No.

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

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the prohibition on political parties' solicitation and expenditure of "nonfederal money" imposed by the Bipartisan Campaign Reform Act of 2002 is unconstitutional as applied to political activities that, when funded by nonfederal money, do not create a risk of actual or apparent *quid pro quo* corruption of federal officeholders.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, California Republican Party, Republican Party of San Diego County, and Michael Steele were plaintiffs below and are appellants in this Court, and Democratic National Committee and Representative Christopher Van Hollen, Jr., were intervenors below and are appellees in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that appellants are not incorporated entities.

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JURISDICTIONAL STATEMENT

Appellants Republican National Committee ("RNC"), California Republican Party, Republican Party of San Diego County, and Michael Steele respectfully submit this jurisdictional statement in support of their appeal from the judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the three-judge district court is not yet published but is electronically reported at 2010 WL 1140721. J.S. App. 1a.

JURISDICTION

The judgment of the three-judge district court was entered on March 26, 2010. The notice of appeal was filed on April 2, 2010. The jurisdiction of this Court is invoked under § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14. Under § 403(a)(4) of BCRA, it is "the duty of" this Court "to advance on the docket and to expedite to the greatest possible extent the disposition of th[is] . . . appeal." *Id.* at 114.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of BCRA are reproduced in the appendix to this jurisdictional statement.

STATEMENT

The "'freedom to engage in association for the advancement of beliefs and ideas'"—including through "partisan political organization"—"'is an inseparable aspect'" of the First Amendment. *Tashjian*

v. Republican Party of Conn., 479 U.S. 208, 214 (1986) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). BCRA smothers that freedom by prohibiting national political parties from raising and spending "nonfederal money"—money that is not spent to support the campaign of a specific federal candidate but instead used, for example, to support state candidates and fund general party operations, including voter registration drives and get-out-the-vote efforts. Under BCRA, *any* money that a national party raises or spends must comply with the same federal contribution limits and source restrictions as money used to support a specific candidate for federal office.

BCRA's prohibition on nonfederal money was always constitutionally suspect. After this Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), however, that restriction on parties' fundamental First Amendment rights is unconstitutional in most, if not all, its applications. *Citizens United* held that the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt" and made clear that "[i]ngratiation and access . . . are not corruption." *Id.* at 910. Yet, both Congress's enactment of the prohibition on nonfederal money and this Court's decision upholding that prohibition on its face rested on the ground that "candidates would feel grateful for . . . donations [of nonfederal money] and that donors would seek to exploit that gratitude." *McConnell v. FEC*, 540 U.S. 93, 145 (2003). *Citizens United* conclusively rejects the "ingratiation" and "access" theories of corruption. After *Citizens United*, there can be no doubt that the essential "'hallmark of corruption is the financial *quid pro quo*: dollars for political favors.'" 130 S. Ct. at 910 (quoting *FEC v. Nat'l Con-*

servative Political Action Comm., 470 U.S. 480, 497 (1985)).

The government must therefore justify *each* application of BCRA's prohibition on nonfederal money by demonstrating that the restriction is necessary to prevent actual or apparent *quid pro quo* corruption of federal officeholders. But *Citizens United* also makes clear that the danger of *quid pro quo* corruption arises with extraordinary infrequency. Independent expenditures, for example, *never* create a material risk of actual or apparent *quid pro quo* corruption—no matter the size of the expenditure. *Citizens United*, 130 S. Ct. at 908-09. Thus, to uphold the application of BCRA's prohibition on nonfederal money, the Court would have to indulge the farfetched supposition that, while a multimillion-dollar independent advertising campaign cannot be a vehicle for *quid pro quo* corruption, the risk that a candidate would be willing to sell his vote in exchange for a donation to his party's get-out-the-vote drive is so dire that Congress can constitutionally prohibit *all* donations of nonfederal money. That assumption is not only facially implausible but is also unsupported by anything in the congressional record accompanying BCRA's enactment. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.D.C. 2003) (Kollar-Kotelly, J.) ("The record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money . . . .").

Because the government cannot meet its burden of establishing that BCRA's prohibition on nonfederal money is constitutional in any of the applications challenged by appellants, probable jurisdiction should be noted.

