No. 09-1287

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

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

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court correctly held that the "soft money" provisions of Section 101 of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 82, are constitutional as applied to the Republican National Committee, its Chairman, and its state and local affiliates.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-25a) is not yet reported, but is available at 2010 WL 1140721.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 26a-27a) was entered on March 26, 2010. A notice of appeal was filed on April 2, 2010 (J.S. App. 28a-29a), and the jurisdictional statement was filed on April 23, 2010. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 114.

STATEMENT

For more than 30 years, Congress has sought to reduce the "opportunities for abuse inherent in a regime of large individual financial contributions," *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976) (per curiam), by limiting the size of contributions that may be made to candidates and political party committees. Political donations that comply with the source-and-amount limitations imposed by the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, are known as "hard money" or "federal funds." Other political donations are known as "soft money" or "nonfederal funds."

Under BCRA Section 101, all contributions to national political parties must be made with hard money, and state and local political parties generally must use hard money to finance any "Federal election activity" they may conduct. See 2 U.S.C. 441i(a) and (b); see also 2 U.S.C. 431(20) (definition of "Federal election activity"). In *McConnell* v. *FEC*, 540 U.S. 93 (2003), this Court upheld those requirements against facial constitutional challenges. The instant appeal challenges the constitutionality of BCRA's soft-money provisions as applied to appellants.

1. The Federal Election Commission (FEC or Commission) is vested with statutory authority over the administration, interpretation, and civil enforcement of FECA and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8), 438(a)(8); see 2 U.S.C. 438(d); to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction

or activity, 2 U.S.C. 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. 437g (2006 & Supp. II 2008).

2. a. Since 1907, Congress has prohibited corporations from making a "money contribution" in connection with any federal election. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865. Congress subsequently extended the contribution prohibition to encompass labor unions, as part of its continuing effort to address "the 'political potentialities of wealth' and their 'untoward consequences for the democratic process.'" *McConnell*, 540 U.S. at 116 (quoting *United States* v. *International Union UAW*, 352 U.S. 567, 577-578 (1957)); see *id.* at 116-117. These provisions "did not deter unseemly fundraising and campaign practices. Evidence of those practices persuaded Congress to enact the [FECA] Amendments of 1974." *Id.* at 118.

The 1974 Amendments, *inter alia*, limited each individual to contributing $1000 per election per candidate and an aggregate total of $25,000 each year. See *Buckley*, 424 U.S. at 7. This Court in *Buckley* upheld those limits as constitutional. See *id.* at 12-38. Specific limits on individual contributions to national parties and to other political committees were added to FECA shortly after the decision in *Buckley*. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 486.

b. FECA's contribution limits applied to donations made for the purpose of influencing any federal election. "Donations made solely for the purpose of influencing state or local elections," by contrast, were "unaffected by FECA's requirements and prohibitions." *McConnell*, 540 U.S. at 122. The statutory scheme did not specifically address the proper treatment of donations to entities, such as national political parties, that engage in

both federal and nonfederal political activity. From 1977 to 1995, the Commission promulgated a series of regulations permitting the national political parties and their state affiliates to "fund mixed-purpose activities—including get-out-the-vote [GOTV] drives and generic party advertising—in part with soft money." *Id.* at 123; see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 196-199 (D.D.C.) (per curiam) (discussing Commission's regulations), aff'd in part and rev'd in part, 540 U.S. 93 (2003).

Pursuant to those "allocation" regulations, political parties accumulated and transferred hundreds of millions of soft-money dollars from their national organizations to their state and local affiliates, which could spend the parties' funds on the same mixed-purpose activities but subject to more favorable allocation rules. See *McConnell*, 540 U.S. at 124, 131. In addition, the national parties themselves spent hundreds of millions of soft-money dollars—including $498 million during the 2000 election cycle alone—on putatively mixed-purpose activities that were actually intended to support the parties' candidates for federal office and were indistinguishable from the types of activities that parties and candidates are required to finance with hard money. *Id.* at 124-125. All of the soft money used to influence federal elections was, by definition, donated by either a corporation, a labor union, or an individual who had exceeded his or her contribution limit. "The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 126.

In 1998, after an extensive investigation, the Senate Committee on Governmental Affairs issued a report detailing the influence that soft money had come to wield

in the electoral process. S. Rep. No. 167, 105th Cong., 2d Sess. 105-167 (1998) (Senate Report); see *McConnell*, 540 U.S. at 129. The Senate Report concluded that the parties' ability to solicit and spend soft money, particularly on "issue advertising designed to influence federal elections," had rendered FECA's source-and-amount limitations ineffective. See *id.* at 129-132. The Senate Report also noted that the national parties had made a practice of transferring funds to the state and local parties to conduct putatively nonfederal activities "that in fact ultimately benefit[ed] federal candidates." *Id.* at 131 (brackets in original) (quoting Senate Report 4466).

