No. 09-1287

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM FOR INTERVENOR-DEFENDANT REPRESENTATIVE CHRISTOPHER VAN HOLLEN, JR.

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QUESTION PRESENTED

Whether appellants' purported "as-applied" challenge to Title I of the Bipartisan Campaign Reform Act of 2002—which limits contributions to political parties—is foreclosed by this Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), which upheld BCRA against the very same arguments that appellants now raise.

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STATEMENT

This case arises against the backdrop of *McConnell* v. *FEC*, in which this Court upheld the contribution limitations of Title I of the Bipartisan Campaign Reform Act of 2002 (BCRA) against a facial challenge brought by a group of plaintiffs that included two of the parties now bringing this action. 540 U.S. 93 (2003). In *McConnell*, the plaintiffs advanced virtually the same argument that appellants now recycle under the guise of an "as applied" challenge—*i.e.*, that contributions to political parties that are spent on activities that alleg-

edly are not specifically related to federal elections do not present a risk of actual or apparent corruption and thus lie beyond Congress's power to regulate. This Court rejected that argument, and the Court's decision (which appellants do not ask this Court to overrule) forecloses appellants' challenges here—as the district court correctly concluded. Nothing in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), which dealt exclusively with independent *expenditures* by corporations, undercuts *McConnell*'s upholding of *contribution* limits to political parties. This case is, therefore, at most, a footnote to *McConnell*—and, indeed, to *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). The district court's decision should be affirmed.

1. In the 1970s, the public learned that its government officials had granted favors, positions, and preferential access to donors who had made large political contributions to federal candidates and officeholders. Shaken by the resulting loss of public confidence in the integrity of the political system, in 1974 Congress amended the recently enacted Federal Election Campaign Act of 1971. Neither the 1971 Act nor the 1974 Amendments (collectively, FECA) removed private money from federal campaigns. Rather, FECA set limits on the amount that individuals could contribute to each federal candidate, imposed overall yearly limits on individual political contributions, required expanded disclosure of those contributions, and established the Federal Election Commission (FEC) to enforce the law. FECA also carried forward provisions, first enacted in 1907 and 1947, prohibiting corporations and unions from using their general treasury funds to make contributions in connection with federal elections. At the same time, FECA permitted corporations and unions to contribute to federal candidates and political parties

through segregated funds financed by donations from affiliated individuals (PACs).

2. In *Buckley*, this Court upheld FECA's limits on contributions to candidates and political committees. 424 U.S. at 23-36. The Court found it "unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the [then] $1,000 contribution limitation." *Id.* at 26. *Buckley* identified two distinct threats to the integrity of the nation's political system that supported FECA's contribution limits. First, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders"—a problem that was "not an illusory one"—"the integrity of our system of representative democracy is undermined." *Id.* at 26-27. Second, and "[o]f almost equal concern," was "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27. Accordingly, "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical … if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* (internal quotation marks omitted).

In adopting this practical understanding of the threat that unregulated contributions pose to the integrity of the nation's political system, *Buckley* explicitly rejected the notion that bribery laws and disclosure requirements sufficed to address the corrupting influence of unlimited political contributions: "[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with

money to influence governmental action." *Id.* at 27-28. "Congress was surely entitled to conclude … that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28.

Buckley also upheld a $25,000 aggregate limit on all contributions made by individuals during a calendar year, which included contributions to political parties. 424 U.S. at 38.[1] The Court viewed this contribution limit as a "quite modest restraint upon protected political activity" and "no more than a corollary of the basic individual contribution limitation" to candidates and political committees. *Id.* That was so, the Court explained, because the aggregate contribution limit "serve[d] to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate *through the use of … huge contributions to the candidate's political party*." *Id.* (emphasis added).

3. Two years after *Buckley*, the FEC opened a loophole that, in time, undermined much of what Congress had sought to accomplish in 1974. The FEC ruled that political parties could use an allocation formula to spend a combination of FECA-compliant "hard" money and unlimited "soft" money (*i.e.*, money contributed directly by corporations or labor unions, or contributed in excess of the FECA contribution limits) for "mixed ac-

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[1] *See also* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 487 (codified as amended at 2 U.S.C. § 441a(a)(1)) (setting contribution limits specific to the political parties in addition to the pre-existing overall contribution limits).

tivities" that affected both federal and state elections. FEC Adv. Op. 1978-10; FEC Adv. Op. 1979-17.

