United States District Court
District of Columbia

Republican Party of Louisiana et al., *Plaintiffs*	
v.	**Civil Case No. 15-cv-1241**
Federal Election Commission, *Defendant*	THREE-JUDGE COURT REQUESTED

Application for Three-Judge Court

Plaintiffs apply for a three-judge court to adjudicate the challenges in the *Verified Complaint* (Doc. 1), pursuant to § 403(a)(1) and (d)(2) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub. L. No. 107-155 (2002), 116 Stat. 81, 113-14. *See* LCvR 9.1; 28 U.S.C. 2284.

BCRA § 403 provides special judicial-review rules where, as here, Plaintiffs elect them:

> **SEC. 403. JUDICIAL REVIEW.**
> (a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.—If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:
> (1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.
> (2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.
> (3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.
> (4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal....
> (d) APPLICABILITY.— ....
> (2) SUBSEQUENT ACTIONS.—With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

As set out in the accompanying *Memorandum in Support of Application for Three-Judge Court*, Plaintiffs' action qualifies for BCRA § 403's judicial-review rules. Wherefore, Plaintiffs request the Court (a) to convene a three-judge court to hear this action and (b) "to advance on the docket and to expedite to the greatest possible extent the disposition of the action," BCRA § 403(a)(4).

Respectfully submitted,

/s/ James Bopp, Jr.
James Bopp, Jr., Bar #CO 0041
jboppjr@aol.com
Richard E. Coleson*
rcoleson@bopplaw.com
Randy Elf*
mail@bopplaw.com
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile
Counsel for Plaintiffs
*Pro Hac Vice Application To Be Filed

Certificate of Service

I hereby certify that on August 3, 2015, I electronically filed the foregoing Application for Three-Judge Court with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following (and any other FEC counsel that will appear):

Kevin Deeley, Acting Associate General Counsel for Litigation
Federal Election Commission
999 E Street, NW
Washington, DC 20463
kdeeley@fec.gov.

In addition, a courtesy copy was sent by email to kdeeley@fec.gov on the same date.

/s/ James Bopp, Jr.
James Bopp, Jr., DC Bar #CO 0041

United States District Court
District of Columbia

Republican Party of Louisiana et al., *Plaintiffs*	
v.	**Civil Case No. 15-cv-1241**
Federal Election Commission, *Defendant*	THREE-JUDGE COURT REQUESTED

Memorandum Supporting Application for Three-Judge Court

James Bopp, Jr., Bar #CO 0041
jboppjr@aol.com
Richard E. Coleson*
rcoleson@bopplaw.com
Randy Elf*
mail@bopplaw.com
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile
Counsel for Plaintiffs
*Pro Hac Vice Application To Be Filed

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes & Rules

Other Authorities

Points and Authorities

Plaintiffs have filed a *Verified Complaint* (Doc. 1) and *Application for Three-Judge Court* under § 403(a)(1) and (d)(2)[1] of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155 (2002), 116 Stat. 81, 113-14. *See* LCvR 9.1; 28 U.S.C. 2284. As demonstrated here, this action (**I**) meets § 403's criteria, (**II**) is like cases with BCRA courts, (**III**) presents substantial, non-foreclosed claims, and (**IV**) is like a related case held to present substantial claims.

Plaintiffs are state and local committees of political parties (Compl. ¶¶ 6-8) seeking to do independent "federal election activity" (Compl. ¶¶ 16, 27 (definitions))[2] absent BCRA restrictions on federal election activity (Compl. ¶¶ 74-116). They challenge BCRA provisions as unconstitu-

---

[1] In relevant part, BCRA § 403 provides:

SEC. 403. JUDICIAL REVIEW.

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.—If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal....

(d) APPLICABILITY.— ....

(2) SUBSEQUENT ACTIONS.—With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

[2] "Federal election activity" ("FEA") encompasses activities of state and local committees, including voter-registration activity (VR"), get-out-the-vote activity ("GOTV"), voter identification ("VID"), generic campaign activity ("GCA") (promoting political party), communications promoting, attacking, supporting, opposing candidates ("PASO"), and compensating workers with over 25% of time monthly on FEA ("25% Rule"). 52 U.S.C. 30101(20); 11 C.F.R. 100.24.

tional as follows: (I) as applied to (a) non-individualized, independent communications exhorting registering/voting and (b) non-individualized, independent communications by Internet; (II) as applied to (a) non-individualized, independent communications and (b) such communications from an independent-communications-only account ("ICA"); (III) as applied to all independent federal election activity; and (IV) facially. (Compl. ¶ 1.) The Complaint provides "Historical & Legal Context" (Compl. ¶¶ 10-73) with provisions, background, and context.

I. This Action Meets BCRA § 403's Criteria.

A three-judge court should be convened, BCRA § 403(a)(1),[3] because Plaintiffs elect BCRA's rules, § 403(d)(2), and meet § 403(a)'s criteria, i.e., "challeng[ing] the constitutionality of any [BCRA] provision." This First Amendment action challenges three BCRA provisions:

(a) the *Ban*, 52 U.S.C. 30125(b)(1),[4] banning state and local committees from using nonfederal funds[5] for federal election activity, BCRA § 101(b), 116 Stat. 82-84;

(b) the *Fundraising Requirement*, 52 U.S.C. 30125(c),[6] requiring federal funds to raise funds to be used for federal election activity, BCRA § 101(c); and

(c) the *Reporting Requirement*, 52 U.S.C. 30104(e)(2),[7] requiring monthly reporting of receipts and disbursements for federal election activity, BCRA § 103(a).

---

[3] The three-judge court is to be convened under 28 U.S.C. 2284(b)(1), which provides that the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court ....

[4] *See* Compl. Counts I-IV. *See also* Compl. ¶ 32 (Ban text).

[5] "*Federal funds* ... comply with the limitations, prohibitions, and reporting requirements of the Act." 11 C.F.R. 300.2(g). "*Non-Federal funds* ... are not subject to the limitations and prohibitions of the Act." 11 C.F.R. 300.2(k). These are also called "hard money" and "soft money."

[6] *See* Compl. Counts I-IV. *See also* Compl. ¶ 34 (Fundraising Requirement text).

[7] *See* Compl. Counts I, III, and IV. *See also* Compl. ¶ 35 (Reporting Requirement text).

II. BCRA § 403's Rules Were Employed in Similar Cases.

In (**A**) *McConnell v. FEC*, 540 U.S. 93 (2003), and (**B**) *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014), this Court convened three-judge courts in actions challenging provisions like those here.

A. *McConnell* Addressed Facial Challenges to BCRA § 101, at Issue Here.

McConnell noted: "Section 403 of BCRA provides special rules for actions challenging the constitutionality of any of the Act's provisions." 540 U.S. at 132 (citation omitted). "[A]ctions were ... heard by a three-judge court. Section 403 directed the District Court to advance the cases on the docket and to expedite their disposition 'to the greatest possible extent.'" *Id.* "As authorized by § 403, ... losing parties filed direct appeals ... within 10 days." *Id.* The Court "ordered ... an expedited briefing schedule and ... a special hearing." *Id. McConnell* addressed a "facial First Amendment challenge to new FECA[8] § 323" (BCRA § 101), *id.* at 134, and upheld FECA § 323(b), i.e., the Ban, 52 U.S.C. 30125(b)(1), *id.* at 188-89. That Ban is challenged here as applied and facially. The Court's summary, *id.*, made no mention of FECA § 323(c), the Fundraising Requirement (52 U.S.C. 30125(c)), and FECA § 304(e)(2)(B), the Reporting Requirement (52 U.S.C. 30104(e)(2)), added by BCRA §§ 101 and 103), which are newly at issue here.

B. *McCutcheon* Struck BCRA Contribution Limits Under § 403 Rules.

In *McCutcheon*, this Court convened a three-judge court (12-1034: Docs. 10, 12) in a challenge to BCRA § 307's aggregate limits on individuals' contributions, and the Supreme Court followed BCRA § 403's special rules, 134 S.Ct. at 1443 (plurality).[9] It struck the limits, *id.* at 1462, holding that "[t]his Court has identified only one legitimate governmental interest for *restricting campaign finances*: preventing corruption or the appearance of corruption." *Id.* at 1450 (emphasis added). This

[8] "FECA" is the Federal Election Campaign Act, codified at 52 U.S.C. 30101 et seq.

[9] This recent use of BCRA § 403 refutes any notion that § 403 was just to quickly resolve constitutional challenges immediately after BCRA's passage. Moreover, Congress expressly authorized use of these rules "after December 31, 2006." BCRA § 403(d)(2).

action is like *McCutcheon* because both involve BCRA provisions "restricting campaign finances" (aggregate contribution limits and nonfederal-funds Ban).

III. This Action Presents Substantial, Non-Foreclosed Claims.

This action presents substantial claims that are not foreclosed by any precedent.

A. Any Criteria Beyond BCRA's Two Criteria Must Be Narrow.

Any criteria beyond BCRA § 403's two criteria ((1) a constitutional challenge (2) to a BCRA provision) must be narrow. BCRA § 403 provided that the "3-judge court [be] convened pursuant to [28 U.S.C. 2284]." BCRA § 403(a)(1). Section 2284 requires a judge receiving a three-judge court application to convene one "unless he determines that three judges are not required." 28 U.S.C. 2284(b)(1). For that determination, Congress specified only two criteria in 2002, fully aware of a *past* problem—with *many* three-judge-court, mandatory-appeal acts—that Congress had *fixed*. Before the fix, courts were encouraged to "minimiz[e] the mandatory docket of [the Supreme] Court in the interests of sound judicial administration." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970); *accord MTM v. Baxley*, 420 U.S. 799, 804 (1975) (per curiam). But that was *before* such acts were repealed, *see* Eugene Gressman et al., *Supreme Court Practice* at 75 (9th ed. 2007) ("Finally, in 1988, Congress completed the task of eliminating virtually all of the [Supreme] Court's mandatory jurisdiction."). Because that mandatory docket has *already* been minimized, any need to further minimize it is reduced or eliminated. Now "[o]nly a tiny fraction of such jurisdiction remains, arising out of a few statutes where Congress continues to find it appropriate to use the three-judge district court device to resolve important and complex statutory problems." *Id.* at 75-76. So when Congress created a *new* three-judge court act in BCRA, fully aware of the past problem and fix, it clearly thought BCRA raises just such important, complex problems and established BCRA § 403's two criteria.

Other criteria must be narrow because (a) in BCRA Congress indicated the need for special rules in BCRA cases and (b) the stated criteria in *Feinberg v. FDIC*, 522 F.2d 1335 (D.C. Cir. 1975), are narrow. *Feinberg* said "[c]onstitutional claims [could] be regarded as insubstantial if ... obviously without merit, or if their unsoundness so clearly result[ed] from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Id.* at 1339 (internal quotation marks omitted). "[C]onstitutional claims [must be] so frivolous, or so foreclosed by prior decisions, as to be too insubstantial for jurisdiction...." *Id.* So under *Feinberg*, FEC must prove claims *obviously* frivolous or *clearly* foreclosed *beyond debate*, and "'the First Amendment requires us to err on the side of protecting political speech rather than suppressing it,'" *McCutcheon*, 134 S.Ct. at 1451 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (plurality) ("*WRTL-II*")).