3. In response to the conduct detailed in the Senate Report and similar conduct that continued during subsequent electoral cycles, Congress enacted BCRA. Title I of BCRA, entitled "Reduction of Special Interest Influence," was intended to prevent the use of soft money to influence federal elections. BCRA Section 101 prohibits national political parties and their officers from soliciting, receiving, or disbursing soft money. 2 U.S.C. 441i(a). Section 101 also prohibits state and local parties from receiving soft money for "Federal election activity," subject to one specific exemption.[1] 2 U.S.C. 441i(b); see 2 U.S.C. 431(20) (definition of "Federal election activity").

All political party committees remain free to spend unlimited amounts of hard money on any activity. BCRA does not restrict how state and local parties may

[1] Under the "Levin Amendment," 2 U.S.C. 441i(b)(2), state and local party committees may finance certain federal election activity with a combination of hard money and "Levin funds," which are additional donations that individuals may make to a state or local party in amounts as high as $10,000 per year (to the extent permitted by the relevant state law). See *McConnell*, 540 U.S. at 162-164.

fund any undertakings other than "Federal election activity"; to the extent applicable state or local law permits, state and local parties can raise and spend unlimited individual, corporate, or union contributions for those nonfederal activities. BCRA also substantially raised the limits on contributions of hard money to national party committees (and on aggregate contributions), and it indexed those limits for inflation. See BCRA § 307(a)(2), (b) and (d), 116 Stat. 102-103.[2]

4. Immediately after BCRA was enacted, 11 complaints were filed in the United States District Court for the District of Columbia to challenge the constitutionality of various provisions of the new statute. One of those suits, *Republican National Committee* v. *FEC*, Civ. No. 02-874, was brought by the RNC, an RNC officer, and several state and local party affiliates. See *McConnell*, 251 F. Supp. 2d at 220 n.55, 225. Another suit, *California Democratic Party* v. *FEC*, Civ. No. 02-875, was brought by the California Republican and Democratic Parties. See *McConnell*, 251 F. Supp. 2d at 220 n.55, 225-227. The plaintiffs in those suits argued that BCRA unconstitutionally limited the national and state parties' receipt and disbursement of soft money for putatively nonfederal activities.

Pursuant to BCRA's judicial-review provision, the district court's judgment in the consolidated cases was appealed directly to this Court. See BCRA § 403(a)(3), 116 Stat. 114. The Court upheld BCRA Title I against the plaintiffs' facial challenge. See *McConnell*, 540 U.S. at 122-126, 133-189.

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[2] Currently, an individual may contribute $30,400 to each national party per year, and $115,500 in the aggregate for the two-year cycle. See *Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 75 Fed. Reg. 8355 (2010).

a. The Court first reiterated the holding of *Buckley*, *supra*, and subsequent cases that contribution limitations such as Title I are reviewed under an intermediate-scrutiny standard. See *McConnell*, 540 U.S. at 134-142; see also *id.* at 138 n.40 (citing cases). While recognizing that "restrictions on campaign expenditures" are subject "to closer scrutiny than limits on campaign contributions," *id.* at 134, the Court rejected the plaintiffs' contention that BCRA Title I imposes an expenditure limit. The Court explained that, although the statute both sets contribution limits and restrains the use of funds raised in excess of those limits, the latter restriction is simply a contribution regulation imposed "on the demand rather than the supply side." *Id.* at 138. BCRA, the Court concluded, "simply limit[s] the source and individual amount of donations"; it does not restrain political party committees from spending as much as they wish so long as they comply with those fundraising limits. *Id.* at 139. BCRA also leaves state and local party committees free to spend unlimited sums (however raised) on activities that are not "Federal election activity." See *id.* at 139 n.41.

Accordingly, the Court described the question before it as whether the provisions of Title I were "closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136 (internal quotation marks and citations omitted). The Court concluded that Congress had validly determined that "large soft-money contributions" to national, state, and local political parties "give rise to corruption and the appearance of corruption," *id.* at 154; see *id.* at 164-166, and that Title I's restrictions were appropriately tailored to prevent those harms, *id.* at 154-161, 166-173.

b. In concluding that prior uses of soft money had caused corruption and the appearance of corruption, the Court recounted the extensive evidence of fundraising abuses leading to BCRA. See 540 U.S. at 115-117. The Court also noted the "special relationship and unity of interest" between national parties and federal candidates and officeholders, which "has placed national parties in a unique position * * * to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* at 144-145 (quoting *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001) (*Colorado II*)). The factual record regarding such "obligated officeholders" included "evidence connect[ing] soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *Id.* at 150. The Court accordingly rejected the plaintiffs' argument that only a "direct contribution to the candidate" can "threaten to create * * * a sense of obligation" from a candidate to a donor. *Id.* at 144.

The Court in *McConnell* also rejected the view that the interest in preventing corruption can justify, at most, regulation of "contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate." 540 U.S. at 152. The Court noted that persons seeking to gain influence over officeholders and candidates have frequently exploited loopholes in FECA, and that indirect attempts to use money to gain influence (such as through contributions to political parties) can create actual or apparent corruption that can justify congressional efforts to protect the integrity of the democratic process. See *id.* at 143-154.