In practice (as Congress later found when it enacted BCRA), the fiction of "mixed activities" allowed political parties to raise and use massive soft-money contributions to influence federal elections, effectively nullifying FECA's contribution limits and restrictions on corporate and union contributions. *McConnell*, 540 U.S. at 126. Not surprisingly, soft-money spending by the national parties grew rapidly, from an estimated $19 million in 1980 to more than $80 million in 1992. App. 44a. This expansion turned into an explosion when, in 1995, the FEC permitted the political parties to use "mixed funds" to finance so-called "issue" advertisements like the ones appellants now seek to finance with soft money. Such advertisements prominently featured candidates for federal office but stopped just shy of using language of "express advocacy." FEC Adv. Op. 1995-25. In the 1996 election cycle, the national parties raised $262 million in soft money. *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 441 n.7 (D.D.C. 2003) (Kollar-Kotelly, J.). By the 2000 election cycle, soft-money contributions reached $495 million, *id.*, and soft money accounted for 42% of the parties' total spending, *id.* at 440.

4. The state political parties also played a significant role in fostering the soft-money loophole. The FEC's allocation rules allowed state political parties to "use a larger percentage of soft money to finance mixed-purpose activities" than the national parties. *McConnell*, 540 U.S. at 124; *McConnell*, 251 F. Supp. 2d at 441 (Kollar-Kotelly, J.); App. 17a, 20a, 26a. As a result, the parties were able to maximize their use of soft money by "transfer[ring] large amounts of their soft money to the state parties."

McConnell, 540 U.S. at 124. In 1996, for example, the national parties transferred $115 million in soft money to the state parties (App. 25a-26a) and, by 2000, soft-money transfers grew to $280 million. *McConnell*, 540 U.S. at 124.

5. As the soft-money loophole emerged, the parties concentrated their fundraising efforts on a small number of very large donors. In the 2000 election cycle, for example, 60% of the soft money (accounting for almost $300 million) came from just 800 donors, each contributing in excess of $120,000. *See McConnell*, 540 U.S. at 124; App. 28a-29a. And, many of these large donors simultaneously contributed hundreds of thousands of dollars to *both* political parties. *See McConnell*, 540 U.S. at 124 & n.12; *McConnell*, 251 F. Supp. 2d at 509 (Kollar-Kotelly, J.); *id.* at 868-869 (Leon, J.); App. 59a-64a.

The abuses that accompanied the explosion of soft money in the 1990s are well documented in the legislative history of BCRA, *see, e.g.*, S. Rep. No. 105-167 (1998), as well as the "reams of disquieting evidence contained in the [*McConnell*] record." 540 U.S. at 153; *see id.* at 146-152; 251 F. Supp. 2d at 467-517 (Kollar-Kotelly, J.). "The evidence in the [*McConnell*] record show[ed] that candidates and donors alike … exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." *McConnell*, 540 U.S. at 146. At the donor end of the bargain, "lobbyists, CEOs, and wealthy individuals alike all … candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials." *Id.* at 147. At the other end of the bargain, the *McConnell* Court concluded, "national parties … ac-

tively exploited the belief that contributions purchase influence or protection to pressure donors into making contributions." *Id.* at 148 n.47. The *McConnell* Court concluded that this convergence of interests between the national parties and large donors seeking influence over federal officeholders resulted in the "national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150.

The *McConnell* record also showed that the injection of soft money into the national parties gave rise to instances in which officeholders took specific actions on pending legislation on account of large donations. As this Court concluded, "[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *McConnell*, 540 U.S. at 149-150.