And such criteria must be narrow because they foreclose Congress's special protection for BCRA constitutional claims *before* the convening of a three-judge court, which has sole jurisdiction to consider the merits. While *obviously frivolous* cases might properly be rejected before convening the merits-court, this case is not frivolous. *See* Parts III-IV. Whether a case is *clearly foreclosed without room for debate* requires careful review of complex merits arguments by the merits-court on full merits briefing. The complexity of such determinations is evident from examples of BCRA three-judge courts being overturned on appeal. Consider three key cases (in which Plaintiffs' counsel Bopp and Coleson were counsel for plaintiffs).

First, Wisconsin Right to Life's challenge to BCRA's corporate electioneering-communication ban was held foreclosed by *McConnell*, 540 U.S. 93, but the *unanimous* Supreme Court held, in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (per curiam) ("*WRTL-I*"), that *McConnell* did not foreclose the as-applied challenge. WRTL won its challenge in *WRTL-II*, 551 U.S. 449. If a

judge had deprived WRTL of a three-judge court because its claim was foreclosed, WRTL would have been deprived of the important judicial proceedings essential to BCRA. The unanimous *WRTL-I* established that facial holdings do not "resolve future as-applied challenges," even if some *language* allegedly seems to do so, *WRTL-I*, 546 U.S. at 411-12:

> We agree with WRTL that the District Court misinterpreted the relevance of our "uphold[ing] all applications of the primary definition" of electioneering communications. *Id.*, at 190, n.73. ... [T]hat ... merely notes that because we found BCRA's primary definition of "electioneering communication" facially valid ..., it was unnecessary to consider the constitutionality of the backup definition Congress provided. *Ibid*. In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges.

Second, in *Citizens United*, 558 U.S. 310, a BCRA court granted FEC summary judgment in a challenge to the corporate electioneering-communications ban. So the court held *as a matter of law* that Citizens United's challenge was foreclosed by precedent. Yet the Supreme Court facially invalidated *both* the corporate electioneering-communication ban *and* the corporate independent-expenditure ban. If a judge had deprived Citizens United of a three-judge court because precedent foreclosed the challenge, Citizens United would also have been deprived of vital BCRA rules. *Citizens United* also established that in cases such as this facial challenges to prior facial holdings (*McConnell* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)) may even be raised on appeal, 558 U.S. at 328-36, even if plaintiffs dismissed a facial challenge below, *id.* at 329. And when the court said " it 'would have to overrule *McConnell*' for [Plaintiffs] to prevail on [their] facial challenge and that '[o]nly the Supreme Court may overrule its decisions'" that simply made review appropriate. *Id.* at 330 (citations omitted).

Third, in *McCutcheon*, 134 S.Ct. 1434, where a BCRA court was convened, the three-judge court granted FEC's motion to dismiss a challenge to the aggregate contribution limit supposedly foreclosed by precedent. The Supreme Court reversed, holding the limits unconstitutional. If plaintiffs had been deprived of a three-judge court because their challenge was deemed foreclosed *before*

the three-judge court was convened, they would have been deprived of the valuable judicial procedures that Congress deemed essential for BCRA challengers. *McCutcheon* rejected FEC's argument that the facial upholding of an aggregate limit in *Buckley v. Valeo*, 424 U.S. 1, 38 (1976), "forecloses appellants' challenge," Br. for Appellee at 43, holding, 134 S.Ct. at 1446:

> Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here. *Buckley* spent a total of three sentences analyzing that limit; in fact, the opinion pointed out that the constitutionality of the aggregate limit "ha[d] not been separately addressed at length by the parties." *Ibid.* We are now asked to address appellants' direct challenge to the aggregate limits in place under BCRA. BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop.

WRTL, *Citizens United*, and *McCutcheon* show that holdings that prior decisions foreclose legal challenges are regularly overturned on appeal in political-speech cases—even when the legal determinations are made *after* three-judge courts are convened and *after* merits briefing. The decisions of the three-judge courts were quickly fixed because of BCRA's rules. The lesson of these cases is that whether complex challenges are "foreclosed" should not be decided on three-judge-court applications, but on full merits briefs by three-judge courts. Given this history of FEC convincing lower courts that restrictions on core political speech are foreclosed by Supreme Court precedents, only to be promptly reversed on appeal, Plaintiffs should have the speedy BCRA procedures Congress intended, to quickly gain Supreme Court review.[10]

Finally, a *big-picture view* is important. As Joel Gora, law professor and former ACLU attorney in *Buckley*, 424 U.S. at 4, explains:

> There is only one severe drawback in all of this unlimited, political giving and spending, which is, by and large, so beneficial for our democracy. That is that our two most central, important political actors—our candidates and our parties—have to fight their political battles with one hand tied behind their back. While their expenditures cannot be limited, contributions to them can be. [So] candidates and parties face the prospect of being outspent by independent individu-

[10] Appeal of a BCRA § 403-court denial would go to the D.C. Circuit because § 403(a)(3) allows appeal of only "[a] final decision" to the Supreme Court.

> als and groups who are no longer restrained in terms of what they can raise and spend. That is a potential imbalance in our political and electoral speech system that should concern us.[11]

This "imbalance" with super-PACs[12] explains why political parties need more funds to make independent communications. Of a related case asserting the right of state committees to receive unlimited contributions to make independent expenditures, *RNC v. FEC* (14-0853 (CRC)) (voluntarily dismissed), former White House Counsel Bob Bauer opined: "the suit does not exploit a 'loophole'; it is not a 'soft money' lawsuit; and the RNC has not previously made this claim:"

> Political committees can spend independently without limitation, and they can also accept contributions without limit to fund these expenditures. The RNC and Libertarian committees are simply saying: "us, too." These party organizations, looking to regain a measure of competitive parity with super PACs, are acting rationally ....[13]

That need for competitive parity was echoed by a Democratic state-party chairman and a Democratic state-party executive director testifying at FEC's forum[14] on the problems of state political parties from BCRA. (Compl. ¶¶ 69-73.) The state-party chairman testified: "[c]andidates and state parties are losing control over their voice" (Compl. ¶ 71), and "if we do not address the growing imbalance ..., we may very well see the end of political parties at the state and local level" (*Id.*). As the bipartisan presenters noted, state political parties need relief from onerous burdens imposed by BCRA reducing their competitiveness. Fortunately, relief is available because BCRA provisions are uncon-

---

[11] Joel M. Gora, *In Defense of "Super PACs" and of the First Amendment*, 43 Seton Hall L. Rev. 1185, 1206-07 (2013).

[12] "Super-PACs" make only independent expenditures, which "do not give rise to corruption or the appearance of corruption," *Citizens United*, 558 U.S. at 357, so "government ... ha[s] no anti-corruption interest in limiting contributions to independent expenditure-only organizations," *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) ("*SpeechNow*").

[13] Bob Bauer, *Circling Back (a Full 360°) to the RNC and Libertarian Party Lawsuits* (June 2, 2014), www.moresoftmoneyhardlaw.com/2014/05/circling-back-full-360-rnc-libertarian-party-lawsuits/.

[14] Commissioners Goodman and Ravel hosted the forum. FEC, News Release (June 4, 2014), www.fec.gov/press/press2014/news_releases/20140604release.shtml) (Audio at www.fec.gov/audio/2014/20140604_FORUM.mp3). Some testimony and materials are at Compl. ¶¶ 69-73.

stitutional as challenged here under controlling precedent.

B. Controlling Holdings Prove This Action Substantial and Non-Foreclosed.

Contribution and *expenditure* precedents prove this a substantial, non-foreclosed action.

1. *McConnell* Deemed the Ban a Contribution Restriction, But the Communications at Issue Are Like those Protected in the Independent-Expenditure Cases.

McConnell treated BCRA's nonfederal-funds provisions as contribution restrictions: "That they [restrict contributions] by prohibiting the spending of soft money does not render them expenditure limitations." 540 U.S. at 139. It called the Ban "a straightforward contribution regulation: It prevents donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'" *Id.* at 161-62. *McConnell* said ads paid for with nonfederal funds were *like express advocacy* and *coordinated*, 540 U.S. at 131 (footnote omitted):

> [B]oth parties began to use ... soft money ... for issue advertising ... to influence federal elections. The [Senate] Committee found such ads highly problematic for two reasons. Since they accomplished the same purposes as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide. Moreover, though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns.

McConnell's reliance on coordination has no application to this action, involving independent activity. Not treating the Ban as an expenditure restriction conflicts with *McCutcheon*'s treatment of aggregate *contribution limits* as "speech." 134 S.Ct. at 1452. And state committees legally *have* nonfederal funds (unlike national committees), so the Ban prohibits using *existing* funds for independent communications, making it an *independent expenditure* restriction as applied. *McConnell*'s acknowledgment that issue ads "accomplish[] the same purposes as express advocacy," 540 U.S. at 131, acknowledges the analytical equivalence of the two. So Plaintiffs' non-individualized, independent communications are constitutionally like and should be treated like independent expen-

ditures.[15] *McConnell* did not consider the Ban as applied to such communications, which are governed by the independent-*expenditure* line of cases, and it did not do so under the now-controlling "corruption" analyses of *Citizens United* and *McCutcheon*. But even under a contribution-restriction analysis, the Ban fails, as discussed next.

2. *Contribution* Precedents Prove this Action Substantial and Non-Foreclosed.

In the contribution-restriction context, *McCutcheon* controls. The Court held aggregate limits on contributions, including to political committees, violated the First Amendment for not being justified by an anti-quid-pro-quo-corruption interest, "while seriously restricting participation in the democratic process." 134 S.Ct. at 1442 (plurality). *McCutcheon* made seven controlling holdings. (**i**) "The right to participate in democracy *through political contributions* is protected by the First Amendment." *Id.* at 1441 (emphasis added). (**ii**) Under "strict scrutiny or *Buckley*'s 'closely drawn' test,[16] we must assess the fit between the stated governmental objective and the means selected to achieve that objective." *Id.* at 1445-46 (citations omitted). (**iii**) The "Court has identified only one legitimate governmental interest for *restricting campaign finances*: preventing corruption or the

---

15 The non-corrupting nature of independent expenditures turns on the *independence* of the communications not whether they contain express advocacy, as is clear from *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 613 (1996) ("*Colorado-I*"), where the Court identified the communication at issue as an "independent expenditure" though it lacked express advocacy, *see FEC v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1488, 1451 (D. Col. 1993) (district court applied express-advocacy construction to relevant provisions and dismissed enforcement proceeding because there was no express advocacy).