The Court further held that Congress had acted permissibly in "subject[ing] *all* funds raised and spent by national parties to FECA's hard-money source and amount limits." 540 U.S. at 154; see *id.* at 154-156. The Court acknowledged that some of the RNC's soft money had historically been spent on "purely state and local election activity." *Id.* at 154 n.50. The Court explained, however, that the existence of some non-federal uses for the contributions was "beside the point" because "the close relationship between federal officeholders and the national parties, as well as the means by which the parties have traded on that relationship," had "made all large soft-money contributions to national parties suspect." *Id.* at 154-155; see *id.* at 143-154.

c. For like reasons, the Court rejected the RNC officer's challenge to the prohibition on his soliciting soft money for state and local parties, 2 U.S.C. 441i(a)(2). The Court held that the prohibition on officer solicitation "follow[ed] sensibly from the prohibition on national committees' receiving soft money." 540 U.S. at 157-158.

d. The Court also upheld the restriction (see 2 U.S.C. 441i(b)) on state and local parties' receipt of soft money for "Federal election activity" as defined in the statute. The Court explained that, "given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations." 540 U.S. at 161. In the Court's view, "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA," as had occurred under the earlier allocation regime, "clearly qualifie[d] as an important governmental interest." *Id.* at 165-166.

The Court further concluded that Section 441i(b) was appropriately tailored to that interest. The Court rejected the state and local parties' contention that the term "Federal election activity," as defined by BCRA, encompassed purely state or local functions that could not corrupt federal officeholders. See 540 U.S. at 166. The Court stated that the activities to which the soft-money restrictions applied—particularly "voter registration efforts, * * * voter identification, GOTV, and generic campaign activity"—"clearly capture activity that benefits federal candidates." *Id.* at 167. The Court accordingly accepted Congress's judgment that soft-money "funding of such activities creates a significant risk of actual and apparent corruption." *Id.* at 168.

Finally, the Court addressed the state and local parties' arguments regarding the prohibition on receiving soft money for advertising that promotes, attacks, supports, or opposes a federal candidate. 2 U.S.C. 431(20)(A)(iii). The Court found that, with respect to the substantial influence of such advertising on federal elections, "[t]he record on this score could scarcely be more abundant." *McConnell*, 540 U.S. at 169-170. Indeed, preventing these party-run "sham issue ad[s]" from being financed with soft money was one of the primary motivations behind BCRA. See *id.* at 129-132 (noting Senate Committee's findings that "the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide"), 169-170. In light of the evidence regarding their influence on federal elections, the Court held that BCRA's ban on financing these communications with soft money was "closely drawn to the anticorruption interest it is intended to address," *id.* at 170, and did not unconstitu-

tionally limit state and local parties' "ability to engage in effective advocacy," *id.* at 173.

5. Appellant RNC is the national committee of the Republican Party. Appellant Michael Steele is the Chairman of the RNC. Appellants California Republican Party (California Party) and Republican Party of San Diego County (San Diego Party) are state and local committees, respectively, of the Republican Party.

One week after the November 2008 general election, appellants commenced this suit, alleging that BCRA Title I unconstitutionally limited their receipt and disbursement of soft money for certain putatively nonfederal activities. Pursuant to BCRA's judicial-review provision, appellants elected to proceed before a three-judge district court. 08-1953 Docket entry No. 2 (D.D.C. Nov. 13, 2008); see BCRA § 403(a) and (d), 116 Stat. 113-114. The Democratic National Committee, the national committee of the Democratic Party, see 2 U.S.C. 431(14), and Representative Christopher Van Hollen intervened as defendants.

The Commission moved to dismiss the complaint. The Commission argued that appellants' claims were precluded because the RNC, an RNC officer, and the California Party had unsuccessfully asserted the same causes of action in *McConnell*. All parties also cross-moved for summary judgment. At the district court's direction, the parties subsequently filed supplemental briefs to address this Court's decision in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010).

6. In an opinion by Circuit Judge Kavanaugh, the three-judge district court granted summary judgment to the Commission. J.S. App. 1a-25a. In light of that disposition, the court dismissed as moot the Commis-

sion's motion to dismiss on preclusion grounds. *Id.* at 3a-4a, 24a n.7.