1. Prior to the enactment of BCRA, federal law imposed source and amount limitations on contributions to political parties made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Federal law placed no limitations, however, on the right of political parties to solicit and spend nonfederal—or "soft"—money for other purposes, including "to help fund issue ads" and "purely state and local election activities." J.S. App. 4a. The solicitation and expenditure of nonfederal money was subject solely to state-law restrictions. Federal law also permitted parties to use a combination of federally regulated money and nonfederal money to fund "mixed-purpose activities (for example, get-out-the-vote and voter registration in years when federal, state, and local candidates are all on the ballot)." *Id.*

BCRA imposed a blanket federal prohibition on national parties' use of nonfederal money for *all* purposes. BCRA added § 323(a) to the Federal Election Campaign Act of 1971 ("FECA"), which prohibits national political parties and their agents from soliciting, receiving, directing, or spending funds "that are not subject to the limitations, prohibitions, and reporting requirements of th[e] Act." 2 U.S.C. § 441i(a)(1). Thus, a national party cannot solicit or spend annual contributions of more than $30,400 (indexed for inflation) from any individual donor, or accept any contributions from corporations and unions, even if those contributions would be spent on state election activities completely unrelated to a federal campaign and would fully comply with state law. *Id.* § 441a(a)(1)(B); Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435, 7437 (Feb. 17, 2009).

BCRA also added FECA § 323(b), which prohibits state and local parties from soliciting or spending nonfederal money on "Federal election activity." 2 U.S.C. § 441i(b)(1). State and local parties thus cannot solicit or spend contributions of more than $10,000 annually from any individual donor, or accept any contributions from corporations and unions, to fund (1) "voter registration activity" that occurs in the 120-day period preceding a federal election; (2) "voter identification," "get-out-the-vote activity," or "generic campaign activity" that is conducted "in connection with" an election in which there is a federal candidate on the ballot; or (3) any "public communication" that promotes, supports, attacks, or opposes a clearly identified federal candidate. *Id.* § 431(20)(A)(i)-(iii); *see also id.* § 441a(a)(1)(C).[1]

In *McConnell*, this Court upheld FECA § 323 against a facial First Amendment challenge. 540 U.S. at 161, 173.

2. In 2008, appellants filed this as-applied challenge to the restrictions that FECA §§ 323(a) and (b) impose on the First Amendment speech and associational rights of political parties and their members.

The RNC and its Chairman alleged that FECA § 323(a) was unconstitutional as applied to their solicitation and expenditure of nonfederal money to (1) support candidates in 2009 state elections in New Jersey and Virginia, where there were no federal candidates on the ballot, (2) support state candidates in elections where both federal and state candidates are on the ballot, (3) finance state Republican par-

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[1] "Generic campaign activity" is campaign activity that promotes the political party but does not promote any specific federal, state, or local candidate. 2 U.S.C. § 431(21).

ties' redistricting efforts after the 2010 census, (4) fund "grassroots lobbying" efforts to educate voters about legislative issues and mobilize grassroots movements regarding such issues, (5) fund litigation in cases not involving federal elections, and (6) pay for the maintenance and upkeep of the RNC's national headquarters. The California Republican Party and Republican Party of San Diego County alleged that FECA § 323(b) was unconstitutional as applied to their solicitation and expenditure of nonfederal money to (1) campaign for or against California ballot initiatives using advertisements that featured federal candidates and (2) fund get-out-the-vote drives and other generic campaign activity not targeted to the campaign of any specific federal candidate.

A three-judge district court was convened pursuant to BCRA § 403(a)(1). The parties filed cross-motions for summary judgment. In support of its motion, the RNC submitted affidavits stating that it will not "'use any federal candidates or officeholders to solicit' soft-money contributions" or "'aid' soft-money donors 'in obtaining preferential access to federal candidates or officeholders.'" J.S. App. 8a. The district court delayed resolution of the summary judgment motions pending this Court's decision in *Citizens United*, and then ordered supplemental briefing regarding the potential implications of that decision.

3. Deeming itself bound by this Court's facial holding in *McConnell*, the district court denied appellants' motion for summary judgment and granted summary judgment to the FEC. J.S. App. 24a.

The district court "agree[d]" with appellants that "*Citizens United* undermines any theory of limiting

contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officeholders and candidates." J.S. App. 13a. The court explained that, "[t]o the extent the FEC argues that large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access, or generate influence, *Citizens United* makes clear that those theories are not viable." *Id.* at 14a.