16 *McCutcheon* stated a *strong* "'closely drawn' test": "[I]f a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, ...it cannot survive 'rigorous' review," *id.* at 1446 (citations omitted), and "fit matters," so tailoring must be "reasonable" with "'means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57 (citation omitted). Under *either* strict or closely drawn scrutiny, "'the Government bears the burden of proving the constitutionality of its actions,'" *id.* at 1452 (citation omitted); "'mere conjecture ... [cannot] carry a First Amendment burden,'" *id.* (citation omitted); in distinguishing "between *quid pro quo* corruption and general influence .... 'the First Amendment requires us to err on the side protecting speech rather than suppressing it,'"*id.* at 1451 (citation omitted); and no deference is afforded "unconstitutional remed[ies]," *Citizens United*, 558 U.S. at 361.

appearance of corruption," *id.* at 1450 (emphasis added), which is "a direct exchange of an official act for money," *id.* at 1441, which entails "'large individual financial contributions' *to particular candidates*," *id.* (citation omitted; emphasis added), i.e., "an act akin to bribery," *id.* at 1466 (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.). (**iv**)

> Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties.... And because the Government's interest in preventing the appearance of corruption is equally confined ..., the Government may not seek to limit the appearance of mere influence or access.

Id. at 1450-51 (plurality; citations omitted). (**v**) "'When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption." *Id.* at 1452 (citation omitted). The Court thus equates *contribution* restrictions with "restrict[ing] *speech*" and requires the Government to prove a quid-pro-quo risk. (**vi**) "*Buckley*'s fear that an individual might 'contribute massive amounts of money to a particular candidate through the use of unearmarked contributions' to entities likely to support the candidate ... is far too speculative." *Id.* at 1452 (quoting *Buckley*, 424 U.S. at 38). (**vii**) "And—importantly—we 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'" *Id.* (citation omitted).

This action is like *McCutcheon* in that both involve BCRA provisions "restricting campaign finances." And *McConnell* and *McCutcheon* may not be meaningfully distinguished because the Supreme Court now equates campaign finance restrictions with restricting "*speech*" and, *in the contribution-limit context*, recognizes *only* quid-pro-quo corruption, requiring the government to prove a fit between a campaign-finance restriction and narrowly defined quid-pro-quo corruption. But this case also involves independent communications, bringing it under the independent-expendi-

ture line of cases. So as *McCutcheon* rejected the idea that *Buckley*'s facial upholding of an aggregate limit foreclosed constitutional review, 134 S.Ct. at 1452 (citing *Buckley*, 424 U.S. at 38), *McConnell* does not foreclose review here under current jurisprudence.

This is especially true given the as-applied challenges here. Consider briefly the Ban as applied to contributions to fund non-individualized, independent communications. A quid-pro-quo risk is required for restricting campaign finances, but as a matter of law, there is no quid-pro-quo risk involved in such independent communications, which are constitutionally like non-corrupting independent expenditures. It follows that there would be no quid-pro-quo risk in contributions used for such independent communications, as there is none for contributions to be used for independent expenditures. *See* Part III.B.3. Only narrow quid-pro-quo corruption is cognizable, which involves a contribution to a candidate, and any other theory of "corruption" is not cognizable— including access, influence, gratitude (and synonyms such as value), benefit (unless it involves narrow quid-pro-quo corruption), close connection, interest alignment, and the like. Under *McCutcheon* even "large" contributions pose no problem absent a quid-pro-quo risk, and no speculation or conjecture is permitted in trying to prove a "fit" between the restriction and preventing quid-pro-quo corruption. Thus, there is no fit between preventing quid-pro-quo corruption and the Ban as applied to such independent communications. *See infra* Part III.C-D.

3. *Expenditure* Precedents Prove this Action Substantial and Non-Foreclosed.

In the expenditure context, controlling precedents readily demonstrate that there is no quid-pro-quo risk involved with independent communications, so nothing justifies restricting contributions for them, especially from an independent-expenditure-only fund. Note the following five matter-of-law holdings that govern here: (**i**) "independent expenditures . . . do not give rise to corruption or [its] appearance," *Citizens United*, 558 U.S. at 357; (**ii**) "because *Citizens United* holds that inde-

pendent expenditures do not corrupt ..., the government ... ha[s] no ... interest in limiting contributions to independent expenditure-only organizations," *SpeechNow*, 599 F.3d at 696; *see also EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009) (recognizing right to have separate accounts for independent expenditures and contributions); *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011) (recognizing that *EMILY's List* authorizes non-contribution accounts ("NCAs") that may receive unlimited contributions for making independent expenditures)[17]; (**iii**) party-committee independent-expenditure activity similarly poses no cognizable risk of corruption or its appearance, *Colorado-I*, 518 U.S. 604; and (**iv**) the fact that party-committees and candidates are "inextricably intertwined," *McConnell*, 540 U.S. at 155, does not pose a constitutionally cognizable risk of quid-pro-quo corruption or its appearance *regarding party-committee independent-expenditure activity* because *McConnell* held that party-committees could not be forced to choose between coordinated expenditures and independent expenditures, *id.* at 213-19, (meaning that political parties are factually capable of doing independent expenditures, as a matter of law, even if they also do coordinated expenditures, and so have a constitutional right to do independent communications under prevailing laws, regulations, and FEC guidelines); (**v**) to these matter-of-law holdings should be added FEC's recognition that, if entities can do independent expenditures *separately*, they must be allowed to pool their resources for effective advocacy by doing them *together*, *see* FEC, Advisory Opinion ("AO") 2010-11 (Commonsense Ten) at 3, which should be treated in the nature of a concession here.

Because non-individualized, independent communications are constitutionally like independent expenditures, there is no fit between preventing quid-pro-quo corruption and the Ban as applied to such independent communications, especially if funded by an ICA (*see infra* at 22-23, 34-35).

---

[17] *See also* FEC, *FEC Statement on Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account* (Oct. 5, 2011) (recognizing that some political committees may have non-contribution accounts to receive unlimited contributions for making independent expenditures) (*see* www.fec.gov/press/press2011/20111006postcarey.shtml).

4. No *McConnell* or Other Case *Language* Forecloses this Action.

The required analysis in First Amendment challenges is careful scrutiny of interests and tailoring to see whether challenged provisions are constitutional in "each application," *WRTL-II*, 551 U.S. at 448. But substituting for that required scrutiny of interests and tailoring reliance on some prior *language* fails the required scrutiny. That was the error in *WRTL-I*, 546 U.S. 410, where the unanimous Court rejected reliance on *language* in a *McConnell* footnote, declaring that "[i]n upholding [the challenged provision] against a facial challenge, we did not purport to resolve future as-applied challenges, *id.* at 411-12. *See supra* at 6. When *WRTL-II* did the required scrutiny of interests and tailoring, it held the electioneering-communication ban unconstitutional as applied to corporate and union issue advocacy. 551 U.S. 449.

That controls here: *scrutiny* of cognizable interests and tailoring in each application is required, not reliance on some prior *language*. For example, *McConnell* has language that FEC might cite in lieu of the required scrutiny, such as "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id.* at 155. To rely on such language in lieu of the required scrutiny would repeat the mistake rejected in *WRTL-I*. And *McConnell* pointed to "the close relationship between federal officeholders and the national parties," with national parties (not involved here) "inextricably intertwined with federal officeholders and candidates," *id.* at 154-55, but reliance on such language would dodge the required interest-tailoring scrutiny.

That required scrutiny must be based on what is *now* cognizable "corruption." *McConnell* repeatedly attacked Justice Kennedy's narrow view of "corruption," including the following:

> Justice Kennedy would limit Congress' regulatory interest only to the prevention of the actual or apparent quid pro quo corruption "inherent in" contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate.... Regulation of any other donation or expenditure—regardless of its size,

> the recipient's relationship to the candidate or officeholder, its potential impact on a candidate's election, its value to the candidate, or its unabashed and explicit intent to purchase influence—would, according to Justice Kennedy, simply be out of bounds. This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.

Id. at 152 (citation omitted). *McConnell* attacked Kennedy's narrow "appearance of corruption":

> At another point, describing our "flawed reasoning," Justice Kennedy seems to suggest that Congress' interest in regulating the appearance of corruption extends only to those contributions that actually "create ... corrupt donor favoritism among ... officeholders." .... This latter formulation would render Congress' interest in stemming the appearance of corruption indistinguishable from its interest in preventing actual corruption.154 n.49 (citation omitted).

In place of Justice Kennedy's narrow "corruption," the majority's "corruption" swept in "actual or apparent indebtedness" resulting from a "close relationship" between officeholders and political parties, along with "access" and "gratitude" (including synonyms). *Id.* at 155-56. So the findings of "corruption," "benefit," etc. from federal election activity in *McConnell* all turn on a *rejection* of Justice Kennedy's narrow view of corruption.

But Justice Kennedy's view now *prevails* in both the independent-expenditure context (*Citizens United*) and the contribution-to-political-parties context (*McCutcheon*). Both expressly repudiate *any* "corruption" beyond narrowly defined quid-pro-quo corruption, requiring a contribution to a candidate and being an act akin to bribery. *See supra* at 10-11. That excludes all else as cognizable "corruption," e.g., access, gratitude, or "corruption" inherent in the close relationship between candidates/officeholders and party committees. So the "corruption" foundation of *McConnell* is gone. And regarding independent communications, the Court held they "do not give rise to corruption or the appearance of corruption," *Citizens United*, 558 U.S. at 357. So "government ... ha[s] no ... interest in limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696. And political-party independent communications may not be presumed coordinated and are also non-corrupting. *Colorado-I*. 518 U.S. 604. So arguing *McConnell* language, while ignoring

the removal of *McConnell*'s "corruption" foundation, fails the required interest-tailoring scrutiny and would not prove this case insubstantial or foreclosed.[18]

The same applies to statements about the Ban. *McConnell* said Congress concluded that "state committees function as an alternate avenue for precisely the same corrupting forces," 540 U.S. at 164, but that is based on *McConnell*'s now-non-cognizable "corruption." *McConnell* said "Congress also made a prediction" that contributors would use donations to state parties to gain "influence" and create "indebtedness," *id.* at 165, but such "corruption" is now non-cognizable and such "mere conjecture" is impermissible, *McCutcheon*, 134 S.Ct. at 1450, 1452. No evidence of real quid-pro-quo corruption was shown in *McConnell*'s massive record.[19] That dooms it now that quid-pro-quo corruption is required in both expenditure and contribution contexts. And though *McConnell* upheld banning nonfederal funds for VR, GOTV, VID, and GCA (*see supra* footnote 2 (abbreviations)) because they "can be used to benefit federal candidates directly," 540 U.S. at 167, or "ha[ve] a direct effect on federal elections," *id.* at 168, or cause officeholders to be "grateful," *id.*, under *current*

[18] In *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("*RNC-I*"), *aff'd* 561 U.S. 1040 (2010), the three-judge court stated that "*McConnell* ... appeared to rely ... on 'the close relationship between federal officeholders and the national parties,'" *id.* at 159 (quoting *McConnell*, 540 U.S. at 154), and "'[g]iven this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent *indebtedness* on the part of federal officeholders, regardless of how those funds are ultimately used,'" *id.* (quoting *McConnell*, 540 U.S. at 145). That cannot foreclose a three-judge court here because (1) "indebtedness" is not the quid-pro-quo corruption (involving acts akin to bribery to candidates) that *McCutcheon* holds now governs the *contribution* context, *see supra* at 11; (2) this case focuses on independent communications that pose no quid-pro-quo corruption risk, *Citizens United*, 558 U.S. at 357; (3) regarding independent communications, *Colorado-I* held there is no cognizable corruption due to close relationships between candidates and parties, 518 U.S. 604; and (4) *McCutcheon* rejected the notion that large federal-funds contributions pose any corruption absent quid-pro-quo exchanges with candidates, 134 S.Ct. at 1450-51, so *a fortiori* no corruption arises from non-federal-fund contributions donated for making independent communications.