The district court held that the challenged BCRA provisions are subject to intermediate rather than strict scrutiny. J.S. App. 10a-11a. The court explained that "limits on *contributions* to candidates and political parties are subject to 'less rigorous scrutiny'" than are "limits on campaign *expenditures*," and it noted this Court's holding in *McConnell* that BCRA's soft-money provisions are properly viewed as contribution limits. *Id.* at 10a (quoting *McConnell*, 540 U.S. at 138 n.40). The court rejected appellants' contention that the soft-money provisions "function as expenditure limits when applied to [appellants'] proposed conduct." *Id.* at 11a. The court explained that this "argument flies in the face of *McConnell*, which squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not turn on how the candidate or party chooses to spend the money." *Ibid.*

While recognizing that "*McConnell* permits as-applied challenges to the provisions of BCRA," the district court explained that a successful as-applied challenge to BCRA Section 101 must be based on something other than "the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision." J.S. App. 13a. The court found the RNC's claims to be factually and legally indistinguishable from the claims that the RNC had asserted and this Court had rejected in *McConnell*. See *id.* at 12a-13a. The court explained that such a challenge "is not so much an as-applied challenge as it is an argument for overruling a precedent." *Id.* at 13a.

The district court agreed with appellants that *Citizens United* had undercut some arguments for uphold-

ing BCRA Section 101. J.S. App. 13a-14a. "But that is not enough for the RNC to prevail here," the court explained, because the Court in *McConnell* had upheld Title I based on evidence "more specific" to soft money —"evidence of the *selling* of *preferential access* * * * in exchange for soft-money contributions." *Id.* at 14a. The district court concluded that the subsequent ruling in *Citizens United* had left that independently sufficient rationale undisturbed. See *ibid.*

The RNC argued that *McConnell* did not control its as-applied challenge because the RNC has pledged to cease its participation in certain abuses (encouraging federal candidates and officeholders to become involved in the party's soft-money solicitations, and providing large soft-money donors "preferential access to candidates or officeholders") at which BCRA's soft-money ban was directed. J.S. App. 14a-15a. The district court rejected that argument. *Id.* at 15a-18a. The court concluded that, in light of "the inherently close relationship between parties and their officeholders and candidates," soft-money donations to national parties would continue to cause corruption or the appearance thereof even if the RNC discontinued those specific practices. *Id.* at 17a; see *id.* at 16a-18a.

The district court also rejected the challenges to BCRA Section 101 raised by the California and San Diego Parties. J.S. App. 19a-22a. Those Parties argued that some of their proposed activities, while falling within BCRA's definition of "Federal election activity," had an insufficient connection to federal campaigns to permit federal regulation. *Id.* at 19a-20a. The court concluded that those claims were foreclosed because appellants had "not distinguished their proposed activities from the categories of state and local party activ-

ities the Supreme Court considered in *McConnell*." *Id.* at 22a. The district court further held that BCRA's ban on soft-money solicitations by the RNC Chairman in his official capacity was likewise constitutional under *McConnell* (though the court recognized that the Chairman remains free to solicit soft money in his personal capacity). *Id.* at 23a-24a. Thus, while recognizing that as-applied challenges to BCRA are cognizable, the district court held that the particular as-applied challenges raised in this case are not meaningfully different from the constitutional attacks that were raised and rejected in *McConnell*.

ARGUMENT

Based on a straightforward application of the legal principles settled by this Court in *McConnell* and prior cases, the district court correctly rejected appellants' constitutional challenges. Appellants do not urge this Court to overrule *McConnell* or any other precedent. Rather, appellants (a) suggest that their own as-applied challenges are meaningfully different from the facial challenges rejected in *McConnell*, and (b) argue that the recent decision in *Citizens United* undermines aspects of the *McConnell* Court's reasoning. Because those contentions lack merit, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. a. Applying the intermediate scrutiny it has long used in examining contribution limits,[3] the Court in

[3] Appellants generally recognize (see J.S. 11) that intermediate scrutiny applies here. Their one suggestion that BCRA Title I might be an expenditure limit subject to strict scrutiny (J.S. 12 n.2) is flatly contrary to *McConnell*. See 540 U.S. at 138-139 (rejecting plaintiffs' "conten[tion] that we must apply strict scrutiny" to BCRA Section 101, and

McConnell held that BCRA's ban on soft-money donations to national parties was closely drawn and therefore constitutional. 540 U.S. at 154-156. The Court rejected the contention that the ban was "impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including * * * funds spent on purely state and local elections in which no federal office is at stake." *Id.* at 154. The Court stated that "[t]his observation is beside the point" because the challenged prohibition "regulates *contributions*, not activities." *Ibid.* The Court explained that "it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect." *Id.* at 154-155.[4]

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holding that the provision "limit[s] the source and individual amount of donations" without "in any way limit[ing] the total amount of money parties can spend"); J.S. App. 11a. Appellants also do not contend that the inflation-adjusted limits at issue are so low as to prevent national or state parties from engaging in effective campaign-related activity. See pp. 27-28, *infra*.

