacting scrutiny," 454 U.S. at 294, to strike down a limit on contributions to ballot-measure committees, noting that "[a]part from the impermissible restraint on freedom of association, but virtually inseparable from it in this context, [the limit] imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees." *Id.* at 298. *CARC* noted that, as with the present case, individuals could "make expenditures without limit" on a ballot measure "but may not contribute beyond the $250 limit when joining with others to advocate common views." *Id.* The Court concluded that "[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression." *Id.*

52. **Response:** Even if it were true, this statement is irrelevant because the FEC bears the burden of demonstrating why the regulation of such activities is necessary and justified. But moreover, because of the difficulty in raising federal funds, and the need to use federal funds for federal purposes, the RNC has engaged in little, if any, of the activities for which it seeks relief

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

in this action to use non-federal funds and state funds. FEC Exh. 4, *Pls.' Discovery Responses* at 4-5; FEC Exh. 1, *Josefiak Dep.* 141:13-144:14, 160:12-20. And to the extent the RNC has engaged in any of these activities, it has been forced to use federal funds, which by there very nature are raised for federal purposes, for these non-federal activities like supporting state candidates. *Id.* If it were not limited to federal funds, the RNC could engage in additional speech. *Id.*

53. **Response:** *See supra* Response ¶ 52.

54. **Response:** This statement is irrelevant. The fact that CRP has used federal funds to support federal candidates in the past has no bearing on this case. What is relevant in this case is CRP's intended use of state funds for ballot measure advocacy and state election activities, which activity is prohibited by the Federal Funds Prohibition. Pls.' Exh. 3, *Christiansen Dec*. ¶¶ 16, 19.

55. **Response:** This statement is irrelevant. The fact that RPSD has used federal funds to support federal candidates in the past has no bearing on this case. What is relevant in this case is RPSD's intended use of state funds for ballot measure advocacy and state election activities, which activity is prohibited by the Federal Funds Prohibition. Pls.' Exh. 5, *Tetlow Dec*. ¶¶ 5-6.

56. **Response:** If RPSD's obtains the judicial relief sought in this action, RPSD will undertake its intended activities using state funds. If RPSD does not obtain the requested judicial relief, it will continue to use federal funds for its activities that qualify as "federal election activity" to the extent federal funds are available. FEC Exh. 3, *Buettner Dep*. 76:2-12.

57. **Response:** *See supra* Response ¶ 52.

58. **Response:** *See supra* Response ¶ 52.

59. **Response:** *See supra* Response ¶ 1.

59.1 **Response**: The RNC has stated its intent to fund specific types of activities in the 2009 New Jersey elections with non-federal dollars, if permitted. *Pls.' Mem.* Exh. 1, *Beeson Aff.* at ¶¶ 3-4. Chairman Steele's deposition answer addressed the problem of not knowing whether there would be a favorable ruling and, if so, when it might be issued, giving rise to "speculation" at the present as to further specificity. So he said that what might be practically possible "[i]f the ruling comes next week" differs from what would be possible "two weeks before the general election," and "I wouldn't speculate as to what we would do until I know what I can do." FEC Exh. 42, *Steele Dep.* at 69:22-70:9. His statement contradicts nothing previously asserted.

60. **Response:** The RNC's intended activities in state and local elections where no federal candidates appear on the ballot do not directly benefit any federal candidate. The 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. 2d at 830 (Leon, J.) (*citing* Cross Exam. of Defense Expert Mann at 71). Nor does voter registration, voter identification, or GOTV activities in elections where no federal candidates appear on the ballot directly benefit any federal candidate. *See McConnell*, 251 F. Supp. 2d at 831 (Leon, J.). Any voter information obtained by the RNC in these state and local elections is "worthless" for use in future federal elections absent a continuing enhancement process on the part of the RNC. *Defendant Van Hollen's Opposition to Plaintiffs' Motion for Summary Judgment*, Exh. 11, *Josefiak Dep.* 246:2-13, 19-22 (Dkt. 41). Voter registration lists must be constantly updated as people move into and out of the relevant jurisdiction. Pls.' Exh. 6, *Josefiak Dep.* 247:10-17. And "just because you register [to vote] once doesn't mean you can vote in every election after that if your circumstances change." *Id.* at

248:14-16. The RNC's involvement in state and local elections is not to use those elections as a 'practice field' for future federal elections, or to benefit federal candidates in some other way. The "RNC is a *national* party, and not just a *federal* party." *Pls. Reply Mem*. Exh. 1, *Josefiak Dep*.138:11-18 (emphasis added).

> As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the *federal, state and local levels*. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord *with Republican views at the* federal, state and local levels.

McConnell, 251 F. Supp. 2d at 335 (citations omitted) (Henderson, J.) (emphasis added). "[T]he RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities." *Id.* at 336. These activities in state and local elections "are substantial [] in their importance . . ." to the RNC. *Id*. at 335. In its role as a *national* party, the RNC seeks to assist state and local candidates, not just federal candidates.