[19] *McConnell* facially upheld BCRA though defendants "identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees." *McConnell*, 251 F. Supp. 2d at 395 (opinion of Henderson, J.). *Accord McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, dissenting) (quoting and citing *McConnell*, 251 F. Supp. 2d at 395 (opinion of Henderson, J.)).

jurisprudence "benefit," "effect," and "grateful[ness]" are also not corruption. As applied to non-individualized, independent communications at issue here, there can be no presumption that they *benefit* a candidate because "an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate," *Citizens United*, 448 U.S. at 360, and "'[t]he absence of prearrangement and coordination ... alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate,'" *id.* at 345 (quoting *Buckley*, 424 U.S. at 47), so "independent expenditures ... do not give rise to corruption or [its] appearance," *id.* at 357.

In sum, only the holdings of controlling cases establishing *now*-cognizable interests and tailoring govern the present, required scrutiny. Any mere *language* cannot prove this action clearly foreclosed beyond debate (and ties go to Plaintiffs) so as to deny BCRA § 403's rules here.

5. Party-Committee Status Does Not Justify Different Treatment.

Another example of language that does not prove this case insubstantial/foreclosed involves statements about political parties that do not apply the required interest-tailoring scrutiny to the claims here. Plaintiffs want to make non-individualized, independent communications like the independent expenditures that "do not give rise to corruption or [its] appearance," *Citizens United*, 558 U.S. at 357, so "the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations," *SpeechNow*, 599 F.3d at 696. In Count II, Plaintiffs sue as applied to independent communications from an independent-communications-only account ("ICA), funded solely by individuals' contributions at a lawful level under state law. An ICA is constitutionally like a non-contribution account ("NCA")[20] that political committees (if not connected to political parties) may use to receive unlimited contributions for making independent

[20] "Non-contribution accounts" are independent-expenditure-only accounts that may receive unlimited contributions. *See supra* footnote 16 (re *FEC Statement on Carey*).

expenditures, as may IE-PACs,[21] a.k.a. super-PACs. Under recent precedents narrowing cognizable corruption, party-committee status does not justify treating ICAs differently from NCAs. But IE-PAC cases have distinguished IE-PACs from party-committees, citing concerns discussed in *Colorado-I*, 518 U.S. 604, *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), and/or *McConnell*, 540 U.S. 93. For example, *SpeechNow* noted that "FEC also argues that we must look to the discussion about the potential for independent expenditures to corrupt in [*Colorado-I*]," but *SpeechNow* rejected FEC's argument, distinguishing political-party independent expenditures and holding that "a discussion in a 1996 opinion joined by only three justices cannot control our analysis when the more recent opinion of the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption." 599 F.3d at 695. Such distinctions are nonbinding and unnecessary.

a. IE-PAC Case Statements Distinguishing Party-Committees Are Dicta.

Statements distinguishing party-committees in IE-PAC cases such as *SpeechNow* are dicta. They were unnecessary to the case decision, and the constitutionality of the provisions challenged here as applied to non-individualized, independent communications, especially from an ICA, was not before the courts. And other circuits' opinions do not control here.

b. Party-Committee Coordination with Candidates May Not Be Presumed.

Distinction of party-committees in some opinions is based on *presumed coordination with candidates*. *Colorado-I* forbids that presumption regarding independent communications: "The question ...is whether the [lower] Court ... erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are 'coordinated.' We believe it did." 518 U.S.

[21] "IE-PACs" (independent-expenditure-only political committees), recognized in cases such as *SpeechNow*, 599 F.3d 686, receive unlimited contributions to make independent expenditures.

at 619. That independent-communication case must control, not *McConnell*, because "[t]his case ... is about independent expenditures," *Citizens United*, 558 U.S. at 361.

Nor may the government *presume that political parties pose a corruption risk* per se: "[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." *Colorado-I*, 518 U.S. at 618 (plurality). "'[A] vigorous party system is vital to American politics," and "'[p]ooling resources from many small contributors is a legitimate function and an integral part of party politics.'" *Id.* (citations omitted).[22] "[T]he basic nature of the party system ... [allows] party members [to] join together to further common political beliefs, and citizens can choose to support a party because they share ... beliefs." *McCutcheon*, 134 S.Ct. at 1461. So "recast[ing] such shared interest ... as an opportunity for ... corruption would dramatically expand government regulation of the political process." *Id.* (citations omitted).

Regarding *corruption* (or *circumvention* by illegal conduit-contributions) from independent-expenditure activity, no presumption is permissible because independent communications involve no contributions *to candidates*. Only contributions to candidates may pose a corruption risk because, unless a financial quid *reaches* a candidate, he could not provide a legislative quo.[23] "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985). *See also McCutcheon*, 134 S.Ct. at 1441 (same). But "independent expenditures ... do not give rise to corruption." *Citizens United*, 558 U.S. at 357. "Spending large sums of money in connection with elections, but not in connection with an effort to control the

[22] "We are not aware of any special dangers of corruption associated with political parties ...." *Id.* at 616 (plurality). "What could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?" *Id.* at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).

[23] " *Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 134 S.Ct. at 1460 (citation omitted). For the corruption risk to arise, "money [must] flow[] ... to a candidate." *Id.* at 1452.

exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S.Ct. at 1450.[24]

Regarding *coordination* of party-committee independent expenditures with candidates, no presumption is permissible because the independent communications party-committees may make, 11 C.F.R. 109.30, may *not* be coordinated with a candidate, 11 C.F.R. 109.37 ("What is a 'party coordinated communication'?"). And *Colorado-I* expressly *rejected* FEC's presumption that party-committees cannot make independent communications because (as FEC presumed) *all* political-party committee communications were coordinated with a political party's candidates. 518 U.S. at 614-22. What the *Colorado-I* opinions said in rejecting presumed coordination controls here. The *Colorado-I* plurality held that, in examining alleged coordination, one may not look to "general descriptions of Party practice," such as a "statement that it was the practice of the Party to 'coordinat[e] with the candidate' campaign strategy" or a statement that a Party official is "'as involved as [he] could be' with the individuals seeking the Republican nomination ... by making available to them 'all of the asserts of the party." *Id.* at 614. Rather, coordination analysis examines whether *particular* communications are *factually* coordinated, *id.*:

> These latter statements, however, are general descriptions of Party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was

[24] *Colorado-II* cited a practice of the Democratic Senatorial Campaign Committee ("DSCC") whereby candidates might receive increased aid from DSCC proportional to contributions raised by candidates for DSCC. 533 U.S. at 459. The Court considered this (legal) practice in the independent-spending context as some indication of circumvention problems if party-committees were allowed unlimited *coordinated* spending. *Id.* at 459 & n.22. *Colorado-II* is inapplicable to *independent* spending, but even the tally-system argument is non-viable after FEC's 2012 decision that the DSCC fulfilled conciliation-agreement obligations regarding its *ongoing* tallying. In Matter Under Review 3620, http://fec.gov/em/mur.shtml, FEC decided that: (a) absent earmarking, party-committees may do what they want with contributions tallied to particular candidate's credit; (b) tallied contributions are not implicitly earmarked; and (c) tallied contributions trigger no quid-pro-quo or conduit-contribution risk. *Id.* Under FEC's decision, "attribution" to a contributor occurs only when there is *earmarking*, not mere tallying of credit to a candidate. *Id.*

> developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate.... [W]e therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

Political party independent communications pose *less* corruption risk than those by individuals:

> If anything, 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. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See *Buckley*, [424 U.S.] at 45-46; *NCPAC*, [470 U.S.] at 498. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

Id. at 617-18. And *Colorado-I* rejected the notion that a party "expenditure is 'coordinated' because a party and its candidate are identical, *i.e.*, the party, in a sense, 'is' its candidates." 518 U.S. at 622. "We cannot assume ... this is so," the plurality continued, *id.*, and such "a metaphysical identity ... arguabl[y] ... eliminates any potential for corruption ...," *id.* at 623, *citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("where there is no risk of 'corruption' of a candidate, the Government may not limit even contributions"). So in the independent-communication context, if the government argues that political parties and candidates have "an absolute identity of views and interests," *id.*, then there is no corruption potential and, consequently, no constitutional justification for any limit even on their *coordinated* expenditures. But since party-committees and their candidates are separate legal entities, as *Colorado-I* and FECA treat them, parties are factually capable of making communications independent of candidates. Whether any *particular* communication is coordinated, depends on coordination standards, *see* 11 C.F.R. 109.21 ("coordinated communication") and 109.37 ("party coordinated communication"), as a *factual* question, and the activities here are verified independent. (Compl. ¶ 78.) So party-committee status changes no controlling analysis here regarding cognizable corruption, circumvention, and coordination, and no cognizable governmental interest prevents party-committees from using nonfederal funds for their independent com-

munications, especially from an ICA.

Nonetheless, *SpeechNow* said that "[*Colorado-I*] concerned expenditures by political parties, which are wholly distinct from 'independent expenditures' as defined in [52 U.S.C. 30101(17)]." 599 F.3d at 695. But this dictum states a distinction without constitutional significance. An "independent expenditure" under 52 U.S.C. 30101(17) is "a communication expressly advocating the election or defeat of a clearly identified candidate" that is not "a coordinated communication under 11 C.F.R. 109.21 or a party coordinated communication under 11 C.F.R. 109.37." 11 C.F.R. 100.16.[25] The communication that the party-committee in *Colorado-I* had a First Amendment right to make was also non-coordinated, but it criticized a Democratic candidate on the issues *without* express advocacy, *see Colorado Republican Federal Campaign Committee*, 839 F. Supp. at 1451,[26] yet *Colorado-I* held that "the expenditure in question is what this Court in *Buckley* called an 'independent' expenditure," 518 U.S. at 613. Here, Plaintiffs want their ICA to receive contributions from individuals at levels subject to state law for making independent communications that are constitutionally like "independent expenditures" in that they are not coordinated and pose no quid-pro-quo risk. The constitutionally significant feature of "independent expenditure" in 52 U.S.C. 30101(17) and *Colorado-I* is the *independence* of the public communication naming a candidate, not the

[25] 52 U.S.C. 30101(17) requires that communications not be coordinated with either candidates or *party-committees*. This does not prevent party-committees from running their own independent-expenditure programs, so there is no problem with an ICA. But *Buckley* recognized coordination with *candidates* (not parties) as creating in-kind contributions. 424 U.S. at 46 n.53. So the ban on coordination with *party-committees* in § 30101(17) seems to resurrect the presumption of party-candidate coordination that *Colorado-I* rejected, which view is supported by the fact that expenditures coordinated with *PACs* (not party-committees) are not coordinated under § 30101(17) nor in-kind contributions under 52 U.S.C. 30116(7)(B). The requirement that independent expenditures be independent from *party-committees* is a prophylaxes layered on the "*base limits*[, which] themselves are a prophylactic measure" in a "prophylaxis-on-prophylaxis approach'" to preventing any possible corruption. *McCutcheon*, 134 S.Ct. at 1458 (emphasis in original) (citation omitted). Such prophylaxes are not justified for independent communications and ICAs, where no corruption exists.