The district court further determined that, to the extent this Court's facial analysis in *McConnell* rested "on evidence that national party committees had sold preferential access to federal officeholders and candidates in exchange for large soft-money donations," there was "considerable logic and force" to appellants' argument that *McConnell*'s facial analysis "does not control this as-applied challenge" because the RNC had made a pledge not to undertake such practices. J.S. App. 14a, 15a. "As a result," the court explained, "a large soft-money contributor could obtain no better access to Republican officeholders or candidates—at least not RNC-arranged access—than a maxed-out hard-money contributor to the RNC." *Id.* at 8a. The court found "no reason that the RNC's pledge could not be meaningfully enforced by the FEC." *Id.* at 8a n.4.

The district court nevertheless concluded that it was bound by *McConnell* to reject appellants' as-applied challenge because "the *McConnell* Court, in upholding § 323(a), appeared to rely not only on the selling of access in exchange for soft-money contributions, . . . but also on 'the close relationship between federal officeholders and the national parties.'" J.S. App. 16a. While "acknowledg[ing] that the *McConnell* opinion is ambiguous on the question whether

the 'unity of interest' between national parties and their candidates and officeholders was an independently sufficient rationale for the Court to uphold the blanket ban on soft-money contributions," it stated that, "[a]s a lower court," it did "not believe [it] possess[ed] authority to clarify or refine *McConnell*." *Id.* at 18a.

In ruling in the FEC's favor, the district court acknowledged that the "current mix of statutes, regulations, and court decisions has left a campaign finance system that reduces the power of political parties as compared to outside groups." J.S. App. 18a n.5. The court "recognize[ed] the RNC's concern about this disparity," but concluded that it was ultimately "an argument for the Supreme Court" to address. *Id.*

THE QUESTION IS SUBSTANTIAL

This Court recently reaffirmed that the "First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)). It is therefore the government's burden to "prove" that "*each application* of a statute restricting" political speech survives constitutional scrutiny. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464, 478 (2007) (op. of Roberts, C.J.) (emphasis in original). The government cannot meet that burden in this case as to *any* of the applications of FECA §§ 323(a) and (b) challenged by appellants.

This Court's decision to uphold FECA § 323 on its face in *McConnell v. FEC*, 540 U.S. 93 (2003), was premised on the ground that "candidates would feel grateful for . . . donations [of nonfederal money] and

that donors would seek to exploit that gratitude." *Id.* at 145. In light of *Citizens United*, however, that rationale for restricting the speech and associational rights of political parties and their members is no longer tenable. In *Citizens United*, the Court made clear that the only constitutionally adequate basis for prohibiting political speech is the prevention of actual or apparent *quid pro quo* corruption—arrangements that exchange dollars for political favors—and that "[i]ngratiation and access . . . are *not* corruption." 130 S. Ct. at 910 (emphasis added). "Reliance on a 'generic favoritism or influence theory,'" the Court concluded, is a constitutionally insufficient ground for suppressing First Amendment freedoms. *Id.*

Thus, even if contributions of nonfederal money to political parties engender the gratitude of elected officials and facilitate access to those officials, Congress cannot respond to these inherent features of "'representative politics'" by prohibiting the solicitation and expenditure of nonfederal money. *Citizens United*, 130 S. Ct. at 910. Moreover, the fact that, in the past, political parties may have "promised and provided special access to candidates . . . in exchange for large soft-money contributions" does not transform the provision of "access" into illicit *quid pro quo* corruption. *McConnell*, 540 U.S. at 130. Exchanging donations for political access cannot be equated with the exchange of "dollars for political favors"—which is the essential "hallmark" of all constitutionally cognizable corruption. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). In any event, as the district court found, the RNC has "submitted evidence it will not 'aid' soft-money donors 'in obtaining preferential access to federal candidates or officeholders'"—a commitment that the

court found could "be meaningfully enforced by the FEC." J.S. App. 8a & n.4.

Nor, despite the district court's erroneous holding to the contrary, can the government satisfy its burden of proving *quid pro quo* corruption by relying on a purported "'unity of interest' between national parties and their candidates and officeholders." J.S. App. 18a. By the time *McConnell* was decided, this Court had already repeatedly rejected "the notion of a 'metaphysical identity' between party and candidate." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 447-48 (2001); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 623 (1996) (op. of Breyer, J.). *McConnell* gave no indication that it was overruling those prior decisions.