61. **Response:** *See supra* Response ¶ 60. The FEC's citations to Chairman Steele's deposition mischaracterize the question and answer and makes an impossible implication. The question was about intended solicitation of "contributions on behalf of specific state candidates," FEC Exh. 42, *Steele Dep.* at 104:18-22. Such contributions would be made directly to the candidates, not RNC, so there would be no "transfer to state candidates." As to the implication that fundraising for candidates would make them conduits for soft-money "sham issue advertising," that is impossible for two reasons. First, persons contributing to a candidate would expect their contributions to be used to advance the candidate's own candidacy, and candidates need funds for their own campaigns, so candidates would be highly unlikely to use campaign

contributions for non-campaign expenses (and state law might forbid it). Second, state candidates *cannot* use "any funds for a communication" that promotes, attacks, supports, or opposes a federal candidate unless the funds are federal-funds, which makes the use of non-federal funds for "sham issue ads" impossible. *See* 2 U.S.C. § 441i(f). Moreover, Chairman Steele indicated that any restrictions imposed by court opinion and order would be faithfully implemented when such an opinion and order would be issued, which could not be done in advance of such an opinion and order.

62. **Response:** *See supra* Response ¶ 1.

63. **Response:** The RNC intends to use the Grassroots Lobbying Account to pay for radio, television, and internet grassroots lobbying advertisements on relevant public-policy issues. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 11. The first two issues the RNC would like to address are issues being debated by the 111th Congress: (1) "card check" legislation, which allows unionization without secret-ballot elections for workers; and (2) legislation to revive the "Fairness Doctrine," which would require radio station owners to provide equal time on matters of public importance or risk losing their broadcast licenses. *Id.* The RNC has provided true and correct copies of two ads that the RNC intends to broadcast: "Card Check" and "Freedom of Speech." The Supreme Court in *WRTL II* provided the means to distinguish alleged bogus issue ads from genuine issue advocacy. The Court found that WRTL's grassroots lobbying ads were genuine issue advocacy because:

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention

> an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 2667. Both the "Card Check" and "Freedom of Speech" ads that the RNC intends to broadcast with non-federal funds undisputedly contain these same characteristics. Under *WRTL II,* ads such as "Card Check" and "Freedom of Speech" are genuine issue ads, not "electioneering" advertising, "campaign speech," or sham issue ads. *See* 127 S. Ct. at 2559, 2667, 2669 n. 7. And the RNC has stated its intention to broadcast materially similar advertisements in the future. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 18. So the RNC intends to use the Grassroots Lobbying Account to broadcast advertisements consistent with the above characteristics of genuine grassroots lobbying ads set out by the Supreme Court. 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. Plaintiffs' objected to the FEC's definition of grassroots lobbying because it encompassed *any* "radio, television, and internet. . . advertisements on relevant public-policy issues" and was not limited to the type of grassroots lobbying advertisements described in *WRTL II* that the RNC intends to engage in. Pls.' Exh. 7, *FEC Discovery Requests* at 4. Chairman Steele did not, as represented, "disavow" the ability to identify grassroots lobbying, but rather said that the scope of what is permissible under that category would have to await the outcome of this case. Moreover, he did not purport to speak for what the RNC wanted to do as to grassroots lobbying, instead specifically stating that he "can't speak to . . . what RNC has proposed in the past as grass-roots lobbying," indicating that he was

not testifying as the RNC representative for discovery. *See* FEC Exh. 42, *Steele Dep.* at 80:18-22, 81:10-15, 82:17-20.

64. **Response:** No response.

65. **Response:** *See supra* Response ¶ 63. Moreover, the "More" and "Taxed too Much" ads previously identified by this Court as "electioneering," fit the description of what the Supreme Court has subsequently described as "genuine issue advocacy." *WRTL II*, 127 S. Ct. at 2667.

66. **Response:** This statement is irrelevant as a speakers intent has no bearing on whether speech is regulable or not. *WRTL II*, 127 S. Ct. at 2665. What is relevant is the substance of the speech. *Id.*

67. **Response:** The Democratic National Committee's activities are not at issue in this case and are entirely irrelevant. Notably, however, the FEC does recognize the existence of a "genuine grassroots lobbying advertisement."

68. **Response:** Supporting redistricting does not "directly" benefit federal candidates. *See McConnell*, 251 F. Supp. 2d at 831-32 (Leon, J.). Redistricting is the province of state legislators. While this state activity involves congressional districts, any effect on federal candidates or officeholders is far too attenuated to be deemed *unambiguously*-campaign-related. *McConnell* stated that only those *activities* that "*directly* benefit" federal candidates pose a risk of corruption sufficient to justify regulation. 540 U.S. at 168-70 (emphasis added). Thus, state parties, as well as corporations and unions, remain free to use non-federal funds to support state redistricting. The FEC points to Chairman Steele's statement that redistricting affects federal

elections, but that sort of effect does not satisfy the requisite unambiguously-campaign-related analysis.

69. **Response:** *See supra* Response ¶ 68.

70. **Response:** The RNC has stated that it intends to use its Litigation Account for the purposes of paying the fees and expenses attributable to this case and costs associated with other litigation not involving federal elections. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 15. Such litigation might include trademark issues, personnel issues, recount issues in state and local candidate elections, and state legal issues regarding voter fraud or voter registration. FEC Exh. 1, *Josefiak Dep.* 172:13-173:11. None of these activities directly affect federal elections.

71. **Response:** *See supra* Response ¶¶ 60, 70.

72. **Response:** Plaintiffs' GOTV activities 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, Pls.' Exh. 3, *Christiansen Dec*. ¶ 16, do not *directly* benefit federal candidates. Such activities may take two different forms. First are 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 are 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 campaign related, *Buckley,* 424 U.S. at 80, because they do not directly benefit any federal candidate. Any effect on federal candidates and officeholders would be indirect and tangential.