[26] The district court applied an express-advocacy construction and dismissed FEC's enforcement proceeding because there was no express advocacy. *Colorado-I*, 518 U.S. at 612-13.

presence or absence of express advocacy. This is so because both uses of "independent expenditure" are rooted *Buckley*'s holding that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47. *See Colorado-I*, 518 U.S. at 615 (quoting *Buckley*, 424 U.S. at 47). Now, *Buckley also* imposed *express-advocacy* constructions on two "expenditure" definitions to avoid vagueness and overbreadth. 424 U.S. at 44 n.52, 80. *That* is the source of the express-advocacy independent-expenditure definition at 2 U.S.C. 431(17). But the right of party-committees to make "independent expenditures" under *Colorado-I* turns on *independence*, not the presence or absence of express advocacy. So for constitutional purposes, an express-advocacy communication from *Buckley* and a non-express-advocacy communication from *Colorado-I* are both an "independent expenditure," with the common, controlling factor being their independence.

c. What the *Colorado* Cases and *McConnell* Really Said Supports Plaintiffs.

Though courts may claim political-parties differ in kind from PACs based on the *Colorado* cases and *McConnell*, what those cases actually said does not preclude a three-judge court here.

In holding that political-party communications lack corruption risk due to independence, the *Colorado-I* principal opinion said: "We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." 518 U.S. at 616. The opinion then said what *SpeechNow* noted (set out here as stated in *SpeechNow*):

> It is true that the opinion of Justice Breyer did discuss the potential for corruption or the appearance of corruption potentially arising from independent expenditures, saying that "[t]he greatest danger of corruption ... appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate," thus evading the limits on direct contributions to candidates. *Id.* at 617....

SpeechNow, 599 F.3d at 695 (citation omitted).[27] But as context, *Colorado-I* said that

> [c]ontributors seeking to avoid the effect of the $1,000 contribution limit indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See *Buckley*, [424 U.S.] at 44-48 (risk of corruption by individuals' independent expenditures is insufficient to justify limits on such spending). If anything, 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.

518 U.S. at 617 (citations omitted). Since contributors and parties may each do independent expenditures, contributors and party-committees have an expressive-association right to do them together, including through an ICA.[28] So *Colorado-I* does not establish that large contributions that may be used for independent communications create corruption, and it supports Plaintiffs activities here.

Colorado-I was remanded to decide whether the Party Expenditure Provision limits were unconstitutional facially, i.e., whether the government could limit *coordinated* expenditures. *Colorado-II*, 533 U.S. 431, held there could be limits on *coordinated* expenditures. Since Plaintiffs' intended activities do not involve coordination, *Colorado-II* neither controls nor informs this case. But note some things said in *Colorado-II*. The Court justified limits to prevent *circumvention* of contribution

---

[27] *SpeechNow* quickly rejected this statement in *Colorado-I* as controlling: "[A] discussion in a 1996 opinion joined by only three Justices cannot control our analysis when the more recent opinion of the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption." 599 F.3d at 695.

[28] The *Colorado-I* plurality recognized the *expressive-association* nature of political parties' independent expenditures for "'core' First Amendment activity," *id.* at 615-16:

> Given these established principles [concerning the high constitutional protection for, and non-corrupting nature of, independent communications], we do not see how a provision that limits a political party's independent expenditures can escape their controlling effect. A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.

limits, not quid-pro-quo corruption directly. 533 U.S. at 465.[29] It said that party-committees "act as agents for spending on behalf of those who seek ... obligated officeholders." 533 U.S. at 452. This was about *coordinated*, not *independent*, communications. The next sentence emphasizes the context: "It is this party role, which functionally unites parties with other self-interested political actors, that the Party Expenditure Provision targets," i.e., what the Provision "targets" in *Colorado-II* is solely *coordinated* spending, as made clear by the Court, *id.* at 457 (emphasis added):

> Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' *coordinated* spending wide open.

McConnell justified the nonfederal-funds Ban on the idea that nonfederal funds could cause gratitude and influence, 540 U.S. at 145, 168, or access, *id.* at 119 & n.5, 124-25 & n.13, 155. "[S]oft money ... enabled parties and candidates to circumvent FECA's limitations ...." *Id.* at 126. *See also id.* at 145 ("widespread circumvention of FECA's limits on contributions" due to likelihood "that candidates would feel grateful ... and ... donors would seek to exploit that"). The Court said such access, gratitude, and consequent "circumvention" constituted "corruption" or "the appearance of corruption." *Id.* at 119 n.5, 142, 145. Also, "[t]he national committees ... are both run by, and largely composed of, federal officeholders and candidates," *id.* at 155, and "[g]iven this close

[29] As to other alleged "corruption," the Court found it unnecessary to reach arguments based on "*quid pro quo* arrangements and similar corrupting relationships between candidates and parties," *id.* at 456 n.18, but the Tenth Circuit had rejected those arguments, *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1229-31 (10th Cir. 2000), as it had rejected the circumvention argument, *id.* at 1231-32. And the district court found no factual evidence of quid-pro-quo corruption between contributors, parties, and candidates. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1211-12 (D. Colo. 1999) (no corruption in the form of contributors "forc[ing] the party committee to compel a candidate to take a particular position"); *id.* at 1212-13 (no "corruption" from parties' influence over candidates because "decision to support a candidate who adheres to the parties' beliefs is not corruption"); *id.* at 1213 ("FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof.").

connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id. McConnell*'s analysis doesn't control here because "corruption" based on *anything* other than narrowly defined quid-pro-quo corruption was rejected in *Citizens United*, 558 U.S. at 359-61 (expenditure context), and *McCutcheon*, 134 S.Ct. at 1441 (contribution context).

But *McConnell* was correct that the independent-expenditure case line controls where (as here) independent communications are involved, 540 U.S. at 145 n.45 (citations omitted):

> Justice Kennedy contends that the plurality's observation in *Colorado I* that large soft-money donations to a political party pose little threat of corruption "establish[es] that" such contributions are not corrupting.... The cited dictum has no bearing on the present case. *Colorado I* addressed an entirely different question—namely, whether Congress could permissibly limit a party's independent expenditures—and did so on an entirely different set of facts.[30]

Citizens United also distinguished those case lines, holding that *McConnell* did not control an independent-communication case, 558 U.S. at 360-61 (citations omitted):

> 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. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule.

Citizens United distinguished the case lines based on whether they involved *independent communications,* not on the basis that *McConnell* involved party committees. That distinction controls.

In sum, these controlling precedents show that none of the counts discussed below is *clearly*

[30] Whether any "set of facts" could prove cognizable corruption from independent expenditures was settled in *Citizens United*, which held, *as a matter of law*, that "independent expenditures ... do not give rise to corruption or the appearance of corruption." 558 U.S. at 357.

foreclosed without room for debate. See supra at 5. All are substantial and non-foreclosed.

C. Count I Presents Substantial, Non-Foreclosed Claims.

Count I easily presents substantial, non-foreclosed claims because it challenges the federal-provisions at issue as applied to two kinds of activity that FEC has in the past conceded pose insufficient quid-pro-quo risk to be restricted and regulated. Plaintiffs challenge the Plaintiffs challenge the Ban (52 U.S.C. 30125(b)(1)), Fundraising Restriction (52 U.S.C. 30125(c)), and Reporting Requirement (52 U.S.C. 30105(e)(2)) as applied to **(1)** *non-individualized, independent communications* that *exhort registering/voting* and **(2)** such communications, and other non-individualized, independent communications constituting federal election activity, *by Internet*.[31] (Compl. ¶¶ 118-19.)

These two challenges coincide in some of Plaintiffs' planned activities. (Compl. ¶¶ 84-87, 89-90.) One such activity is the following article that is (1) a non-individualized, independent communication exhorting registration and voting (2) on LAGOP's website, www.lagop.com/get-registered:

> Your right to vote for public officials and representatives is valuable. It is rare in human history. It was hard-won by America's founders.
>
> Before America gained independence, the colonies were ruled by Great Britain. In the Declaration of Independence, the founders listed many grievances against British rule, especially the lack of representation. The Declaration said King George would not enact needed laws "unless ... people ... relinquish[ed] the right of Representation in the Legislature." It said the British were "suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."
>
> The Revolutionary War rejected British rule. America established a republic where citizens select their representatives in government. Yet astonishingly, many people don't register and vote.
>
> As Americans who enjoy the benefits that a democratic society offers, it is our civil duty to actively participate in government by voting. But more importantly, voting allows citizens the opportunity to make direct decisions that better our communities and allows us to build a free and prosperous society. Many people in the world live in places where their voices will not be heard because they are unable to vote. So take a stand to let your voice be heard, and help build a stronger America by registering to vote today!
>
> The Louisiana Secretary of State's website provides valuable information to help you register

[31] Plaintiffs intend no paid communications on another's website, which are not at issue.

and vote. For registration information and to register online, see
- www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx and
- www.sos.la.gov/ElectionsAndVoting/Pages/OnlineVoterRegistration.aspx.

For voting information, see
- www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx.

The calendar of elections and deadlines for registration and voting by mail, see
- www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2016.pdf.

Check out those websites today, and let your voice be heard in 2016!

(Compl. ¶ 85.) LAGOP also wants to *email* the article (Compl. ¶ 86), and the local-committee plaintiffs want to email a substantially similar article (Compl. ¶ 87).

The website article is not FEA ("federal election activity")[32] now, but will be VR ("Voter Registration Activity"), on November 6, 2015 and GOTV ("Get-Out-the-Vote Activity") on December 2, 1015, when the emails also would be VR and GOTV. Then, only federal funds may be used for these communications' costs.[33] For the local-committees, sending one substantially similar email merely exhorting registering/voting requires federal funds, requiring in turn a federal account, which is treated as and reports monthly as a political committee—with no de minimis exception. (Compl. ¶¶ 36-39.) Political-committee burdens are "onerous," as a matter of law. *Citizens United*, 558 U.S. at 339.[34]

---

[32] *See supra* footnote 2 (explaining FEA, VR, GOTV, VID, GCA, and PASO abbreviations).