6. Congress enacted Title I of BCRA in direct response to this rampant circumvention of long-standing contribution limits and the accompanying threat to the integrity of the national political system. Congress imposed no spending limits, but rather restored the efficacy of FECA by closing the soft-money loophole. Congress subjected all funds received (or solicited) by the national political parties and their officers to contribution limits. BCRA § 101(a), FECA § 323(a) (codified at 2 U.S.C. § 441i(a)). As a necessary corollary, moreover, BCRA imposed contribution limits on funds used by the political parties' state and local committees for federal election activities. BCRA § 101(b)(1), FECA § 323(b)(1) (codified at 2 U.S.C. § 441i(b)(1)).

7. Various entities—including appellants Republican National Committee (RNC) and California Repub-

lican Party (CRP)—challenged the constitutionality of BCRA's soft-money provisions. *McConnell*, 251 F. Supp. 2d at 206. This Court upheld Sections 323(a) and (b) in their entirety. The *McConnell* Court asked whether Section 323's limits on contributions to the parties were "'closely drawn' to match 'a sufficiently important [government] interest.'" 540 U.S. at 136 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)); *see also Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 387-388 (2000); *Buckley*, 424 U.S. at 25. In so doing, *McConnell* adhered to an uninterrupted line of decisions that have given less-exacting scrutiny to contribution limits than to expenditure limits, *see McConnell*, 540 U.S. at 134-137, and that have shown deference to Congress' "significantly greater institutional expertise … in the field of election regulation," *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring).

In applying "closely drawn" scrutiny, the Court rejected the plaintiffs' characterization of Section 323 as a spending regulation, holding that "it is irrelevant that Congress chose in § 323 to regulate contributions on the demand rather than the supply side" and that "neither [§ 323(a) nor § 323(b)] in any way limits the total amount of money parties can spend." 540 U.S. at 138-139. These provisions, the Court found, "simply limit the source and individual amount of donations." *Id.* at 139. The Court accordingly dismissed as irrelevant plaintiffs' objection that Section 323(a) regulates all contributions to the national parties, including funds "spent on purely state and local elections in which no federal office is at stake." *Id.* at 154.

The Court also reaffirmed the holdings of *Buckley* and subsequent cases that, in the context of contribution limits, the government's anti-corruption interest is

"not limited … to the elimination of cash-for-votes exchanges." *McConnell*, 540 U.S. at 143; *see also id.* at 153-154. To the contrary, "'[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' [the Court had] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 143 (quoting *Shrink Missouri*, 528 U.S. at 389).

Turning to BCRA, the Court held that this government interest justifies Section 323(a)'s restrictions. Given "the reams of disquieting evidence contained in the record," 540 U.S. at 153, the Court upheld "Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *Id.* at 154. Further, based on that same massive record, the Court concluded that Section 323(a) is narrowly tailored to achieve the government's anti-corruption interest. In this respect, the Court concluded that "the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, … have made *all* large soft-money contributions to national parties suspect." *Id.* at 154-155 (emphasis added).

With respect to Section 323(b), the Court held that its targeted regulation of the state and local parties' financing of *federal* election activity, 2 U.S.C. § 431(20), advanced the government's anti-corruption interest. 540 U.S. at 164-165. Further, the Court concluded that Section 323(b) was also instrumental to avoiding wholesale evasion of Section 323(a)—a "hard lesson of circumvention" having been taught "by the entire history of campaign finance regulation." *Id.* at 165. The Court

concluded that, because large contributions made to support "federal election activity"—such as voter registration and get-out-the-vote efforts—"can be used to benefit federal candidates directly," they "pose the greatest risk of this kind of corruption." *Id.* at 167.

8. In the present case, the RNC and its Chairman challenge Section 323(a)'s restrictions on receiving or soliciting soft-money contributions, purportedly "as applied" to a number of activities in which they intend to engage. These activities include so-called "issue" ads, redistricting activities, and support for state-office candidates in both off-cycle and dual federal-state elections. JS App. 7a. CRP and the Republican Party of San Diego County (SDRP) challenge Section 323(b)'s regulation of contributions to the state and local parties that are used for federal election activity, purportedly "as-applied" to CRP's and SDRP's intended ads attacking or opposing federal candidates in connection with certain ballot initiatives and to other intended campaign activities in dual state-federal elections. JS App. 9a, 19a. Implicitly recognizing that providing soft-money donors with preferential access to federal officials is problematic, the RNC promises that "it will not arrange or facilitate meetings, conference calls, or other kinds of contact between soft-money contributors and federal candidates and officeholders 'in any manner *different than* or *beyond that* currently afforded to contributors' of hard money." JS App. 8a (emphasis added). According to appellants, these promises eliminate any need for Section 323(a) and make its continued enforcement against them unconstitutional.