73. **Response:** *See supra* Response ¶ 72. The "RNC is a *national* party, and not just a *federal* party." *Pls. Reply Mem.* Exh. 1, *Josefiak Dep*.138:11-18 (emphasis added).

> As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the *federal, state and local levels*. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views *at the federal, state and local levels*.

McConnell, 251 F. Supp. 2d at 335 (citations omitted) (Henderson, J.) (emphasis added). "[T]he RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities." *Id.* at 336. These activities in state and local elections "are substantial [] in their importance. . ." to the RNC. *Id*. at 335. In its role as a *national* party, the RNC seeks assist state and local candidates, not just federal candidates.

74. **Response:** *See supra* Response ¶¶ 72-73.

75. **Response:** That CRP has previously identified federal candidates in its GOTV activities is irrelevant to this case. At issue in this case is CRP's desire to use state funds for GOTV activities that will not "be targeted to any federal candidate, *i.e*., it would not reference, describe, or otherwise depict any federal candidate." Pls.' Exh. 3, *Christiansen Dec*. ¶¶ 16.

76. **Response:** RPSD's past use of federal funds for GOTV activities referencing federal candidates is irrelevant to this case. At issue in this case is RPSD's desire to use state funds for GOTV activities that will not "be targeted to any federal candidate, *i.e*., it would not reference, describe, or otherwise depict any federal candidate." Pls.' Exh. 5, *Tetlow Dec*. ¶ 5.

77. **Response:** CRP's voter registration efforts in elections where both state and federal candidates appear on the ballot is intended "to elect more Republicans at both [the state and federal] levels." FEC Exh. 2, *Christiansen Dep.* 123:12-13. CRP intends to use state funds for voter registration activity that will not "be targeted to any federal candidate, *i.e*., it would not

reference, describe, or otherwise depict any federal candidate." Pls.' Exh. 3, *Christiansen Dec*. ¶ 16. These activities do not directly benefit any federal candidate.

78. **Response:** To the extent this paragraph refers to voter registration efforts in elections where no federal candidate appears on the ballot, *see supra* Response ¶ 60. To the extent this paragraph refers to voter registration efforts in elections where both state and federal candidates appear on the ballot, *see supra* Response ¶ 77.

79. **Response:** 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.* While this finding was sufficient to uphold the law facially, it is not sufficient to uphold the law in every application, *i.e.* when the activity does not directly benefit federal candidates. 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. *Cf. WRTL I,* 546 U.S. at 412. In the wake of *WRTL II,* 127 S. Ct. 2652, it is apparent that CRP and RPSD's public communication, Pls.' Exh. 3, *Christiansen Dec*. ¶ 19; Pls.' Exh. 5, *Tetlow Dec*. ¶ 6, is not "bogus issue advertising," but is instead genuine issue advocacy. As such, it does 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." *WRTL II*, 127 S. Ct. at 2667.

80. **Response:** No response.

81. **Response:** *See supra* Response ¶¶ 72,77.

82. **Response:** *See supra* Response ¶¶ 72,77.

83. **Response:** *See supra* Response ¶¶ 72-73.

Respectfully submitted,

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

Plaintiffs' Supplemented Statement of Material Issues and Objections to Defendant's Statement of Undisputed Facts

Plaintiffs' RNC et al. submit the following statement of material issues in opposition to the Federal Election Commission's ("FEC") supplemented statement of undisputed material facts. LCvR 7(h). The following numbered paragraphs correspond with the FEC's numbered paragraphs.[1]

1. **Response:** "The RNC is a *national* party, and not just a *federal* party." *Pls.' Reply Mem*. Exh. 1, *Josefiak Dep*. at 138:11-18 (emphasis added).

> As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the federal, state and local levels. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views at the federal, state and local levels.

[1] Plaintiffs' Exhibits 1-5 were attached to Plaintiffs' motion for summary judgment (Dkt. 21). Plaintiffs' Exhibits 6-7 were attached to Plaintiffs' initial statement of material issues. Plaintiffs' exhibit attached to their reply memorandum in support of summary judgment (Dkt. 50) is herein referred to as *Pls. Reply Mem*. Exh. 1. Defendant FEC's Exhibits 1-25 were attached to its memorandum in opposition to Plaintiffs' motion for summary judgment, (Dkt. 39), and Defendant FEC's Exhibits 26-41 were attached to the FEC's motion for summary judgment. (Dkt. 56).

McConnell, 251 F. Supp. 2d at 335 (Henderson, J.) (citations omitted). These activities in state and local elections "are substantial both in their importance to the RNC's mission and in their resource commitment." *Id.* "Even for elections in which there is no federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities." *Id.* at 336. Furthermore, a political "party has its own traditions and principles that transcend the interests of individual candidates and campaigns . . . ." *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 629 (1996) ("*Colorado I*") (Kennedy, J., concurring in the judgment and dissenting in part). Parties have a "unique role in serving" First Amendment principles. *Id.* "[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 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.

2. **Response:** *See supra* Response ¶ 1.

3. **Response:** *See supra* Response ¶ 1.

4. **Response:** *See supra* Response ¶ 1.