After *Citizens United*, then, the government must demonstrate that each application of BCRA's prohibition on nonfederal money targets an activity that, if funded by nonfederal money, would create an appreciable risk of actual or apparent *quid pro quo* corruption of federal officeholders. The government cannot meet that burden in this case as to any of the challenged applications of FECA §§ 323(a) and (b).

Appellants seek to solicit and expend donations for purposes other than "influencing an[ ] election for Federal office" (2 U.S.C. § 431(8)(A)(i)), including supporting state candidates in elections in which no federal candidate appears on the ballot, funding grassroots lobbying campaigns, and financing redistricting efforts. As the *McConnell* district court found, Congress presented *no* evidence at the time of BCRA's enactment that such activities—or any other activities funded by nonfederal money—create a risk of actual or apparent *quid pro quo* corruption. *See*

McConnell v. FEC, 251 F. Supp. 2d 176, 481 (D.D.C. 2003) (Kollar-Kotelly, J.); *id.* at 852 (Leon, J.). Nor has the government proffered any evidence in this case that even remotely suggests that the solicitation and expenditure of nonfederal money to fund this constitutionally protected political speech could serve as the basis for illicit *quid pro quo* arrangements.

If the decision below is permitted to stand, BCRA's prohibition on nonfederal money will continue to stifle the fundamental First Amendment freedoms of appellants and party members, and political parties will continue to confront burdens on their rights of political speech and association that are not imposed on other political organizations, including nonprofit advocacy groups and 527 organizations. Plenary review is warranted to remove these obstacles to the exercise of political parties' First Amendment rights and to safeguard parties' essential role in the American political process.

I. FECA § 323 IS UNCONSTITUTIONAL AS APPLIED TO EACH OF APPELLANTS' PLANNED POLITICAL ACTIVITIES.

The government bears the burden of proving that each application of FECA § 323 is "closely drawn" to serve a "sufficiently important" government interest. *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (internal quotation marks omitted); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464, 478 (2007) (op. of Roberts, C.J.). The government cannot meet that burden in this case as to any of the challenged applications of FECA §§ 323(a) and (b).[2]

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[2] FECA § 323 is unconstitutional as applied to appellants whether it is examined under the "closely drawn" standard of scrutiny or under strict scrutiny because it does not further an

A. BCRA's Ban On Nonfederal Money Is Unconstitutional As Applied To Political Activities That Do Not Create A Risk Of *Quid Pro Quo* Corruption.

In *McConnell*, this Court rejected a facial challenge to FECA § 323. Emphasizing that "Congress' legitimate [anticorruption] interest extends beyond preventing simple cash-for-votes corruption," the Court held that FECA § 323 was facially constitutional because nonfederal money could be used to secure the gratitude of, and gain access to, federal officeholders. 540 U.S. at 150. According to the Court, "large soft-money contributions to national parties are likely to create actual or apparent indebtedness

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important—let alone, a compelling—government interest. FECA § 323 should be examined under strict scrutiny, however, because *all* "[l]aws that burden political speech are subject to strict scrutiny." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted). Moreover, even if contribution limits are generally subject to a lower standard of scrutiny, FECA § 323 operates as both a contribution limit *and* an expenditure limit. *See* 2 U.S.C. § 444i(a)(1) ("A national committee of a political party . . . may not . . . spend any funds[ ] that are not subject to the limitations, prohibitions, and reporting requirements of this Act."); *cf. Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam). Finally, even if FECA § 323 were only a contribution limit or were applicable to some activities that implicate only associational (rather than speech) interests, strict scrutiny would still be warranted in light of the "heav[y] burden" that the provision imposes on "political part[ies'] associational freedom." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest.").

on the part of federal officeholders, regardless of how those funds are ultimately used," and "are likely to buy donors preferential access to federal officeholders no matter the ends to which their contributions are eventually put." *Id.* at 155, 156.

To prevent this form of "corruption," the Court continued, it was permissible for Congress to take what the Court described as the "modest" step of enacting a blanket prohibition on national parties' solicitation and expenditure of nonfederal money. *McConnell*, 540 U.S. at 142. The Court also held that the limitations that BCRA imposes on state and local parties' use of nonfederal money were facially constitutional because "state committees function as an alternative avenue for precisely the same corrupting forces" that affect national parties. *Id.* at 164.