9. The three-judge district court unanimously rejected appellants' challenges, concluding that they are all foreclosed by *McConnell*. First, the court held that, to the extent the RNC's "as-applied" challenge was

based on the claim that contribution limits could be applied only to funds raised by the national parties for federal electoral purposes, its argument was "not so much an as-applied challenge as it was an argument for overruling" *McConnell*, which "upheld § 323(a) against a facial challenge based on the same applications of the statute that the RNC now raises." JS App. 13a. Second, the court dismissed CRP's and SDRP's "as-applied" challenges to Section 323(b) because they "are essentially the same arguments considered and rejected in *McConnell*." JS App. 20a-21a. Third, the court held that, notwithstanding the RNC's pledge not to have federal officials raise soft money or to grant soft-money donors greater access to federal candidates and officeholders than it already provides to its top federal-dollar contributors, *McConnell* forecloses the RNC's argument that its proposed activities do not give rise to a risk of actual or apparent corruption. JS App. 15a-18a.[2] Finally, the court rejected the RNC Chairman's attack on Section 323(a)'s restriction preventing national-party officers from soliciting soft money in their official capacity. It held that, "[u]nder *McConnell*, there is no reason to think that contributions made *to* a national party and contributions made *at the behest* of a national party are any different in terms of their potential ability to produce corruption or the appearance of corruption." JS App. 23a-24a.

[2] The three-judge court assumed, without any factual or legal basis (JS App. 8a n.4), that the FEC would be able to enforce the RNC's promises.

ARGUMENT

This is not a case of first impression. Each and every one of the challenges appellants raise was considered and rejected by this Court in *McConnell*. Appellants' Jurisdictional Statement neither urges this Court to overrule the portion of *McConnell* that upheld Title I of BCRA nor even mentions the *stare decisis* considerations that dictate whether a controlling precedent should be overruled. *See Citizens United* v. *FEC*, 130 S. Ct. 876, 912 (2010).[3]

Nevertheless, appellants argue that, "as applied" to each of their intended uses of soft money, Section 323 fails to advance a valid governmental interest. JS 11-20. Yet, appellants wholly fail to explain how their supposed "as-applied" challenge differs from the facial challenges that the Court rejected in *McConnell*. Nor can appellants claim a constitutional exemption from BCRA merely by pledging to behave in a manner that supposedly would meet Congress's concerns about the appearance of corruption; a law does not become unconstitutional just because one party subject to it promises, in hedged terms, not to act contrary to one of its purposes. *Citizens United* similarly provides no assistance to appellants, for that case involved independent expenditures and reemphasized that the regulation of

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[3] A footnote in appellants' jurisdictional statement suggests that "FECA §§ 323(a) and (b) may well be unconstitutional in *all* their applications" (JS 20 n.4), but this oblique comment is insufficient to raise or preserve a facial challenge to BCRA. It does, however, amount to a tacit acknowledgment that appellants' arguments for their as-applied challenge are irreconcilable with the reasoning of *McConnell*'s holding that Title I is facially constitutional.

expenditures and *contributions* raise fundamentally distinct constitutional considerations. 130 S. Ct. at 909. Finally, appellants' argument that political parties have been severely and unconstitutionally disadvantaged vis-à-vis other political actors relies on reasoning that was squarely rejected in *McConnell* and, in any event, ignores reality.