5. **Response:** When the President of the United States is a Republican, he will offer a suggestion of a chairperson to the RNC. This person must then receive an independent majority vote of the 168 members of the RNC in order to become the chairperson. The members may choose not to accept the President's suggestion. FEC Exh. 1, *Josefiak Dep*. 193:2-194:5. When

the President is a Republican, the White House cooperates with the RNC, but the President maintains no control over the RNC and the RNC alone decides how it will spend its resources. *Id*. at 194:6-12.

6. **Response:** The RNC has, on occasion, entered into name-for-name list exchanges with campaigns, which may include voter preference information and/or donor information. *See* FEC Exh. 1, *Josefiak Dep*. 98:8-14. The FEC's statement that RNC "assists Members of Congress by distributing their 'message point[s]' to the party's 'base,'" mischaracterizes Chairman Steele's statement. First, the statement omits the context, which is as to "purposes" for "initiat[ing] contact with federal officeholders." Second, "assists" implies a regular event, when "they've been very few." Third, he said the purpose was "to have them get us information on a subject," which he elaborated to be "their message point," i.e., "the issue," especially in the context of legislation so as to "have the understanding of what it is they want, what they're trying to do." When asked why he would "seek to gain that understanding," he responded that the purpose would be to "educate our base as to [cited public issues] and the solutions that legislative leaders are looking to propose . . . ." *See* FEC Exh. 42, *Steele Dep.* at 29:5-22. So the evidence is that there are occasional calls to federal officeholders about issues, such as legislation, to understand what the proposed legislation is to accomplish. The FEC's statement implies regular contact for the purpose of obtaining and communicating an officeholder's undefined "message point[s]," creating the impression that these might be some sort of political talking points under discussion, instead of a discussion about public issues.

7. **Response:** The RNC provides its contributors of federal funds with certain opportunities and invitations to events not offered to the public at large. FEC Exh. 4, *RNC*

Discovery Responses at 7. 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 Exh. 1, *Josefiak Dep*. at 73:3-77:4 (describing RNC fundraising events for federal funds contributors). No matter the size of the event, the RNC does not facilitate individualized one-on-one contact between federal funds contributors and federal officeholders or candidates. FEC Exh. 4, *RNC Discovery Responses* at 7; FEC Exh. 1, *Josefiak Dep*. at 73:3-77:4, 126:20-130:3; FEC Exh. 42, *Steele Dep.* at 51:10-18. Where a contributor attends an event at which the contributor might have opportunity to speak with a federal officeholder or candidate, "[t]ypically these conversations are about three to seven seconds long: Hi. How are you." FEC Exh. 42, *Steele Dep.* at 48:15-17. The RNC does not encourage federal officeholders to meet with contributors of federal funds. FEC Exh. 4, *RNC Discovery Responses* at 7; FEC Exh. 42, *Steele Dep.* at 46:1-4. Nor does the RNC pass on to candidates or officeholders requests from donors to meet with such candidates or officeholders. FEC Exh. 1, *Josefiak Dep.* at 127:1-128:1. The RNC also does not arrange for contributors to participate in conference calls with federal candidates or officeholders. FEC Exh. 42, *Steele Dep.* at 46:8-12.

8. **Response:** *See supra* Response ¶ 7. To the extent "an attending donor has an opportunity to inform the federal candidate or officeholder about the donor's opinion on legislation or other issues," it would occur by the possible opportunity to ask the candidate a question during the question and answer session following a candidate or officeholder's speech. FEC Exh. 1, *Josefiak Dep*. 75:22-77:8-11 (noting that donors who attend such events and express their opinions often have divergent positions on the same issue).

9. **Response:** No response.

10. **Response:** *See infra* Response ¶¶ 11, 16.

11. **Response:** *See supra* Response ¶ 7. Just as no preferential access is now provided to federal donors, the RNC will not provide non-federal donors with preferential access to any federal candidate or officeholder. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 19, 30; *FEC Mem.* Exh. 4 at 7; FEC Exh. 1, *Josefiak Dep*. 126:20-130:3; FEC Exh. 42, *Steele Dep.* at 46:1-19, 51:10-18, 55:13-22, 111:12-21. 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 Exh. 1, *Josefiak Dep*. 126:20-130:3. The record from *McConnell* does not support the statement that "trading of soft money for access to federal officeholders was rampant" at the RNC prior to BCRA's enactment.

The FEC's supplemented statement—that "Chairman Steele does not plan to develop such a policy until after this lawsuit is resolved, and he does not know what the content of that policy will be"—conflates concepts and statements that may not be conflated and creates an implication that mischaracterizes the evidence. This may clearly be seen by what comes before and what comes after the supplemented material. Before the supplemented material is a statement that there is "no written policy . . . against preferential access," and following the supplemented statement is an acknowledgment of "an unwritten policy" against preferential access. FEC Exh. 42, *Steele Dep.* at 11:5-21. So there *is* a policy against "providing donors with preferential access to federal candidates and officeholders" in place, as set out in the cited evidence in this Response. Any implication that having such a policy awaits the end of this lawsuit is erroneous. Policies arising out the scope of what this case may allow clearly must await instruction from the court, so such policies will of course be formulated after final

resolution of this matter. To be clear, here is what the evidence actually shows as to RNC policies.