[33] Regarding *what costs* of a website containing federal-election-activity content must be funded solely with federal funds, FEC has stated in rulemaking that time/space allocation may not be permissible and "a ripple effect" might require payment of computer and online access costs. "Internet Communications," 71 Fed. Reg. 18589, 18597 n.37 (April 12, 2006) ("Internet Communications E&J"). So costs for computers, online access, etc. for the whole website might have to be included, not just the cost for someone to post to the website. (Compl. ¶ 62.)

[34] The article, online or emailed, is not excluded from the VR and GOTV definitions by the brief-and-incidental exceptions (Compl. 64) because the exceptions exclude only a "brief exhortation ... incidental to a communication, activity, or event," 11 C.F.R. 100.24(a)(2)(ii) and (3)(ii). "To qualify for the exception, the exhortation ... must be both brief *and* incidental. " FEC, "Definition of Federal Election Activity," 75 Fed. Reg. 55257, 55261-62 (Sep. 10, 1010) ("2010 E&J") (emphasis in original). Examples provided in the 2010 E&J are one-line exhortations, *id.*, as are those in the rules, 11 C.F.R. 100.24(a)(2)(ii)(A) and (a)(2)(ii)(B). So emails with the *topic* of exhorting registering/voting are not incidental, and *extended* exhortations (beyond such one-liners) to register/vote in emails or online are not brief.

The *hyperlinks* to state election materials in the article above would not be federal election activity on LAGOP's *website*. 11 C.F.R. 100.25(c)(7).[35] But they would become so if *emailed* because the cited exception does not exclude emails and because the VR and GOTV definitions expressly include emailed communications—though FEC was urged to exclude such Internet communications (Compl. ¶ 60)—in the "[e]ncouraging or urging" portions of the VR and GOTV definitions, 11 C.F.R. 100.24(a)(2)(i)(A) and(3)(i)(A). (*See* Compl. ¶¶ 53-68 ("FEC Rulemaking and Litigation on Federal-Election-Activity Definitions").)[36]

The online and emailed article must be funded entirely with federal funds (Ban), and those funds must be raised entirely with federal funds (Fundraising Requirement), and all such activity must be done from a federal account that is treated as and reports monthly as a political committee (Reporting Requirement). What is the constitutional justification for the challenged provisions? Purportedly that patriotic paean to participation poses quid-pro-quo-corruption risk. But it does not because it (1) merely exhorts registering/voting and (2) is on LAGOP's own website, neither of which poses cognizable risk. FEC has conceded this in rulemakings, as discussed next.

1. Non-Individualized, Independent Communications Merely Exhorting Registering or Voting Pose No Quid-Pro-Quo-Corruption Risk.

No quid-pro-quo risk justifies the challenged provision as applied to such independent communications. This is clear from FEC's own comments.[37] The Complaint includes a section, "FEC Rule-

[35] The federal election activity ("FEA") definition here excludes "*[d]e minimis* costs associated with" a party committee providing, on its website, hyperlinks to an election-board's site, downloadable registration and absentee-ballot forms, and voting dates, hours, and locations. *Id.*

[36] If *emailing* the hyperlinks poses quid-pro-quo risk, excluding them *online* from the FEA definition is underinclusive. *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

[37] And it is also clear because such non-individualized, independent communications are constitutionally like independent expenditures except they conceptually pose less quid-pro-quo risk than independent expenditures because they neither expressly advocate (nor even mention) a candidate. Of course express advocacy poses *no* quid-pro-quo risk. *Citizens United*, 558 U.S. at 357.

making and Litigation on Federal-Election-Activity Definitions," which sets out FEC's efforts to *exclude* merely exhorting registering/voting from the VR and GOTV definitions. (Compl. ¶¶ 53-68.) In 2002, FEC did a rulemaking to implement BCRA. FEC "define[d] voter registration activity to encompass *individualized* contact for the specific purpose of *assisting* individuals with the process of registering to vote.... The Commission ... expressly rejected an approach whereby merely encouraging voter registration would constitute Federal election activity." FEC, "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money," 67 Fed. Reg. 49063, 49066 (July 29, 2002) ("2002 E&J ") (emphasis added). FEC said it "must define GOTV in a manner that distinguishes ... [it] from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates.... [I]f GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity." *Id.* Consequently, *id.* (emphasis in original),

> the Commission adopt[ed] a definition of "GOTV activity" as "contacting registered voters * * * to assist them in engaging in the act of voting." This definition is focused on activity that is ultimately directed to *registered* voters, even if the efforts also incidentally reach the general public. Second, GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law. The Commission understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate.

In 2004, *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), held that FEC did not provide adequate notice of its approach, remanding for rulemaking.

In 2006, FEC "retain[ed its] ... definitions of 'voter registration activity' and 'GOTV activity,' which exclude mere encouragement of registration and/or voting," *id.* at 8928, explaining that mere encouragement "would be overly broad." FEC, "Definition of Federal Election Activity," 71 Fed. Reg. 8926, 8929 (Feb. 22, 2006) ("2006 E&J"). It reaffirmed "that these definitions will not lead to circumvention of FECA because the regulations prohibit the use of non-Federal funds for disbursements ... for ... activities ... actually register[ing] individuals to vote." *Id.*

In 2008, *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays-III*"), said FEC defended its individualized-assistance definitions based on (a) a need to avoid capturing brief, incidental exhortations appended to speeches or events, which the court said could be dealt with by an exemption, and (b) providing a bright line, which the court said was an argument for bright lines. 528 F.3d at 932. *Shays-III* mentioned no constitutional arguments against overbroad definitions.

In 2010, because *Shays-III* rejected an individualized-assistance approach, FEC made definitions reaching "encouraging or urging" registering/voting "by any ... means" (except for brief *and* incidental exhortations). 2010 E&J, 75 Fed. Reg. at 55260-64. But FEC reiterated its rationales for its earlier positions (*see* Compl. ¶¶ 54-55) and a rationale from *McConnell*, 540 U.S. 93:

> In reaching its decision, the Court noted that BCRA regulated only "those contributions to state and local parties that can be used to benefit Federal candidates directly" and therefore posed the greatest threat of corruption. *Id.* at [167]. As such, the Court found BCRA's regulation of voter registration activities, which "directly assist the party's candidates for federal office," and GOTV activities, from which Federal candidates "reap substantial rewards," to be permissible methods of countering both corruption and the appearance of corruption. *Id.* []; see also *id.* [] (finding that voter registration activities and GOTV activities "confer substantial benefits on federal candidates" and "the funding of such activities creates a significant risk of actual and apparent corruption," which BCRA aims to minimize).

2010 E&J, 75 Fed. Reg. at 55258. So FEC acknowledged that communications merely exhorting registering/voting do not "benefit Federal candidates" directly under *McConnell*, just as independent expenditures pose no quid-pro-quo risk under *Citizens United*, 558 U.S. at 357. FEC also reiterated that "its 2006 E&J [said FEC's 2006] regulations would not lead to the circumvention of the Act precisely because they captured 'the use of non-Federal funds ... for those activities that actually register individuals to vote.'" *Id.* at 55259 (citation omitted).

In this as-applied challenge, "non-individualized" means what FEC meant in its original rule, i.e., "not involv[ing] contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote" or "in engaging in the act of voting," which quotations

are the original language of FEC's VR and GOTV definitions." *See* 2002 E&J, 67 Fed. Reg. at 49110-11. (*See* Compl. ¶¶ 54-55.) The communications will be made in substantially similar form to multiple persons and lack "individualized contact for the specific purpose of assisting individuals with the process of registering to vote [or voting]." *Id.* at 49066 (language of original FEC rule). (*See* Compl. ¶ 54.) So the communications simply involve activity that FEC found should not be included in the VR and GOTV definitions, for constitutional reasons, including FEC's statement that even *McConnell*'s analysis did not require reaching such activity, *see supra* at 31. Yet FEC was compelled to restrict and regulate such activity based on congressional intent in BCRA. BCRA is unconstitutional as applied to such activity posing no quid-pro-quo risk.

2. Such Communications, and Other Non-Individualized, Independent Communications Constituting FEA, Made *by Internet* Pose No Quid-Pro-Quo-Corruption Risk.

The governmental interest in preventing narrowly defined quid-pro-quo corruption (and its appearance) does not justify the challenged provisions as applied to such communications (as just addressed, Part III.C.1), and other non-individualized, independent communications constituting federal election activity, *by Internet*. FEC E&Js make this clear. (*See* Compl. ¶¶ 60-63.)

The 2010 E&J said a "commentator argued that the Commission should exempt from the [VR and GOTV] definition[s] ... all Internet communications, stating that such communications are made at 'virtually no cost.'" 75 Fed. Reg. at 55261 and 55263. That commentator was the Democratic National Committee ("DNC"), by counsel Rebecca H. Gordon, and DNC's arguments went beyond "virtually no cost." DNC said FEC should "create an exception ... for voter registration and GOTV messages ... conveyed though the internet," which FEC "could accomplish ... very simply by limiting the covered communications to those that qualify as 'public communications' under current regulations." DNC Comments at 4.[38] DNC explained:

[38] Available at http://sers.fec.gov/fosers/showpdf.htm?docid=10065.

> In its 2006 rulemaking on Internet Communications, the Commission explicitly acknowledged that the unique features of the internet—in particular its accessibility, low cost, low barrier to entry, and interactive features—merited regulatory restraint. *See* Internet Communications, 71 Fed. Reg. 18,589 ... ("[T]he Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach."). This position of restraint led the Commission to ... exclude from the disclaimer requirements, the coordination rules, and other regulatory provisions most communications made over the internet.

DNC Comments at 3. Denying the exception "exacts too high a cost on political speech[,] ... contravenes the Commission's stated views about internet communications, and fails to advance Congress's stated purpose ... to reduce the flow of so-called 'soft money' in federal elections." *Id.*

In the cited "Internet Communications E&J," 71 Fed. Reg. 18589 (April 12, 2006), FEC justified its definition of "public communications," which is incorporated into the generic-campaign-activity and PASO-communication definitions, 11 C.F.R. 100.25 and 100.24(b)(3). The public-communication definition excludes Internet communications, "except for communications placed for a fee on another person's Web site." 11 C.F.R. 100.26. So

> a State party committee that pays to produce a video that PASOs a Federal candidate will have to use Federal funds when the party committee pays to place the video on a Web site operated by another person. This is ... consistent with how the party committee would be required to pay for a communication that it distributes through television or any other medium that is a form of "public communication." In such circumstances, the party committee must pay the costs of producing and distributing the video entirely with Federal funds. See 11 C.F.R. § 300.32(a)(2).