[4] In describing the practices that gave rise to BCRA, the Court stated that the "special relationship and unity of interest" between national parties and federal candidates and officeholders had "placed national parties in a unique position * * * to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *McConnell*, 540 U.S. at 145 (quoting *Colorado II*, 533 U.S. at 452). The Court further explained that the record was "replete with * * * examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations," *id.* at 150, thereby helping the donors exert "undue influence" over legislation and creating the appearance of corruption arising from soft-money donations, *id.* at 154. Appellants therefore are mistaken in

The Court in *McConnell* further explained that "[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." 540 U.S. at 155. The Court concluded that "[t]he Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source [and] amount * * * limitations of FECA." *Id.* at 156. The Court thus made clear that the constitutionality of BCRA's ban on soft-money donations to national parties does not depend on the use to which those additional funds would otherwise be put. As the district court correctly recognized (J.S. App. 11a-18a), the Court's analysis in *McConnell* disposes of the RNC's contention (*e.g.*, J.S. 12) that national parties have a constitutional right to receive soft money so long as it is spent on allegedly non-corruptive activities.

b. *McConnell* also forecloses the constitutional challenge brought by the California and San Diego Parties. Those appellants contended below (see J.S. App. 19a-22a), and appear to reassert in this Court (see J.S. 18), that BCRA Section 101 is unconstitutional because it prohibits state and local parties from using soft money to fund certain undertakings that fall within BCRA's

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contending (J.S. 10, 15-16) that pre-*McConnell* cases such as *Colorado II*, *supra*, conclusively establish that no such relationship exists. Indeed, those cases, read in full, only undercut appellants' argument. See, *e.g.*, *Colorado II*, 533 U.S. at 455 (recognizing that parties "function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape").

definition of "Federal election activity" but that (in appellants' view) cannot corrupt federal candidates.

The Court in *McConnell* considered and rejected a substantively identical challenge. See 540 U.S. at 166-171. The Court explained that the relevant BCRA provision "is premised on Congress' judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption." *Id.* at 167. The Court further observed that the provision is "narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption: those contributions to state and local parties that can be used to benefit federal candidates directly." *Ibid.* The Court then examined the various categories of conduct encompassed by the statutory definition of "Federal election activity," and it concluded that each of the covered activities confers sufficient benefits on federal candidates to "create[] a significant risk of actual and apparent corruption." *Id.* at 168; see *id.* at 167-171.

In rejecting the California and San Diego Parties' constitutional challenge, the district court correctly explained that appellants "do not distinguish their proposed ads from the category of state and local party advertising that the Supreme Court expressly considered in *McConnell*." J.S. App. 21a. Because appellants make no effort to refute that conclusion, *McConnell* is controlling here.

c. Indeed, a particularly striking feature of appellants' as-applied challenge is the close resemblance between the activities in which appellants now propose to engage and the activities that this Court previously considered in *McConnell*. For example, the RNC asserts a constitutional right to receive soft money to support

state and local candidates (J.S. App. 7a), particularly those in Virginia and New Jersey (see Am. Compl. ¶¶ 16-17). The RNC raised the same claim before this Court in *McConnell*, including the same arguments regarding Virginia and New Jersey. See Br. of Political Parties at 1, 9-12, 14, 19-20, 34, 40-41, 58-59, 63-64, 78-79, 86-87, *McConnell, supra* (No. 02-1727) (arguing for constitutional right to receive soft money for nonfederal elections); *id.* at 11-12 (noting RNC's "considerable 'in-house' efforts [devoted] to the Virginia and New Jersey gubernatorial and state legislative races * * * with a 'mix' of federal and nonfederal funds"). The RNC also wishes to receive soft money to finance what it calls "grassroots lobbying" (J.S. 18)—a topic exhaustively litigated and reviewed in *McConnell*. See *McConnell*, 540 U.S. at 169-170 (noting that "[t]he record on this score could scarcely be more abundant"). Appellants' other claims are similarly duplicative of their claims in *McConnell*.[5] See FEC Mem. in Supp. of Mot. to Dismiss 11-19 (showing duplication of RNC's, Chairman's, and California Party's claims). Those duplicative claims are foreclosed by this Court's rejection of the originals.[6]

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[5] Appellants refer (J.S. 6, 18) to challenging BCRA as applied to the "maintenance and upkeep" of the RNC's headquarters, but this challenge does not appear in the complaint. See J.S. App. 7a n.3 (noting differences between RNC's complaint and summary-judgment motion). In any event, the RNC raised and lost a similar building-fund claim in *McConnell*. See, *e.g.*, 251 F. Supp. 2d at 332 (Henderson, J.); *id.* at 462-463 (Kollar-Kotelly, J.); *id.* at 819 (Leon, J.) (including building funds in list of activities RNC financed with soft money prior to BCRA).