(1) The RNC does not and will not facilitate intimate meetings between donors and federal candidates and officeholders. By "preferential access" RNC does not mean merely "an opportunity to briefly speak with an officeholder" at an event, but rather "some secret cabal. You're getting some special favor . . . ." . *See* FEC Exh. 42, *Steele Dep.* at 50:12-20. In *RNC Discovery Responses*, in response to Interrogatory 5, a question about "preferential access," the RNC said that it "does not facilitate one-on-one meetings between federal candidates and officeholders and any contributor of federal funds. Nor does the RNC encourage federal candidates or officeholders to meet one-on-one with or have other individualized contact with any RNC contributor." FEC Exh. 4, *RNC Discovery Responses* at 7 at 7; *see also Plaintiffs' Statement of Undisputed Material Facts* at ¶ 24 (no "preferential access" with examples); *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19 (same). Although RNC does have events to which individuals are invited because they have *already* contributed federal funds at particular levels (they do not pay to attend the event and they pay their own way to get there), at such events there is only opportunity for a brief greeting, handshake, and photo-op, but not any more substantive one-on-one meeting. *See* FEC Exh. 1, *Josefiak Dep.* at 72:12-73:19; FEC Exh. 42, *Steele Dep.* at 48:8-49:22.

In its discovery responses, the RNC has verified that the policy against granting preferential access will continue. Specifically, "in regard to both federal and potential non-federal donations, the RNC would instruct its staff not to facilitate any one-on-one meetings or

other individualized contact between contributors and federal candidates and officeholders." FEC Exh. 4, *RNC Discovery Responses* at 6-7.

(2) As stated in its discovery responses, the "RNC does provide contributors of federal funds with certain opportunities and invitations to certain events not offered to the public at large." FEC Exh. 4, *RNC Discovery Responses* at 7. However, access to these donor events at the various levels is now and will continue to be based only on federal funds, not non-federal funds. At such a time as RNC is able to accept non-federal funds, those will not be counted toward these major-donor, federal-fund clubs. Membership in a donor club is a perk available only to donors of federal funds. There may be events for donors of only non-federal funds, but there will be no federal candidates or officeholders at such events, and they will not solicit non-federal funds. *Pls.' Reply Mem.* Exh. 1, *Josefiak Dep.* at 208:2-209:3; *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19.

(3) Federal candidates or officeholders cannot and will not solicit non-federal funds. *Pls' Reply Mem.* Exh. 1, *Josefiak Dep.* at 208:2-209:3 ("federal officers, office holders and candidates would not be involved in these fund-raising efforts, period."); *Pls' Mem.* Exh. 1, *Beeson Affid.* at ¶ 19 ("the RNC will not use any federal candidates or officeholders to solicit funds for any of the Accounts."). Therefore, the RNC will "not include federal candidates in the [non-federal] fund-raising event at all or officeholders." *Pls' Reply Mem.* Exh. 1, *Josefiak Dep.* at 208:7-9.

12. **Response:** Donors contribute to the RNC "because they want to assist the Republican National Committee." FEC Exh. 1, *Josefiak Dep.* 74:18-75:2.

13. **Response:** No response.

14. **Response:** The FEC points to no evidence that prior to the enactment of the BCRA federal officeholders solicited funds on behalf of the RNC. As for the RNC's intended activities in this case, no federal candidate or officeholder will solicit funds to any of the RNC's intended accounts. *Pls.' Mem.* Exh. 1, *Beeson Aff.* ¶ 19.

15. **Response:** The RNC does not distribute donor lists or donor information to federal candidates or officeholders, Pls.' Exh. 6, *Josefiak Dep*. 95:6-96:13, with the exception of the exchanges referenced in Response ¶ 6.

16. **Response:** Gratitude on the part of candidates and officeholders, which contributors might try to exploit to gain undue influence, can only exist where a direct benefit is conferred on the candidate officeholder. Absent a direct benefit, any gratitude on the part of candidates and officeholders is too attenuated to pass constitutional muster. Plaintiffs' intended activities do not directly benefit any federal candidate or officeholder and thereby pose no threat of corruption or its appearance. To the extent that *McConnell* discussed corruption arising from 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).

17. **Response:** *See supra* Response ¶¶ 7, 16. To the extent donors inform federal candidates or officeholders of contributions to the RNC's intended Accounts, it would be no different than if they informed the officeholder of their contribution to a state candidate, state party, or charitable organization of the officeholder's liking. See FEC Exh. 42, *Steele Dep.* at

61:4-62:13 (stating that the RNC does not have the right to prevent donors from independently informing officeholders of their contributions to the intended Accounts). The FEC mischaracterizes Chairman Steele's testimony by the use of "would," saying that donors "would" attend . . . and contact officials in other ways," when "could" would be correct.

18. **Response:** *See supra* Response ¶¶ 7, 11-12,16.

19. **Response:** No response.

20. **Response:** No response.

21. **Response:** There is regular communication between the RNC and all its members because the members "make up the Republican National Committee." FEC Exh. 1, *Josefiak Dep.* 200:20-201:1. There is no "near-constant strategic communication between state parties and the RNC." *Id*. 200:13-201:16.

22. **Response:** A political "party has its own traditions and principles that transcend the interests of individual candidates and campaigns . . . ." *See Colorado I*, 518 U.S. at 629 (Kennedy, J., concurring in the judgment and dissenting in part). Parties have a "unique role in serving" First Amendment principles. *Id*. "[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 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.

23. **Response:** No response.