71 Fed. Reg. at 18597. So state committees posting GCA or PASO communications on their *own* website would not be doing federal election activity (unlike with VR and GOTV). The "Internet Communications E&J" also said, 71 Fed. Reg. at 18597,

> one reason [FEC] ... excluded Internet activities from the ... 'public communication' [definition] ... was to permit State ... and local party committees to refer to their Federal candidates on the committees' own Web sites or post generic campaign messages without requiring that the year-round costs of maintaining the Web site be paid entirely with Federal funds.

Despite these justifications for not including Internet communications, the "[e]ncouraging or urging" portions of the VR and GOTV definitions, 11 C.F.R. 100.24(a)(2)(i)(A) and(3)(i)(A), are

not limited to "public communications" and expressly *include* communications "by ... e-mail ... or by any other means." If Internet communications pose a cognizable quid-pro-quo risk in VR and GOTV contexts, failure to regulate Internet GCA and PASO communications is underinclusive, making any asserted interest non-credible. *White*, 536 U.S. at 780. But FEC was right that such activity poses insufficient quid-pro-quo risk for restriction and regulation.

While the foregoing will be expanded in full merits briefing (*cf.* Compl. ¶¶ 117-29), what is provided shows that the Count I challenges are substantial and non-foreclosed.

D. Count II Presents Substantial, Non-Foreclosed Claims.

Count II presents substantial, non-foreclosed claims because it challenges the Ban (52 U.S.C. 30125(b)(1)) and Fundraising Restriction (52 U.S.C. 30125(c)) as applied to **(a)** *non-individualized, independent communications*[39] and **(b)** such communications funded from an *independent-communications-only account* ("ICA"). Plaintiffs believe the challenged provisions are unconstitutional as applied to such communications and doubly so as applied to such communications made from an ICA. The *ICA* at issue here would contain only contributions from individuals that are legal under state law and applicable federal law (other than the challenged provisions), and would be used only for making the independent communications described above. (*See* Compl. ¶ 131.) Because LAGOP does not challenge the Reporting Requirement under Count II, LAGOP would report the ICA's activity under requirements applicable when LAGOP is able to do the intended activity.

The only cognizable interest that might justify such restrictions on core political speech and association is preventing quid-pro-quo corruption or its appearance. *Citizens United*, 558 U.S. at 359. *See also McCutcheon*, 134 S.Ct. at 1450. Such corruption/appearance requires "a direct ex-

[39] These may occur under 11 C.F.R. 100.24(a)(2)(i)(A)-(C) (VRA), 100.24(a)(3)(i)(A)-(B) (GOTV), and 11 C.F.R. 100.24(a)(4) (VID), as well as those definitions requiring "public communications" (100.25), namely, 11 C.F.R. 100.24(b)(2)(ii) (GCA) and 100.24(b)(3) (PASO). (*See* Compl. ¶¶ 84-95, 97-100, 103-05 (examples).)

change of an official act for money," *id.* at 1441, "an act akin to bribery," *id.* at 1460 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting), and only "arises when an individual makes large contributions to the candidate or officeholder himself," *id.* at 1460 (plurality).

As applied to the *non-individualized, independent communications* at issue, there is no such risk. Such independent communications pose neither "corruption [n]or the appearance of corruption," *Citizens United*, 558 U.S. at 357, because "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" *Id.* (quoting *Buckley*, 424 U.S. at 47).

As applied to such communications *funded from the ICA*, there is no such risk. The ICA is constitutionally like the NCAs of nonconnected committees.[40] Because independent communications pose no quid-pro-quo risk, NCAs may solicit *unlimited nonfederal* funds, including from corporations and unions, for making such communications funded *entirely* with *nonfederal* funds. In contrast, the ICA will contain only contributions allowed by state law (and unchallenged FECA provisions) from *individuals* (no corporate/union contributions) at the level allowed by state law (currently $100,000 over a 4-calendar-year period) (Compl. ¶ 109), and Plaintiffs will only be able to use nonfederal funds in *allocated* percentages with federal funds under existing rules. (Compl. ¶¶ 45-51.)

While the foregoing will be expanded in full merits briefing (*Cf.* Compl. ¶¶ 130-38), what is provided shows that the Count II challenges are substantial and non-foreclosed.

E. Count III Presents Substantial, Non-Foreclosed Claims.

[40] *See* FEC, *FEC Statement on Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account*, www.fec.gov/press/press2011/20111006postcarey.shtml. When party ICAs are approved, FEC will give similar guidance, which Plaintiffs will follow.

In Count III, Plaintiffs challenge the Ban (52 U.S.C. 30125(b)(1)), Fundraising Restriction (52 U.S.C. 30125(c)), and Reporting Requirement (52 U.S.C. 30105(e)(2)) as unconstitutional as applied to *all independent* federal election activities. "Federal election activity" sweeps in independent activity. *See* 11 C.F.R. 100.24.

Because the challenged provisions burden core political speech and association (by both contribution and pooling resources for effective advocacy), highly protected by the First Amendment, FEC at a minimum must prove a close "fit" to cognizable governmental interest to justify the requirement under the appropriate level of scrutiny. *See McCutcheon*, 134 S.Ct. at 1445 (controlling plurality opinion). There is no "fit" as applied. The only cognizable interest that might justify such restrictions on core political speech and association is preventing quid-pro-quo corruption or its appearance. *Citizens United*, 558 U.S. at 359. *See also McCutcheon*, 134 S.Ct. at 1450 (controlling opinion). Quid-pro-quo corruption (or its appearance) requires "a direct exchange of an official act for money," *id.* at 1441, "an act akin to bribery," *id.* at 1460 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting), and only "arises when an individual makes large contributions to the candidate or officeholder himself," *id.* at 1460 (plurality). Gratitude, access, influence, and leveling playing fields are not corruption or its appearance. *Citizens United*, 558 U.S. at 359-61. "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S.Ct. at 1450.

The Ban, Fundraising Requirement, and Reporting Requirement must be justified as to each of the different types of federal election activity by a cognizable interest. There is no quid-pro-quo risk due to the independence of the activities. For example, if the independent federal election activity involves communications, such communications are like the independent expenditures that "do not

give rise to corruption or the appearance of corruption," *Citizens United*, 558 U.S. at 357, because "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" *Id.* (quoting *Buckley*, 424 U.S. at 47).

For another example, if a state-committee employee works 26% of her salaried time in a month on federal election activities, then the state committee must pay 100% of her salary from federal funds (instead of the usual allocation between federal and nonfederal funds). But federal election activity encompasses merely soliciting or encouraging registration or voting by Internet communications for which there is no cognizable quid-pro-quo risk. So triggering the 100% federal-funds mandate based on 26% of such activity is unjustified. Nor would there be any such risk in other independent federal election activity, including other aspects of voter-registration and get-out-the-vote activity, or voter-identification, or generic campaign activity, or PASO communications. Only if these activities fit within a coordination definition might they arguably pose quid-pro-quo risk, but their independence removes such risk.

An informational interest is inadequate to support the Reporting Requirement, because the foundational justification for regulating federal election activity was a theory of corruption (or its appearance), based on gratitude and access, which was rejected in *Citizens United* and *McCutcheon* (in both expenditure and contribution contexts), so such regulation is now unfounded for that reason and because the independence of the activities at issue means that they may not benefit a candidate and may actually be counterproductive.

While the foregoing will be expanded in full merits briefing, what is provided shows that the Count III challenge is substantial and non-foreclosed because no interest justifies the challenged

provisions as applied.

F. Count IV Presents Substantial, Non-Foreclosed Claims.

Plaintiffs challenge the Ban (52 U.S.C. 30125(b)(1)), Fundraising Restriction (52 U.S.C. 30125(c)), and Reporting Requirement (52 U.S.C. 30105(e)(2)) as unconstitutional facially. This count is not *clearly* foreclosed *beyond debate* (with doubts resolved in Plaintiffs' favor) as would be required to deny a three-judge court for this claim (assuming *arguendo* that criteria in addition to BCRA's are applicable). *See supra* at 4-9. Rather, it is substantial and non-foreclosed for three reasons.

First, *Citizens United*, 558 U.S. 310, and *McCutcheon*, 134 S.Ct. 1434, have held, in the expenditure and contribution contexts respectively, that *BCRA* provisions—like *all* provisions that burden "speech," *id.* at 1452—must be justified, by the government, with non-speculative evidence of narrowly defined quid-pro-quo corruption, *id.* at 1450-52. Quid-pro-quo corruption (or its appearance) requires "a direct exchange of an official act for money," *id.* at 1441, "an act akin to bribery," *id.* at 1460 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting), and only "arises when an individual makes large contributions to the candidate or officeholder himself," *id.* at 1460 (plurality). Gratitude, access, influence, and leveling playing fields are not corruption or its appearance. *Citizens United*, 558 U.S. at 359-61. "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S.Ct. at 1450. Because the facial upholding of the challenged provisions in *McConnell* was built on a now-rejected, broadly defined "corruption," it is without a foundation and therefore the superstructure must collapse.

Second, there was never any proven quid-pro-quo corruption (or its appearance) supporting the regulation of federal election activity in the record of *McConnell*, 540 U.S. 93. *McConnell* upheld

these provisions on their face though *McConnell* defendants "identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees." *McConnell*, 251 F. Supp. 2d at 395 (opinion of Henderson, J.). *Accord McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, dissenting) (quoting and citing *McConnell*, 251 F. Supp. 2d at 395 (opinion of Henderson, J.)). But the Supreme Court requires evidence of quid-pro-quo corruption (or its appearance) to uphold such restrictions. *Citizens United*, 558 U.S. at 359-60; *McCutcheon*, 134 S.Ct. at 1450-51 (controlling plurality opinion). So no cognizable interest justifies the challenged provisions.

Third, *Citizens United* established that, in First Amendment cases such as this, facial challenges to prior facial holdings (in that case it was *McConnell* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)), are substantial, non-foreclosed, and may even be raised on appeal, 558 U.S. at 328-36, even if plaintiffs dismissed a facial challenge below, *id.* at 329. So a facial challenge here cannot be foreclosed for purposes of a three-judge court because it is substantial, non-foreclosed, and could be raised even on appeal if required.

While the foregoing will be expanded in full merits briefing, what is provided shows that the Count IV challenge is substantial and non-foreclosed.

III. This Action Is Like a Related Case Held to Present Substantial Claims.

Finally, this action is substantial and non-foreclosed because it is like a related case in which similar claims were held substantial and non-foreclosed. That related case is *Republican National Committee et al. v. FEC* (14-0853) ("*RNC-II*") (consolidated with *Rufer v. FEC* (14-0837)). LAGOP and the local-committee plaintiffs here were also plaintiffs in *RNC-II*, which they and RNC voluntarily dismissed. (*Rufer* was also voluntarily dismissed.)

In Count II, Plaintiffs here challenge the Ban and Fundraising requirement as applied to non-

individualized, independent communications from an ICA (independent-communications-only account for making such independent communications). The ICA is constitutionally like an NCA (a non-contribution account, which is an independent-expenditures-only account for making independent expenditures, i.e., independent communications). But an ICA is more limited in the funds it may receive. Plaintiffs do not seek for the ICA to receive unlimited contributions, only contributions from individuals at the level at which state law permits. Plaintiffs also challenge those provisions as applied to funding such independent expenditures with such non-federal funds from individuals without an ICA.