As the district court correctly recognized, these "ingratiation" and "access" theories of corruption are no longer constitutionally tenable. J.S. App. 14a. In *Citizens United*, the Court made clear that the government's interest in preventing actual and apparent corruption does not extend beyond illicit *quid pro quo* arrangements. 130 S. Ct. at 910. "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption," the Court explained, "that interest was limited to *quid pro quo* corruption." *Id.* at 909 (citing *Buckley v. Valeo*, 424 U.S. 1, 26-28, 30, 46-48 (1976) (per curiam)). Because the "'hallmark of corruption is the financial *quid pro quo*,'" "[i]ngratiation and access . . . are not corruption." *Id.* at 910 (quoting *FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 497 (1985)). Thus, the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Id.* Indeed, the Court emphasized that

"'[f]avoritism and influence are not . . . avoidable in representative politics'" and that the "appearance of influence or access" therefore "will not cause the electorate to lose faith in our democracy." *Id.* (ellipsis in original).

Citizens United removes any doubt that "[r]eliance on a generic favoritism or influence theory" to defend restrictions on political speech "is at odds with standard First Amendment analyses." 130 S. Ct. at 910 (internal quotation marks omitted). The government therefore cannot meet its burden of proving the constitutionality of FECA § 323's application to appellants by contending that appellants' First Amendment freedoms must be suppressed to prevent donor "[i]ngratiation and access." *Id.*

To prevail in this as-applied challenge, the government must instead prove that each disputed application of FECA § 323 furthers the government's interest in preventing actual or apparent *quid pro quo* corruption. To satisfy that burden, the government cannot rely on the fact that political parties may in the past have "sold access to federal candidates and officeholders" in exchange for donations of nonfederal money. *McConnell*, 540 U.S. at 153-54 (emphasis omitted). This Court has defined a *quid pro quo* arrangement as one exchanging "dollars for *political favors*." *NCPAC*, 470 U.S. at 497 (emphasis added). Selling "access"—in the form of private meetings, telephone calls, and social invitations—in exchange for donations is a far cry from illicit *quid pro quo* deals in which an officeholder agrees to take favorable governmental action—supporting legislation or directing sought-after agency action, for example—in exchange for a donation. Indeed, the "record before Congress" at the time it enacted FECA "was replete with specific examples of improper at-

tempts to obtain governmental favor in return for large campaign contributions." *Buckley v. Valeo*, 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) (en banc). It was those examples on which the Court relied in *Buckley* to illustrate the "pernicious practice[ ]" of "large contributions . . . given to secure a political *quid pro quo* from current and potential office holders." 424 U.S. at 26, 27.

In any event, the RNC has made a commitment 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." J.S. App. 8a. The district court found "no reason that the RNC's pledge could not be meaningfully enforced by the FEC," including by "initiat[ing] an investigation and requir[ing] the RNC to disclose the names of invitees to its donor maintenance events" and "adopt[ing] regulations requiring such disclosures even outside the context of an investigation." *Id.* at 8a n.4.

Nor can the government simply rely—as the district court erroneously did—on "'the close relationship between federal officeholders and the national parties'" to establish a constitutionally sufficient basis for upholding future applications of FECA § 323. J.S. App. 16a. Although this Court has held that large contributions to candidates themselves may create a risk of actual or apparent *quid pro quo* corruption (*Buckley*, 424 U.S. at 26), contributions to political parties are not the equivalent of direct candidate contributions.

This Court has repeatedly held that there is no "'metaphysical identity' between party and candi-

date." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 447-48 (2001) ("*Colorado II*"); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996) (op. of Breyer, J.) ("*Colorado I*"). In *Colorado I*, for example, the Court rejected the FEC's argument that all expenditures by political parties in support of a candidate can be deemed "coordinated"—rather than "independent"—expenditures. 518 U.S. at 621. While "the Government . . . argue[d] that [such] expenditure[s] [are] 'coordinated' because a party and its candidates are identical, *i.e.*, the party, in a sense, 'is' its candidates," the Court refused to "assume . . . that this is so" because parties are "'coalitions' of differing interests" and because "Congress chose to treat candidates and their parties quite differently under" FECA. *Id.* at 622, 623; *see also id.* at 629 (Kennedy, J., concurring) (a "political party has its own traditions and principles that transcend the interests of individual candidates and campaigns"). The Court reaffirmed this conclusion in *Colorado II*, which held that the "assertion that the party is so joined at the hip to candidates that most of its spending must necessarily be coordinated spending is a statement at odds with the history of nearly 30 years under the Act." 533 U.S. at 449.