24. **Response:** No response.

25. **Response:** No response.

26. **Response:** *See supra* Response ¶ 22.

27. **Response:** No response.

28. **Response:** No response.

29. **Response:** In regard to state and local party committees, which are required to use federal funds only for "federal election activity," *McConnell* 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*." 540 U.S. at 167 (emphasis added). To the extent the Court discussed such parties' relationships with federal candidates and officeholders as justifying regulation, it applied this analysis only when 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"). Nevertheless, the FEC mischaracterizes statements made by CRP's representatives regarding their relationship with federal candidates as indicative of preferential access. Because CRP's intended activities do not directly benefit federal candidates and because CRP does not give preferential access to any donor, evidence regarding CRP's relationship with federal candidates and officeholders is irrelevant.

30. **Response:** *See supra* Response ¶ 29.

31. **Response:** *See supra* Response ¶ 29.

32. **Response:** *See supra* Response ¶ 29.

33. **Response:** *See supra* Response ¶ 29.

34. **Response:** *See supra* Response ¶ 29. The FEC mischaracterizes the statement of the CRP Chairman in this letter. As stated in regards to the RNC in Response ¶11, a mere introduction does not rise to the level of "preferential access." The FEC fails to establish that the CRP has a practice of providing donors with preferential access.

35. **Response:** *See supra* Response ¶ 29.

36. **Response:** *See supra* Response ¶ 16. No federal candidates will directly benefit from Plaintiffs' intended activities and so this statement is irrelevant. To the extent that *McConnell* discussed corruption arising from 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.

37-45. **Response**: No response.

46. **Response:** Expenditures by committees and organizations not parties to this suit are irrelevant.

47-50. **Response:** No response.

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

[2] "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.*

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[3] that clearly identify and "promote," "attack," "support," or "oppose" ("PASO") a federal candidate. *Id.* § 431(20). The Supreme Court has noted that limiting the amount of contributions "in turn" limits expenditures. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) ("*CARC*"). In *CARC*, the Supreme Court employed "exacting scrutiny," 454 U.S. at 294, to strike down a limit on contributions to ballot-measure committees, noting that "[a]part from the impermissible restraint on freedom of association, but virtually inseparable from it in this context, [the limit] imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees." *Id.* at 298. *CARC* noted that, as with the present case, individuals could "make expenditures without limit" on a ballot measure "but may not contribute beyond the $250 limit when joining with others to advocate common views." *Id.* The Court concluded that "[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression." *Id.*

52. **Response:** Even if it were true, this statement is irrelevant because the FEC bears the burden of demonstrating why the regulation of such activities is necessary and justified. But moreover, because of the difficulty in raising federal funds, and the need to use federal funds for federal purposes, the RNC has engaged in little, if any, of the activities for which it seeks relief

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

in this action to use non-federal funds and state funds. FEC Exh. 4, *Pls.' Discovery Responses* at 4-5; FEC Exh. 1, *Josefiak Dep.* 141:13-144:14, 160:12-20. And to the extent the RNC has engaged in any of these activities, it has been forced to use federal funds, which by there very nature are raised for federal purposes, for these non-federal activities like supporting state candidates. *Id.* If it were not limited to federal funds, the RNC could engage in additional speech. *Id.*

53. **Response:** *See supra* Response ¶ 52.

54. **Response:** This statement is irrelevant. The fact that CRP has used federal funds to support federal candidates in the past has no bearing on this case. What is relevant in this case is CRP's intended use of state funds for ballot measure advocacy and state election activities, which activity is prohibited by the Federal Funds Prohibition. Pls.' Exh. 3, *Christiansen Dec*. ¶¶ 16, 19.

55. **Response:** This statement is irrelevant. The fact that RPSD has used federal funds to support federal candidates in the past has no bearing on this case. What is relevant in this case is RPSD's intended use of state funds for ballot measure advocacy and state election activities, which activity is prohibited by the Federal Funds Prohibition. Pls.' Exh. 5, *Tetlow Dec*. ¶¶ 5-6.

56. **Response:** If RPSD's obtains the judicial relief sought in this action, RPSD will undertake its intended activities using state funds. If RPSD does not obtain the requested judicial relief, it will continue to use federal funds for its activities that qualify as "federal election activity" to the extent federal funds are available. FEC Exh. 3, *Buettner Dep*. 76:2-12.

57. **Response:** *See supra* Response ¶ 52.

58. **Response:** *See supra* Response ¶ 52.

59. **Response:** *See supra* Response ¶ 1.

59.1 **Response**: The RNC has stated its intent to fund specific types of activities in the 2009 New Jersey elections with non-federal dollars, if permitted. *Pls.' Mem.* Exh. 1, *Beeson Aff.* at ¶¶ 3-4. Chairman Steele's deposition answer addressed the problem of not knowing whether there would be a favorable ruling and, if so, when it might be issued, giving rise to "speculation" at the present as to further specificity. So he said that what might be practically possible "[i]f the ruling comes next week" differs from what would be possible "two weeks before the general election," and "I wouldn't speculate as to what we would do until I know what I can do." FEC Exh. 42, *Steele Dep.* at 69:22-70:9. His statement contradicts nothing previously asserted.