In *RNC-II*, RNC and LAGOP made a similar constitutional challenge as applied to a party-committee having an NCA like other political committees, so they could receive unlimited contributions from individuals to make independent expenditures and other independent communications. In its Memorandum Opinion of August 19, 2014 (14-0853: Doc. 33), this Court held that circuit caselaw requires the district court to determine—for either a BCRA § 403 court or en-banc certification under old 2 U.S.C. 437h (now 52 U.S.C. 30110)—whether actions are "obviously without merit" or so clearly foreclosed by precedent as to "leave no room for the inference that the question sought to be raised cannot be the subject of controversy." *Id.* at 8 (quoting *Feinberg*, 522 F.2d at 1338 (quotation marks omitted)). And regarding the claim that party-committees should be able to have NCAs like other political committees, this Court held that plaintiffs raised "substantial, non-frivolous constitutional claims that are not foreclosed." *Id.* at 2. It noted the "confluence" of case lines also present here:

> This case sits at the confluence of two currents of First Amendment jurisprudence concerning federal campaign finance: the constitutional permissibility of limiting contributions to federal candidates and political parties, and the constitutional impermissibility of limiting contributions to independent entities whose campaign expenditures are not coordinated with candidates or parties. Plaintiffs rest their challenge on the latter current; the FEC resists it on the former." *Id.* at 5-6. This present case sits at the same confluence and is likewise substantial and non-fore-

closed.

Id. at 5-6. This Court further noted that

> the Supreme Court in *McConnell* upheld the portions of BCRA that cabined contributions to political parties in connection with federal elections, "regardless of how th[e] funds are ultimately used." 540 U.S. at 155 (upholding 2 U.S.C. §§ 441i(a) & (b)). This portion of *McConnell* was untouched by the Court's later ruling in *Citizens United*, which overturned the ban on unlimited expenditures by private and public corporate entities. 558 U.S. at 360–61 ("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." (internal citations omitted)).

Id. at 9. This Court concluded that the challenges involving a party-committee NCA were substantial

> because the Supreme Court has not "expressly considered," *RNC[-I]]*, 698 F. Supp. 2d at 157, the specific factual and legal arguments advanced by Plaintiffs in this as-applied challenge: whether the threat of quid pro quo corruption or its appearance inherent in donations to political parties may be sufficiently reduced by segregating contributions to independent expenditure accounts so as to defeat the government's ability to cap such contributions consistent with the First Amendment. Because the Supreme Court has not squarely confronted this issue, the constitutional questions raised by Plaintiffs meet the threshold level of substantiality required for adjudication by a three-judge court or certification to the en banc D.C. Circuit.

Id. at 10. Because the claims in Count II here have likewise not been expressly considered, they are also substantial, non-foreclosed, and suitable for a three-judge court. Because they challenge only BCRA provisions, en-banc certification under old 2 U.S.C. 437h (now 52 U.S.C. 30110) is not an option, and in any event no plaintiff qualifies as a plaintiff under old-437h.

In Count I, Plaintiffs here challenge the Ban, Fundraising Requirement, and Reporting Requirement as applied to **(1)** *non-individualized, independent communications* that *exhort registering/voting* and **(2)** such communications, and other non-individualized, independent communications constituting federal election activity, *by Internet*. This too has never been expressly considered and is similarly substantial and non-foreclosed.

In Count III, plaintiffs challenge the Ban, Fundraising Requirement, and Reporting Requirement as applied to all independent federal election activity. In its *RNC-II* Memorandum Opinion, this

Court noted that *RNC-I* had decided that such a claim, "'based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision,'" was "'not so much an as-applied challenge as it is an argument for overruling a precedent.'" (14-0853: Doc. 33 at 9 (quoting *RNC-I*, 698 F. Supp. 2d at 157)). But *McConnell* expressly relied on the idea that the sort of communications at issue here were *like express advocacy* and *coordinated*:

> [B]oth parties began to use ... soft money ... for issue advertising ... to influence federal elections. The [Senate] Committee found such ads highly problematic for two reasons. Since they accomplished the same purposes as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide. Moreover, though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns.

540 U.S. at 131 (footnote omitted). Not only are the communications at issue here *independent*, which is a constitutionally vital distinction, but the independent-expenditure case line, which should govern here, has developed since *McConnell*. That case line recognizes that independent communications pose no cognizable quid-pro-quo corruption risk, which is now the only cognizable interest for restricting campaign contributions. So the confluence of that independent-expenditure case line with *McConnell* has developed since *McConnell* was decided, making this claim substantial. Moreover, *McCutcheon* has held, in the *contribution* context, that the only cognizable interest for restricting campaign contributions is the same narrow quid-pro-quo corruption. That undercuts the very foundation of *McConnell*.[41] And *McCutcheon* stated a strengthened version of the "closely drawn

[41] The United States Supreme Court has stated that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (citation omitted). So courts must follow the most recent case in the case line that directly controls. Here, as *McCutcheon* demonstrates, it is *Citizens United*. Other courts have recognized the broad application and relevance of *Citizens United*'s narrow corruption definition. A unanimous en-banc D.C. Circuit reviewed a contractor contribution ban and followed *McCutcheon*'s lead in applying *Citizens United*'s corruption definition. *Wagner v. FEC*, No. 13-5162, 2015 WL 4079575, *5 (D.D.C. July 7, 2015); *id* at *5 n. 7 ("[W]hen we use the term 'corruption' or its 'appearance,' we refer to the quid pro quo variety."). *U.S. v. McDonnell*, No. 15-4019, 2015 WL 4153640, *27 (4th Cir. July 10,

test." *See supra at* footnote 16. These make this case substantial. To the extent Count III might be deemed a request for overturning *McConnell*, despite these vital distinctions, a request for overturning a facial holding is neither insubstantial nor foreclosed in light of the developments in the independent-expenditure case line and *McCutcheon*'s holding in the contribution-restriction case line. So this claim is substantial and non-foreclosed for purposes of a three-judge court.

In Count IV, Plaintiffs challenge the Ban, Fundraising Requirement, and Reporting Requirement facially, because only narrow quid-pro-quo corruption is now cognizable for campaign-contribution restrictions. No such quid-pro-quo corruption was shown in *McConnell*'s record. And as just shown in discussing Count III, *McCutcheon* held, in the *contribution* context, that only narrow quid-pro-quo corruption could justify such restrictions. That fundamentally undercuts *McConnell*. Moreover, *Citizens United* established that, in First Amendment cases, facial challenges to prior facial holdings are certainly not foreclosed because they may even be raised on appeal in a BCRA case, 558 U.S. at 328-36. So this facial challenge, for purposes of a three-judge court, is substantial and non-foreclosed.

Finally, this Court's disposition of *RNC-II* in its Memorandum Opinion should guide it as to discovery and expedition here. This Court rejected FEC's motion for discovery, especially rejecting

---

2015), found jury instructions adequate for including *Citizens United*'s definition. *See also Yamada v. Snipes*, 786 F.3d 1182, 1205 (9th Cir. 2015) (citing "*McCutcheon* (reaffirming that a legislature may limit contributions to prevent actual quid pro quo corruptions or its appearance"); *Vermont Right to Life Committee v. Sorrell*, 758 F.3d 118, 139-40 (2d Cir. 2014) ("campaign finance restrictions must target quid pro quo corruption or its appearance ... to survive First Amendment scrutiny. *McCutcheon* ...."); *Wisconsin Right To Life v. Barland*, 751 F.3d 804, 823-24 (7th Cir. 2014) ("only public interest strong enough to justify restricting election-related speech is the interest in preventing quid pro quo corruption or the appearance of corruption"). The district court judge who authored a Second Circuit contribution-limits decision pre-*McCutcheon*, *Ognibene v. Parkes*, 671 F.3d 175 (2d Cir. 2011), acknowledges post-*McCutcheon* that the narrow corruption definition applies. *New York Progress and Protection PAC v. Walsh* , 17 F. Supp.3d 319, 321-22 (S.D.N.Y. 2014) (Crotty, J.) (agreeing with Justice Breyer that *McCutcheon*'s corruption definition differs from prior Supreme Court jurisprudence but holding that *McCutcheon* controls and striking down contribution limits to independent-expenditure groups).

the need for "legislative" facts, and ordered the parties to promptly propose facts, on the basis of which this Court would make findings of fact. (14-0853: Doc. 33 at 13.) And though it denied plaintiffs' expedition motion (*id.* at 15), this Court in fact promptly certified the case.

Conclusion

For the foregoing reasons, this action and each claim is substantial and non-foreclosed, and all requirements for a three-judge court are met. So such a court should be convened and this case advanced on the docket and expedited under BCRA § 403.

Respectfully submitted,

/s/ James Bopp, Jr.
James Bopp, Jr., Bar #CO 0041
jboppjr@aol.com
Richard E. Coleson*
rcoleson@bopplaw.com
Randy Elf*
mail@bopplaw.com
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile
Counsel for Plaintiffs
*Pro Hac Vice Application To Be Filed

Certificate of Service

I hereby certify that on August 3, 2015, I electronically filed the foregoing Application for Three-Judge Court with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following (and any other FEC counsel that will appear):

Kevin Deeley, Acting Associate General Counsel for Litigation
Federal Election Commission
999 E Street, NW
Washington, DC 20463
kdeeley@fec.gov.

In addition, a courtesy copy was sent by email to kdeeley@fec.gov on the same date.

/s/ James Bopp, Jr.
James Bopp, Jr., DC Bar #CO 0041

United States District Court
District of Columbia

Republican Party of Louisiana et al., *Plaintiffs* *v.* **Federal Election Commission**, *Defendant*	**Civil Case No. 15-cv-1241** THREE-JUDGE COURT REQUESTED

Notification of Application for a Three-Judge Court

Plaintiffs bring claims challenging the constitutionality of provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. An action that is "brought for declaratory or injunctive relief to challenge the constitutionality of any provision" of the BCRA "shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to [28 U.S.C. § 2284]" if the plaintiffs request a 3-judge court. Pub. L. No. 107-155, 116 Stat. 113-14. Plaintiffs have filed an application for a 3- judge court. Accordingly, the Court notifies Chief Judge Garland of this request so that he may designate two additional judges to participate in hearing and determining Plaintiffs' claims. The Clerk is directed to transmit a copy of this request forthwith to the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

Date: _____

_____
United States District Judge

Distribution:

James Bopp, Jr., DC Bar #CO 0041, jboppjr@aol.com
Richard E. Coleson,* rcoleson@bopplaw.com
Randy Elf,* relf@bopplaw.com
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
Counsel for Plaintiffs

Kevin Deeley, Acting Associate General Counsel for Litigation
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
kdeeley@fec.gov.
Counsel for Defendant FEC

*Pro Hac Vice Application Pending