I. THIS COURT'S DECISION IN *MCCONNELL* FORECLOSES EACH OF APPELLANTS' CHALLENGES TO SECTION 323

A. Under *McConnell*, The RNC's Proposed Use Of Soft Money Is "Beside The Point"

In *McConnell* v. *FEC*, this Court considered and rejected the central argument on which the RNC's claims rest—that the constitutionality of Section 323(a)'s restrictions on contributions to national parties depends on the nature of the activities for which those contributions are ultimately used. JS 14, 17-20. There, the plaintiffs advanced the contention—which appellants recycle in this case—that Section 323(a) violates the First Amendment because "it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including, for example, funds spent on purely state and local elections in which no federal office is at stake." 540 U.S. 93, 154 (2003). The Court unequivocally dismissed that argument as simply "beside the point." *Id.* The Court explained that "Section 323(a), like the remainder of § 323, regulates contributions, not activities." *Id.*

Appellants purport to raise an "as-applied" challenge to Section 323, but they offer no plausible way to distinguish the factual and legal claims in this case from those raised in *McConnell*. In *McConnell*, the Court made clear that soft-money contributions to national political parties foster a risk of actual and apparent cor-

ruption, "*regardless of how those funds are ultimately used.*" *Id.* at 155. (emphasis added). Appellants' promise that soft money will be spent only on certain activities is thus "beside the point." 540 U.S. at 154. It is not how soft money is spent that gives rise to the risk of actual or apparent corruption; rather, the *McConnell* Court held that it is "the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect." *Id.* at 154-155. Accordingly, appellants do not raise a genuine "as-applied" challenge to Title I of BCRA. And, even if appellants' challenge were properly conceived as an "as-applied" challenge, their arguments would still fail: They were raised and rejected in *McConnell*, on a record whose constitutionally significant facts encompass those here, and thus should not be reconsidered here.

B. *McConnell* Considered And Rejected CRP's And SDRP's Challenges

McConnell also squarely forecloses CRP's and SDRP's "as-applied" challenges. In upholding Section 323(b), *McConnell* considered each of the types of activities that CRP and SDRP seek to finance with unlimited soft-money contributions—*i.e.*, public communications that attack or oppose federal candidates, 2 U.S.C. § 431(2)(A)(iii), voter registration, voter identification, get-out-the-vote activity, and other generic campaign activity in connection with dual state-federal elections, 2 U.S.C. § 431(2)(A)(i)-(ii). The Court concluded that, because large contributions made to support these state-party activities "can be used to benefit federal candidates directly," such contributions "pose the greatest risk … of corruption." 540 U.S. at 167.

CRP and SDRP do not—and cannot—identify any facts distinguishing their proposed activities from the activities this Court considered in *McConnell*. That their intended ads attacking federal candidates might also support or oppose state ballot initiatives is irrelevant; *McConnell* sustained the constitutionality of Section 323(b) regardless of whether a communication to which it applies is "'targeted'" at federal elections, (JS App. 21a), since "*any* public communication" by a state or local party that "attacks a clearly identified federal candidate" implicates the federal anti-corruption interest. 540 U.S. at 170 (emphasis added). Similarly, it is irrelevant that CRP and SDRP seek to "target[]" their get-out-the-vote drives and other federal campaign activities to non-federal candidates in dual elections—whatever that might mean in practice. JS 6.[4] *McConnell* concluded that because these state and local party activities inevitably "confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." 540 U.S. at 168.

C. The RNC's Pledges Not To Grant Preferential Access To Soft-Money Donors Do Not Give Rise To A Proper As-Applied Challenge

The RNC's studiously worded pledges that it will not have federal officeholders raise soft money nor will it provide preferential treatment to soft-money donors "in any manner different than or beyond that currently

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[4] Notably, in *McConnell*, too, plaintiffs pointed to the state and local parties' activities in connection with ballot initiatives in support of their challenge to Section 323(b). *See* Political Parties Br. 53-55, *McConnell*, 540 U.S. 93. The Court, of course, upheld Section 323(b) in its entirety. 540 U.S. at 161-174.

afforded to contributors" (JS App. 8a, 14a-15a; JS 15) cannot release the RNC from this Court's holding in *McConnell*. Carried to its logical conclusion, appellants' attempt to construct an "as-applied" challenge based on behavioral pledges would permit all manner of circumvention of the law. Under the logic of appellants' position, for example, the operator of an adult theater would be able to circumvent any facially valid zoning ordinance addressing the danger of criminal activity resulting from the operation of adult theaters simply by pledging that he will serve only well-meaning customers whose patronage will not increase crime in the area. *See, e.g.*, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Indeed, appellants' logic would permit candidates to escape limits on contributions made directly to them merely by promising not to be corrupted by large gifts of money. Surely, that cannot be the law, for it would preclude Congress from adopting prophylactic rules—a proposition that is at odds with the holding in *Buckley* and virtually every contribution limit case since then.