60. **Response:** The RNC's intended activities in state and local elections where no federal candidates appear on the ballot do not directly benefit any federal candidate. The 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. 2d at 830 (Leon, J.) (*citing* Cross Exam. of Defense Expert Mann at 71). Nor does voter registration, voter identification, or GOTV activities in elections where no federal candidates appear on the ballot directly benefit any federal candidate. *See McConnell*, 251 F. Supp. 2d at 831 (Leon, J.). Any voter information obtained by the RNC in these state and local elections is "worthless" for use in future federal elections absent a continuing enhancement process on the part of the RNC. *Defendant Van Hollen's Opposition to Plaintiffs' Motion for Summary Judgment*, Exh. 11, *Josefiak Dep.* 246:2-13, 19-22 (Dkt. 41). Voter registration lists must be constantly updated as people move into and out of the relevant jurisdiction. Pls.' Exh. 6, *Josefiak Dep.* 247:10-17. And "just because you register [to vote] once doesn't mean you can vote in every election after that if your circumstances change." *Id.* at

248:14-16. The RNC's involvement in state and local elections is not to use those elections as a 'practice field' for future federal elections, or to benefit federal candidates in some other way. The "RNC is a *national* party, and not just a *federal* party." *Pls. Reply Mem*. Exh. 1, *Josefiak Dep*.138:11-18 (emphasis added).

> As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the *federal, state and local levels*. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord *with Republican views at the* federal, state and local levels.

McConnell, 251 F. Supp. 2d at 335 (citations omitted) (Henderson, J.) (emphasis added). "[T]he RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities." *Id.* at 336. These activities in state and local elections "are substantial [] in their importance . . ." to the RNC. *Id*. at 335. In its role as a *national* party, the RNC seeks to assist state and local candidates, not just federal candidates.

61. **Response:** *See supra* Response ¶ 60. <u>The FEC's citations to Chairman Steele's deposition mischaracterize the question and answer and makes an impossible implication. The question was about intended solicitation of "contributions on behalf of specific state candidates," FEC Exh. 42, *Steele Dep.* at 104:18-22. Such contributions would be made directly to the candidates, not RNC, so there would be no "transfer to state candidates." As to the implication that fundraising for candidates would make them conduits for soft-money "sham issue advertising," that is impossible for two reasons. First, persons contributing to a candidate would expect their contributions to be used to advance the candidate's own candidacy, and candidates need funds for their own campaigns, so candidates would be highly unlikely to use campaign</u>

contributions for non-campaign expenses (and state law might forbid it). Second, state candidates *cannot* use "any funds for a communication" that promotes, attacks, supports, or opposes a federal candidate unless the funds are federal-funds, which makes the use of non-federal funds for "sham issue ads" impossible. *See* 2 U.S.C. § 441i(f). Moreover, Chairman Steele indicated that any restrictions imposed by court opinion and order would be faithfully implemented when such an opinion and order would be issued, which could not be done in advance of such an opinion and order.

62. **Response:** *See supra* Response ¶ 1.

63. **Response:** The RNC intends to use the Grassroots Lobbying Account to pay for radio, television, and internet grassroots lobbying advertisements on relevant public-policy issues. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 11. The first two issues the RNC would like to address are issues being debated by the 111th Congress: (1) "card check" legislation, which allows unionization without secret-ballot elections for workers; and (2) legislation to revive the "Fairness Doctrine," which would require radio station owners to provide equal time on matters of public importance or risk losing their broadcast licenses. *Id.* The RNC has provided true and correct copies of two ads that the RNC intends to broadcast: "Card Check" and "Freedom of Speech." The Supreme Court in *WRTL II* provided the means to distinguish alleged bogus issue ads from genuine issue advocacy. The Court found that WRTL's grassroots lobbying ads were genuine issue advocacy because:

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention

> an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 2667. Both the "Card Check" and "Freedom of Speech" ads that the RNC intends to broadcast with non-federal funds undisputedly contain these same characteristics. Under *WRTL II,* ads such as "Card Check" and "Freedom of Speech" are genuine issue ads, not "electioneering" advertising, "campaign speech," or sham issue ads. *See* 127 S. Ct. at 2559, 2667, 2669 n. 7. And the RNC has stated its intention to broadcast materially similar advertisements in the future. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 18. So the RNC intends to use the Grassroots Lobbying Account to broadcast advertisements consistent with the above characteristics of genuine grassroots lobbying ads set out by the Supreme Court. 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. Plaintiffs' objected to the FEC's definition of grassroots lobbying because it encompassed *any* "radio, television, and internet. . . advertisements on relevant public-policy issues" and was not limited to the type of grassroots lobbying advertisements described in *WRTL II* that the RNC intends to engage in. Pls.' Exh. 7, *FEC Discovery Requests* at 4. Chairman Steele did not, as represented, "disavow" the ability to identify grassroots lobbying, but rather said that the scope of what is permissible under that category would have to await the outcome of this case. Moreover, he did not purport to speak for what the RNC wanted to do as to grassroots lobbying, instead specifically stating that he "can't speak to . . . what RNC has proposed in the past as grass-roots lobbying," indicating that he was

not testifying as the RNC representative for discovery. *See* FEC Exh. 42, *Steele Dep.* at 80:18-22, 81:10-15, 82:17-20.

64. **Response:** No response.

65. **Response:** *See supra* Response ¶ 63. Moreover, the "More" and "Taxed too Much" ads previously identified by this Court as "electioneering," fit the description of what the Supreme Court has subsequently described as "genuine issue advocacy." *WRTL II*, 127 S. Ct. at 2667.