[6] By contrast, the Court in *McConnell* noted certain issues that it *did* reserve for decision in potential future as-applied challenges. See, *e.g.*, 540 U.S. at 157 n.52 (potential state-law prohibitions on soliciting hard money); *id.* at 159 (solicitations by new political parties). The instant case does not implicate any of those issues.

d. Appellants contend that, to prevail in this case, "the government must demonstrate that each application of BCRA's prohibition on nonfederal money targets an activity that, if funded by nonfederal money, would create an appreciable risk of actual or apparent *quid pro quo* corruption of federal officeholders." J.S. 10. Well before *McConnell*, however, this Court had made clear that the validity of contribution limits does not depend on that sort of particularized showing. In *Buckley*, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court nevertheless held that the difficulty of identifying those contributors who will actually seek to wield such influence, and Congress's interest in guarding against the inherent appearance of abuse, justified uniform application of the $1000 individual contribution limit.[7] *Id.* at 29-30; cf. *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 198-199 & n.19 (1981) (plurality opinion) (holding that contributions to political committees are subject to FECA's limitations even if contributions are to be used purely for administrative support). Far from requiring contribution-specific proof of likely corruptive effect, this Court has consistently upheld contribution restrictions so long as those limits are not so low as to "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; see *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 395-396 (2000).

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[7] The Court in *Buckley* held that the basic FECA contribution limit was valid as applied to contributions from "immediate family members," even though it recognized that the "risk of improper influence is somewhat diminished" in that circumstance. 424 U.S. at 53 n.59.

2. Appellants' primary argument is that this Court in *Citizens United* repudiated the rationales on which the *McConnell* Court upheld BCRA's limits on contributions to political parties. The Court in *Citizens United* held that Congress may not constitutionally prohibit corporations from engaging in independent electoral advocacy. In rejecting the government's contention that the expenditure ban served a valid anti-corruption purpose, the Court stated that

> independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. 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.

130 S. Ct. at 910-911 (citations omitted). Contrary to appellants' contention, that analysis does not cast doubt on *McConnell*'s holding that BCRA Title I is valid.

a. Most importantly, the Court in *Citizens United* emphasized that the dispute before it involved independent electoral advocacy rather than contributions. In the passage quoted above, the Court discussed (and largely discounted) the corruptive potential of "independent expenditures," and it distinguished *McConnell*'s analysis of BCRA Title I on the ground that *Citizens United* was "about independent expenditures, not soft money." 130 S. Ct. at 910-911. The Court went on to explain that "[w]hen Congress finds that a problem exists, [the Court] must give that finding due deference; but Congress may not choose an unconstitutional remedy."

Id. at 911. The Court concluded that "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." *Ibid.*

That analysis does not mean either that soft-money contributions to political parties lack corruptive potential, or that contribution limits are an impermissible means of preventing actual or apparent corruption. Since *Buckley*, this Court has consistently held that Congress has greater latitude to limit contributions to candidates or political committees than to limit independent expenditures, both because contributions pose a greater danger of corruption and because expenditure limits trench more severely on First Amendment freedoms. See *Buckley*, 424 U.S. at 19-21, 45-47; *McConnell*, 540 U.S. at 134-137. Neither party in *Citizens United* questioned that basic distinction; rather, the dispute concerned whether corporations have the same First Amendment right as non-corporate entities to spend their own funds on independent electoral advocacy. The Court's holding that corporations have that right is in no way inconsistent with the *McConnell* Court's analysis of BCRA's limits on contributions to political parties.[8]

Indeed, the limited nature of the relief that appellants seek in this case reflects appellants' implicit recognition of the constitutional differences between contribution and expenditure restrictions. Appellants do not seek invalidation of all federal limits on contributions to political parties—the relief that would logically follow if contributions to political parties were constitutionally indistinguishable from independent expenditures, or if such contributions posed no danger of corrupting fed-

[8] The Court in *Citizens United* overruled "the part of *McConnell* that upheld [Section 203 of BCRA]," 130 S. Ct. at 913, not the part of *McConnell* that upheld Title I of BCRA.

eral officeholders. Rather, appellants appear to accept Congress's basic determination that large contributions to political parties can have a corruptive effect, and that the size of such contributions can be limited to address that danger, if the contributions are eventually used by the parties for activities that influence federal elections. Appellants argue only that the BCRA limits are unconstitutional as applied to funds ultimately spent for specified activities (see J.S. 18) that, in appellants' view, lack a meaningful connection to federal campaigns. Appellants' challenge is thus limited to the details of Congress's judgments regarding the sorts of contributions to political parties that will benefit (and thus potentially corrupt) the parties' federal candidates and officeholders. *Citizens United* does not speak to the proper disposition of that challenge.

The *Citizens United* Court's statement that "[i]ngratiation and access * * * are not corruption," 130 S. Ct. at 910, should be understood in light of that fundamental distinction between contributions and independent expenditures. Read in the context of the Court's full opinion, that statement simply reflects the Court's determination that an elected representative does not behave corruptly by feeling greater sympathy for, or giving increased access to, persons who publicly advocate on his behalf. That determination does not imply that the provision of access as a reward for infusions of cash, either to the officeholder himself or to his political party, is similarly innocuous. See *McConnell*, 540 U.S. at 153-154 (explaining that, although "mere political favoritism or opportunity for influence alone is insufficient to justify regulation[,] * * * it is the manner in which parties have *sold* access to federal candidates and officeholders

that has given rise to the appearance of undue influence").