But, in any event, appellants do not envision a fundraising environment materially different from the one that existed before, and led to, the enactment of BCRA. In *McConnell*, too, the RNC said that "'access' to federal officeholders is [not] *uniquely* granted to nonfederal donors as a result of their donations to political parties" and that "'federal officeholders are [not] more likely to meet with nonfederal donors than with federal donors.'" Political Parties Br. 26-27, *McConnell*, 540 U.S. 93 (citation omitted). The *McConnell* Court, nonetheless, rejected the relevance of that contention, holding, among other things, that federal officeholders and candidates will inevitably become aware of the identities of large soft-money donors, 540

U.S. at 147, and that, as a result, unregulated contributions pose a unique risk of actual or apparent corruption. Nothing appellants have proposed differs from what the Court considered and rejected in *McConnell*.

D. This Court Has Recognized The Close Relationship Between National Parties And Their Federal Candidates And Officeholders

Appellants argue that "contributions to political parties are not the equivalent of direct candidate contributions." JS 15. However, even if this statement is true, it is not a basis for holding Section 323 unconstitutional, for the Court has long recognized that large contributions to political parties are a means of circumventing limitations on contributions to candidates. In *Buckley* v. *Valeo*, for example, this Court upheld FECA's $25,000 limit on aggregate yearly contributions to candidates, political committees, and political party committees as a "quite modest restraint ... to prevent evasion of the $1,000 contribution limitation" by, among other things, "huge contributions to the candidate's political party." 424 U.S. 1, 38 (1976).

Moreover, *McConnell* could not have been clearer that national parties and federal candidates and officeholders are "'inextricably intertwined,'" 540 U.S. at 155, have a "close connection and alignment of interests," *id.*, and "enjoy a special relationship and unity of interest," *id.* at 145. *McConnell* concluded that "'[t]here is no meaningful separation between the national party committees and the public officials who control them.'" *Id.* at 155 (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 468-469 (D.D.C. 2003) (Kollar-Kotelly, J.)). And, according to *McConnell*, it was precisely this "close relationship between federal officeholders and the national parties, as well as the means by which parties

have traded on that relationship, that … made all large soft-money contributions to national parties suspect." *Id.* at 154-155.

Pointing to observations in *Colorado Republican Federal Campaign Committee* v. *FEC ("Colorado I")*, 518 U.S. 604 (1996), and *FEC* v. *Colorado Republican Federal Campaign Committee ("Colorado II")*, 533 U.S. 431 (2001), appellants assert that "there is no "'metaphysical identity" between party and candidate,'" JS 15-16 (quoting *Colorado II*, 533 U.S. at 447-448). But those observations are irrelevant to the issue of *contributions to* political parties; rather, they concerned *expenditures by* political parties—as this Court pointed out in *McConnell*, 540 U.S. at 145 n.45. And although the Court in *Colorado II* recognized that "[p]arties … perform functions more complex than simply electing candidates," it also noted that "they act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452; *see also id.* at 450-451. This Court has thus consistently recognized that unlimited contributions to political parties present the same danger of corruption and appearance of corruption as is created by unlimited contributions to candidates—and on that basis has upheld Congress's reasonable regulation of such contributions. Appellants present no basis for overruling this settled law.

II. NOTHING IN *CITIZENS UNITED* UNDERMINES *MCCONNELL*'S RATIONALE FOR UPHOLDING SECTION 323

Citizens United neither implicitly overruled *McConnell*'s holding that Title I of BCRA is constitutional nor undermined the foundation of that holding. Rather, *Citizens United* dealt with the entirely distinct question whether Congress may regulate independent *expenditures* by corporations. It did not address *con-*

tribution limits and the very different constitutional standards that apply in that context.