Nothing in *McConnell* purported to overrule these decisions or otherwise disturb the Court's prior holdings that political parties and their candidates are not so closely aligned as to be considered a single, unitary entity under the law.

B. None Of The Challenged Applications Of FECA § 323 Would Prevent Actual Or Apparent *Quid Pro Quo* Corruption.

Because the government cannot rely on "ingratiation" and "access" or the purported "unity of interest" between candidates and parties to defend BCRA's prohibition on nonfederal money, the government must demonstrate that each challenged application of FECA § 323 prevents actual or apparent *quid pro quo* corruption of federal officeholders. The government cannot meet that burden as to any of appellants' intended uses of nonfederal money.

In *McConnell*, this Court did not purport to identify a single example of *quid pro quo* corruption associated with nonfederal money. Nor could it plausibly have done so in light of the district court's unambiguous factual finding to the contrary. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 851 (D.D.C. 2003) (Leon, J.) ("The record contains no evidence of quid pro quo corruption") (capitalization altered). Indeed, the district court found that "[t]here is no evidence presented in the record that any Member of Congress has *ever* changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party." *Id.* (emphasis added); *see also id.* at 481 (Kollar-Kotelly, J.).[3]

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[3] The Court in *McConnell* stated that the "evidence connects soft money to manipulations of the legislative calendar." 540 U.S. at 150 (citing 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.); *id.* at 852 (Leon, J.)). The pages of the district court's opinion cited to substantiate these calendar "manipulations" recount testimony regarding what amounts, at most, to legislators' responsiveness to a donor's legislative priorities, not to a *quid pro quo* arrangement in which donations of nonfederal money were

The government has not filled that evidentiary void here by introducing any evidence that the political activities that appellants are seeking to fund with nonfederal money could conceivably generate actual or apparent *quid pro quo* corruption.

Appellants seek to solicit and expend nonfederal money to (1) support candidates in state elections where there are no federal candidates on the ballot (such as the 2009 state elections in New Jersey and Virginia), (2) support state candidates in elections where both federal and state candidates appear on the ballot, (3) finance party redistricting efforts after the 2010 census, (4) fund "grassroots lobbying" efforts to mobilize voters in response to legislative issues, (5) fund litigation in cases not involving federal elections, (6) pay for the maintenance and upkeep of the RNC's national headquarters, (7) finance advertising campaigns regarding California ballot initiatives using advertisements that mention federal candidates, and (8) fund get-out-the-vote efforts and other generic campaign activity.

The government has not identified any evidence that the solicitation of nonfederal money to finance these political activities would create a risk of actual or apparent *quid pro quo* corruption. The government's difficulty in building an evidentiary record is not surprising. It is far-fetched, to say the least, to think that a federal officeholder would sell his vote in exchange for donations to his party that are used

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exchanged for favorable legislative outcomes. *See* 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.) (recounting an episode where, in the absence of a hearing, the Senate amended a bill supported by a donor of nonfederal money); *id.* at 852 (Leon, J.) (same).

to support a state candidate in an election where federal candidates do not even appear on the ballot, to fund a generic get-out-the-vote drive, or to maintain the parties' headquarters. *See Colorado I*, 518 U.S. at 616 (op. of Breyer, J.) ("the opportunity for corruption posed by ['soft money' contributions] is, at best, attenuated").

A federal candidate is much more likely to be corrupted, it would seem, by a multimillion-dollar independent advertising campaign that expressly endorses his candidacy. But, *Citizens United* makes clear that independent expenditures—no matter their size—do not create a risk of *quid pro quo* corruption. It follows, *a fortiori*, that parties' solicitation and expenditure of donations of nonfederal money do not have sufficient *quid pro quo* potential to warrant stifling the speech and associational rights of parties and their members. *See Colorado I*, 518 U.S. at 617 (op. of Breyer, J.) ("an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem *less likely* to corrupt than the same (or a much larger) independent expenditure made directly by that donor") (emphasis added).