b. In any event, the Court in *McConnell* relied not just on evidence that soft-money donors received increased access to federal officeholders, but also on "the record" of "real or apparent corruption" resulting from large donations to political parties. See 540 U.S. at 149-150. That record included concrete examples of soft-money donations leading to "manipulations of the legislative calendar," through which Members of Congress whose parties received soft money stopped legislation to which the parties' soft-money donors were opposed. See *id.* at 150. Appellants assert (J.S. 10-11; see J.S. 18-19) that there is "*no* evidence * * * [that] activities funded by nonfederal money * * * create a risk of actual or apparent *quid pro quo* corruption," and they dismiss the above-noted examples as "legislators' responsiveness to a donor's legislative priorities" (J.S. 17 n.3). That argument cannot be reconciled with the *McConnell* Court's description of these "manipulations":

> Plaintiffs argue that without concrete evidence of an instance in which a federal officeholder has actually switched a vote (or, presumably, evidence of a specific instance where the public believes a vote was switched), Congress has not shown that there exists real or apparent corruption. But the record is to the contrary. * * * To claim that such actions do not change legislative outcomes surely misunderstands the legislative process.

540 U.S. at 149-150.

3. Appellants assert that, if they win this lawsuit, (1) they will not ask federal officeholders to solicit soft money, and (2) they will not help soft-money donors gain

more access to federal officeholders than the access appellants provide their largest hard-money donors. See J.S. 6-7, 9-10, 15. Appellants argue that these self-imposed behavioral limits would eliminate the corruptive potential of soft-money donations, thus rendering BCRA's soft-money provisions unconstitutional as applied to appellants. That argument lacks merit.

a. In sustaining BCRA's soft-money provisions, the Court in *McConnell* rejected the argument that only "contributions made at the express behest of" a federal officeholder raise corruption concerns. 540 U.S. at 152. Quite apart from candidate solicitations, the inherent "special relationship and unity of interest" between national parties and federal candidates and officeholders "has placed national parties in a unique position, 'whether they like it or not,' to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* at 145 (quoting *Colorado II*, 533 U.S. at 452). With respect to state parties, the use of soft-money donations to finance "Federal election activity" likewise has a clear potential to produce obligated officeholders, see *id.* at 167, regardless of who solicits the donations.

The Court in *McConnell* reviewed extensive evidence demonstrating that soft money was often requested, not by officeholders themselves, but rather by professional lobbyists channeling funds to political parties in exchange for influence over the officeholders. For example, when the Court discussed the "troubling * * * evidence in the record showing that national parties have actively exploited the belief that contributions purchase influence," the Court cited a corporate soft-money donor's description of solicitations by lobbyists. *McConnell*, 540 U.S. at 148 n.47. Even when soft-money donations were solicited by persons other than officeholders,

officeholders were well aware of who the biggest soft-money donors were. See *McConnell*, 251 F. Supp. 2d at 853-854 (Leon, J.) ("[Y]ou cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party.") (quoting former Senator Bumpers); see also *McConnell*, 540 U.S. at 147 ("[F]or a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves.") (brackets in original) (quoting *McConnell*, 251 F. Supp. 2d at 488 (Kollar-Kotelly, J.)). The Court's analysis in *McConnell* does not suggest that the corruptive potential of large soft-money donations would be eliminated or even meaningfully reduced if federal candidates and officeholders were no longer asked to solicit such contributions.

b. Appellants' offer to cease providing soft-money donors with preferential access to federal officeholders does not distinguish this case from *McConnell*. To the contrary, the RNC asserted in that case that it did not "arrange meetings with government officials for any of its donors—federal or non-federal." *McConnell*, 251 F. Supp. 2d at 351 (Henderson, J.) (citing testimony of RNC finance officer). Yet voluminous record evidence that the RNC facilitated its soft-money donors' access to federal officials is exhaustively catalogued in the *McConnell* district court's opinion. See *id.* at 481-512 (Kollar-Kotelly, J.). And the record in the instant case demonstrates that appellants still arrange frequent meetings, receptions, dinners, and other events at which their major donors discuss legislation with federal candidates and officeholders. See 08-1953 Docket entry No. 56, FEC Statement of Material Facts ¶¶ 7-11 (D.D.C. Apr. 10, 2009) (Statement of Material Facts).

c. If (as *McConnell* squarely holds) BCRA's limits on soft-money donations to political parties are otherwise valid anti-corruption measures, nothing in this Court's decisions suggests that appellants can render those limits invalid as applied simply by pledging to implement their own alternative anti-corruption policies. No one would suggest, for example, that the FECA limits on individual contributions to federal candidates are unconstitutional as applied to candidates who promise not to give preferential treatment to larger donors. Any effort to enforce appellants' pledge would require the FEC to police the interactions between appellants and Republican candidates and officeholders (to determine whether appellants have urged candidates and officeholders to solicit soft-money donations) and between the party and its donors (to determine whether appellants have helped soft-money donors to gain preferential access). A chief virtue of contribution limits, however, is that they avoid the need for such difficult and intrusive inquiries. Cf. *McConnell*, 540 U.S. at 153 (explaining that, because an officeholder's decision to act "according to the wishes of those who have made large financial contributions * * * is neither easily detected nor practical to criminalize," the "best means of prevention is to identify and remove the temptation").[9]