A. Congress May Limit Contributions To Avoid The Risks Of Favoritism Toward And Improper Influence By Large Contributors

Appellants concede (JS 11)—as they must—that Section 323 is not subject to strict scrutiny, since it regulates contributions and not expenditures.[5] Instead, the government need only satisfy the "lesser demand" of showing that Section 323 is "'closely drawn' to match 'a sufficiently important [governmental] interest.'" *McConnell*, 540 U.S. at 136.[6]

Appellants, nonetheless, seek to divorce the holding of *Citizens United* from its context. *Citizens*

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[5] In a footnote, appellants contradict their concession by arguing that Section 323 operates as a spending limit in that it restricts political parties from "'spend[ing] any funds that are not subject to [BCRA's] limitations, prohibitions, and reporting requirements.'" JS 11 n.2 (quoting 2 U.S.C. § 441i(a)(1)). This argument was squarely rejected in *McConnell*, where the Court made clear that Section 323 was not an expenditure limit merely because Congress chose "to regulate contributions on the demand rather than the supply side." 540 U.S. at 138. *Citizens United* did not in any way alter this holding. *See* 130 S. Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subject to rigorous First Amendment scrutiny.").

[6] *See also Randall* v. *Sorrell*, 548 U.S. 230 (2006) (plurality opinion of Breyer, J., joined by Roberts, C.J. and Alito, J.) (applying "closely drawn" scrutiny to contribution limits); *FEC* v. *Beaumont*, 539 U.S. 146 (2003) (same); *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (same); *California Med. Ass'n* v. *FEC*, 453 U.S. 182 (1981) (plurality opinion) (same); *Buckley*, 424 U.S. 1 (same); *see also Colorado II*, 533 U.S. 431 (same with respect to coordinated expenditures).

United did not hold, as appellants suggest, that the government must always be oblivious to the risks of generating favoritism, undue influence, gratitude, and preferential access—regardless of the context in which the regulation arises. To the contrary, *Citizens United* dealt only with the unique demands of strict scrutiny and the regulation of independent expenditures. Nothing in the Court's decision addresses what types of governmental interests are sufficient to meet the "less rigorous" requirements of "closely drawn" scrutiny, *McConnell*, 540 U.S. at 136 n.39, much less undermines the Court's holding in *McConnell* that Title I of BCRA meets that standard.

Nor was *McConnell*'s holding in this respect at all novel. Indeed, in *Buckley*, the Court held that contribution limits are justified not only by apparent or "actual *quid pro quo* arrangements," but also by "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. Similarly, in *Shrink Missouri*, 528 U.S. at 389—again, in the context of addressing contribution limits—the Court relied on the corrupting "threat" of "improper influence" and "politicians too compliant with the wishes of large contributors" as the basis for upholding contribution limits such as those challenged today. *See also Colorado II*, 533 U.S. at 440-441 (noting that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment"). *Citizens United* did not disturb this Court's long history of recognizing government interests beyond the prevention of actual or apparent *quid pro quo* corruption as a sufficient justification for contribution limits under closely drawn scrutiny.

B. BCRA's Soft-Money Restrictions Permissibly Curb The Risk Of Actual Or Apparent *Quid Pro Quo* Corruption

Even if *Citizens United* did somehow narrow the anti-corruption interest that can support limits on *contributions*—an issue that was not before the Court—the Court's holding in *McConnell* remains both sound and binding. The record in that case contained abundant evidence of actual or apparent *quid pro quo* arrangements resulting from soft-money donations to political parties. "The evidence," for example, "connect[ed] soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *McConnell*, 540 U.S. at 150 (record citations omitted). The Court, moreover, specifically rejected the contention, repeated by appellants here (JS 18), that vote selling is necessary for *quid pro quo* corruption, and explained that "[t]o claim that such [non-voting] actions d[id] not change legislative outcomes … misunderst[ood] the legislative process." *Id.* Accordingly, the Court held that "there exists real or apparent corruption" notwithstanding the lack of "concrete evidence of an instance in which a federal officeholder ha[d] actually switched a vote." *Id.* at 149.