66. **Response:** This statement is irrelevant as a speakers intent has no bearing on whether speech is regulable or not. *WRTL II*, 127 S. Ct. at 2665. What is relevant is the substance of the speech. *Id.*

67. **Response:** The Democratic National Committee's activities are not at issue in this case and are entirely irrelevant. Notably, however, the FEC does recognize the existence of a "genuine grassroots lobbying advertisement."

68. **Response:** Supporting redistricting does not "directly" benefit federal candidates. *See McConnell*, 251 F. Supp. 2d at 831-32 (Leon, J.). Redistricting is the province of state legislators. While this state activity involves congressional districts, any effect on federal candidates or officeholders is far too attenuated to be deemed *unambiguously*-campaign-related. *McConnell* stated that only those *activities* that "*directly* benefit" federal candidates pose a risk of corruption sufficient to justify regulation. 540 U.S. at 168-70 (emphasis added). Thus, state parties, as well as corporations and unions, remain free to use non-federal funds to support state redistricting. The FEC points to Chairman Steele's statement that redistricting affects federal

elections, but that sort of effect does not satisfy the requisite unambiguously-campaign-related analysis.

69. **Response:** *See supra* Response ¶ 68.

70. **Response:** The RNC has stated that it intends to use its Litigation Account for the purposes of paying the fees and expenses attributable to this case and costs associated with other litigation not involving federal elections. *Pls.' Mem.* Exh. 1, *Beeson Affidavit* ¶ 15. Such litigation might include trademark issues, personnel issues, recount issues in state and local candidate elections, and state legal issues regarding voter fraud or voter registration. FEC Exh. 1, *Josefiak Dep.* 172:13-173:11. None of these activities directly affect federal elections.

71. **Response:** *See supra* Response ¶¶ 60, 70.

72. **Response:** Plaintiffs' GOTV activities 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, Pls.' Exh. 3, *Christiansen Dec*. ¶ 16, do not *directly* benefit federal candidates. Such activities may take two different forms. First are 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 are 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 campaign related, *Buckley,* 424 U.S. at 80, because they do not directly benefit any federal candidate. Any effect on federal candidates and officeholders would be indirect and tangential.

73. **Response:** *See supra* Response ¶ 72. The "RNC is a *national* party, and not just a *federal* party." *Pls. Reply Mem.* Exh. 1, *Josefiak Dep*.138:11-18 (emphasis added).

> As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the *federal, state and local levels*. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views *at the federal, state and local levels*.

McConnell, 251 F. Supp. 2d at 335 (citations omitted) (Henderson, J.) (emphasis added). "[T]he RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities." *Id.* at 336. These activities in state and local elections "are substantial [] in their importance. . ." to the RNC. *Id*. at 335. In its role as a *national* party, the RNC seeks assist state and local candidates, not just federal candidates.

74. **Response:** *See supra* Response ¶¶ 72-73.

75. **Response:** That CRP has previously identified federal candidates in its GOTV activities is irrelevant to this case. At issue in this case is CRP's desire to use state funds for GOTV activities that will not "be targeted to any federal candidate, *i.e*., it would not reference, describe, or otherwise depict any federal candidate." Pls.' Exh. 3, *Christiansen Dec*. ¶¶ 16.

76. **Response:** RPSD's past use of federal funds for GOTV activities referencing federal candidates is irrelevant to this case. At issue in this case is RPSD's desire to use state funds for GOTV activities that will not "be targeted to any federal candidate, *i.e*., it would not reference, describe, or otherwise depict any federal candidate." Pls.' Exh. 5, *Tetlow Dec*. ¶ 5.

77. **Response:** CRP's voter registration efforts in elections where both state and federal candidates appear on the ballot is intended "to elect more Republicans at both [the state and federal] levels." FEC Exh. 2, *Christiansen Dep.* 123:12-13. CRP intends to use state funds for voter registration activity that will not "be targeted to any federal candidate, *i.e*., it would not

reference, describe, or otherwise depict any federal candidate." Pls.' Exh. 3, *Christiansen Dec*. ¶ 16. These activities do not directly benefit any federal candidate.

78. **Response:** To the extent this paragraph refers to voter registration efforts in elections where no federal candidate appears on the ballot, *see supra* Response ¶ 60. To the extent this paragraph refers to voter registration efforts in elections where both state and federal candidates appear on the ballot, *see supra* Response ¶ 77.

79. **Response:** 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.* While this finding was sufficient to uphold the law facially, it is not sufficient to uphold the law in every application, *i.e.* when the activity does not directly benefit federal candidates. 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. *Cf. WRTL I,* 546 U.S. at 412. In the wake of *WRTL II,* 127 S. Ct. 2652, it is apparent that CRP and RPSD's public communication, Pls.' Exh. 3, *Christiansen Dec*. ¶ 19; Pls.' Exh. 5, *Tetlow Dec*. ¶ 6, is not "bogus issue advertising," but is instead genuine issue advocacy. As such, it does 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." *WRTL II*, 127 S. Ct. at 2667.

80. **Response:** No response.

81. **Response:** *See supra* Response ¶¶ 72,77.

82. **Response:** *See supra* Response ¶¶ 72,77.

83. **Response:** *See supra* Response ¶¶ 72-73.

Respectfully submitted,

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