Moreover, even if the solicitation and expenditure of nonfederal money could create a risk of *quid pro quo* corruption, FECA §§ 323(a) and (b) would not be "closely drawn" to serve the government's anticorruption interest because there are substantially less restrictive regulatory alternatives available to the government. For example, a monetary limit on the amount of nonfederal money that a donor could give to a party would further the government's anticorruption interest (assuming that interest were implicated by nonfederal money), and, in so doing, would impose a less severe First Amendment burden

than the outright prohibition on nonfederal money established by FECA §§ 323(a) and (b). Like other campaign-finance regulations invalidated by this Court, BCRA's blanket prohibition on nonfederal money is manifestly "disproportionate to the public purposes" it was purportedly "enacted to advance." *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (op. of Breyer, J.).

In the absence of any evidence that the challenged applications of FECA §§ 323(a) and (b) are "closely drawn" to further the government's interest in preventing *quid pro quo* corruption of federal officeholders, those applications of the statute unconstitutionally deprive appellants of their rights to political speech and association.[4]

II. PLENARY REVIEW IS WARRANTED BECAUSE THE QUESTION PRESENTED HAS PROFOUND IMPLICATIONS FOR THE FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES AND THEIR MEMBERS.

BCRA's prohibition on nonfederal money imposes onerous restrictions on the First Amendment rights of political parties and their members, and places political parties at a profound disadvantage to other participants in the political process.

This Court has repeatedly emphasized the important role of political parties in the American democratic process. "Representative democracy in any

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[4] Although this case was filed as an as-applied challenge, this Court's post-filing decision in *Citizens United*—together with the absence of any evidence in BCRA's legislative history or the record in this case linking donations of nonfederal money to *quid pro quo* corruption—indicates that FECA §§ 323(a) and (b) may well be unconstitutional in *all* their applications.

populous unit of governance is unimaginable," the Court has explained, "without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). It is no surprise, then, that the "formation of national political parties was almost concurrent with the formation of the Republic itself." *Id.*

FECA § 323 is incompatible with the Nation's political history and constitutional tradition because it severely restricts the ability of political parties to finance political activities. Indeed, BCRA's blanket prohibition on nonfederal money does not preserve a *single* political activity that a national party can finance with nonfederal money. No matter how attenuated the link to federal elections, a national party cannot speak unless its speech is financed by funds raised in compliance with FECA's source and amount limitations. Even if those limitations may be a reasonable response to the potential for *quid pro quo* corruption of federal officeholders where the money is to be spent "for the purpose of influencing" a federal election (2 U.S.C. § 431(8)(A)(i)), those requirements are unwarranted and unconstitutional where a national party is spending funds for other purposes, such as state campaigns, litigation, or redistricting.

The First Amendment burdens of BCRA's prohibition on nonfederal money reach not only the parties themselves but also their members. As this Court has emphasized, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents" to associate together. *NAACP v. Button*, 371 U.S. 415, 431 (1963) (internal quotation marks omitted); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S.

290, 296 (1981) ("To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association."). Indeed, exercising their associational right to join together in a political party is generally the most effective means for individuals to make their voices heard in the political process. BCRA's prohibition on nonfederal funds impairs that associational right by constraining the ability of political parties to speak on their members' behalf.

In so doing, BCRA places political parties at a disadvantage to those political organizations, such as nonprofit advocacy groups and 527 organizations, that have the ability to fund political activities without regard to the source and amount restrictions that impede political parties' nonfederal activities. *See Citizens United*, 130 S. Ct. at 913 (advocacy groups and other corporations); *EMILY's List v. FEC*, 581 F.3d 1, 25 (D.C. Cir. 2009) (527s). Singling out political parties for disfavored First Amendment status is fundamentally at odds with parties' overriding importance to the electoral process, and with the speech and associational rights of their members. *See Citizens United*, 130 S. Ct. at 898 (the First Amendment . . . [p]rohibit[s] . . . restrictions distinguishing among different speakers, allowing speech by some but not others").

Unless the government can make a showing that parties' use of nonfederal money to fund political activities creates a meaningful risk of actual or apparent *quid pro quo* corruption, parties cannot be relegated to second-class constitutional status. Because the government has not made that showing here, FECA §§ 323(a) and (b) are unconstitutional in each of their challenged applications.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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