Moreover, to the extent *Citizens United* mentioned contribution limits at all, it embraced *Buckley*'s conclusion that contribution limits can be sustained even on a record that does not include specific instances of actual *quid pro quo* corruption. As the Court explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 130 S. Ct. at 908. The Court noted that "[t]he *Buckley* Court, nevertheless, sustained limits on direct contributions in

order to ensure against the reality or appearance of corruption." *Id.*

Indeed, in defining the government's interest in preventing *quid pro quo* arrangements, *Buckley* pointed to instances in which donors had obtained access to President Nixon by pledging large donations and where the President later took action favorable to the donors. *Buckley*, 424 U.S. at 27 n.28; *Buckley* v. *Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975) (en banc). Notably, "[i]t [wa]s not material" to determine "whether the President's [subsequent administrative] decision was in fact, or was represented to be, conditioned upon or 'linked' to the reaffirmation of the pledge." 519 F.2d at 839 n.36. Whether or not an *actual quid pro quo* exchange had occurred, the selling of access, combined with a subsequent favorable government action, was sufficient to create an appearance of *quid pro quo* corruption. *McConnell*, likewise, concluded that "[i]t was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption." 540 U.S. at 154. *Citizens United* does not undercut that holding.

C. BCRA Does Not Unfairly Disadvantage Political Parties

Appellants argue that the loosening of restrictions on corporate expenditures in *Citizens United* puts the political parties at an unfair disadvantage because corporations may now spend unlimited general treasury money on political activities while political parties may not raise soft money for "nonfederal activities." JS 20, 22. This argument both misconceives the reasons underlying the soft-money restrictions and ignores the enormous resources the political parties have at their disposal.

First, as *McConnell* made clear and *Citizens United* affirmed, Section 323 "regulates *contributions*, not activities." *McConnell*, 540 U.S. at 154; *Citizens United*, 130 S. Ct. at 910-911 ("The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money." (citations omitted)). It restricts the source and amount of donations political parties can accept, but leaves them as free as corporations to *spend* money, without restriction, on electoral advocacy, grassroots advocacy, and other political activities.

Indeed, the distinction in treatment to which appellants object "has existed to some extent since *Buckley*," *EMILY's List* v. *FEC*, 581 F.3d 1, 22 (D.C. Cir. 2009), which upheld the $25,000 limit on aggregate yearly contributions to candidates, political committees, and parties, *Buckley*, 424 U.S. at 38. Most notably, after BCRA was enacted, various groups other than political parties "remain[ed] free to raise soft money to fund" the type of activities that appellants complain that they cannot fund with soft money, and, in *McConnell*, the RNC argued that Title I of BCRA violated equal protection "because it discriminates against political parties in favor of special interest groups." 540 U.S. at 187-188; *see* Political Parties Br. 2, 91-99, *McConnell*, 540 U.S. 93. This Court, however, rejected that challenge, stressing that "BCRA actually favors political parties in many ways," and concluded that Congress was "fully entitled to consider the real-world differences between political parties and interest groups." 540 U.S. at 188. As the Court wrote, "[i]nterest groups do not select slates of candidates for elections" and "do not determine who will serve on legislative committees,

elect congressional leadership, or organize legislative caucuses." *Id.*

Second, appellants' argument that political parties are now hobbled in the political marketplace beggars plausibility. In the 2007-2008 election cycle, the Republican national party committees received hard-money contributions of $640,308,267, and the Democratic national party committees received hard-money contributions of $599,107,722.[7] Funds in excess of a total of a billion dollars are certainly sufficient to raise the voices of the national parties above "the level of notice." *McConnell*, 540 U.S. at 173 (internal quotation marks and citation omitted). Given these numbers, it is farfetched, to say the least, to suggest that the political parties will find it difficult to compete with corporations, unions, or nonprofit advocacy groups.

CONCLUSION

The judgment of the district court should be affirmed.

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[7] *See* Center for Responsive Politics, *Political Parties Overview*, *available at* http://www.opensecrets.org/parties/index.php?cmte=&cycle=2008 (last visited May 21, 2010) (sum of contributions to the three national committees of each party).

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