[9] The district court's confidence (J.S. App. 8a n.4) that appellants' pledge could be enforced was misplaced. The Commission's investigative authority, 2 U.S.C. 437g(a)(2), requires a complaint, or information regarding a violation of law, in order to initiate an investigation. It is unlikely that the RNC's facilitation of a private meeting between a wealthy donor and a Member of Congress, or a party official's communication encouraging a Republican officeholder to solicit soft-money donations, would come to light under either of those statutory conditions. Nor did the district court identify any statutory authority for the

4. Appellants have not demonstrated that BCRA's soft-money restrictions prevent them from raising sufficient funds to engage in effective electoral activity. To the contrary, in each election cycle since BCRA, the national party committees raised amounts of hard money—between approximately $900 million and $1.24 billion in hard money in each election cycle—that are comparable to or greater than the amounts raised in hard and soft money *combined* before BCRA.[10] See 08-1953 Docket entry No. 56, FEC Mem. in Supp. of Mot. for Summ. J.

Commission to "adopt regulations requiring * * * disclosures" of donors invited by the party to meet with officeholders, J.S. App. 9a n.4.

[10] These factual developments run counter to the projections that the RNC made in *McConnell*. Despite the fact that BCRA raised and indexed for inflation the hard-money limits on contributions to political parties, see p. 6, *supra*, the RNC predicted in that case that it would "*not* be able to recoup these lost non-federal revenues" because "it is unlikely that the RNC will be able to raise more federal money from lower-dollar contributors than it currently does." 08-1953 Docket entry No. 56, FEC Mem. in Supp. of Mot. for Summ. J. 4 (D.D.C. Apr. 10, 2009) (FEC Summary Judgment Memorandum) (quoting RNC testimony). The RNC further predicted that "[t]he net effects of BCRA [would] be massive layoffs and severe reduction of * * * speech at the RNC, and reduction of many state parties to a 'nominal' existence." *McConnell*, 251 F. Supp. 2d at 698 (Kollar-Kotelly, J.) (quoting RNC brief).

In *McConnell*, however, this Court found that the plaintiff political parties had failed to establish that they would be unable to engage in effective advocacy after BCRA. 540 U.S. at 173. The Court observed that, "[i]f the history of campaign finance regulation * * * proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities." *Ibid.* This Court was prescient: The national parties massively expanded their low-dollar contributor base, and the RNC's dire predictions about a "severe reduction" of the RNC's "speech" and marginalization of state parties have been shown to be unfounded. See FEC Summary Judgment Memorandum 3-5.

2-5 (D.D.C. Apr. 10, 2009) (discussing fundraising totals). The limit on contributions to national parties—currently set at $30,400 per year and indexed for inflation, see p. 6 & note 2, *supra*—is "closely drawn" because it is not "so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135-136 (quoting *Buckley*, 424 U.S. at 21; and *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)); see also *Randall* v. *Sorrell*, 548 U.S. 230, 247 (2006) (opinion of Breyer, J., joined by Roberts, C.J. and Alito, J.) (same). The hundreds of millions of dollars that the parties have been able to raise after BCRA are plainly sufficient for "effective advocacy."

Appellants also contend (see J.S. 11, 22) that BCRA unconstitutionally disadvantages political parties relative to other political organizations. The Court in *McConnell* rejected the political parties' equal-protection challenge, which was premised on the same purported differential treatment, and explained "that BCRA actually favors political parties in many ways." 540 U.S. at 187-188. The national parties can receive up to $30,400 per year from each individual donor, and the state, district, and local committees of a party can receive up to a combined $10,000 per year in hard money from each individual donor. By contrast, other political committees can receive only $5000 per year from an individual donor. See 2 U.S.C. 441a(a)(1); 11 C.F.R. 110.17(b).[11]

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[11] The term "political committee" encompasses any entity, whether a corporation, union, or otherwise, that has as its "major purpose" the election or defeat of candidates, see *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986), and meets certain statutory criteria, see 2 U.S.C. 431(4).

To be sure, BCRA's soft-money limits subject political parties to source-and-amount restrictions that are not imposed on advocacy groups that fall outside FECA's "political committee" provisions. As the Court in *McConnell* explained, however, "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." 540 U.S. at 188. "Political parties have influence and power in the Legislature that vastly exceeds that of any interest group," including the power to "select slates of candidates for elections" and the power to "determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." *Ibid.* The Court in *McConnell* concluded that "Congress' efforts at campaign finance regulation may account for these salient differences," *ibid.*, and appellants identify no sound reason for the Court to revisit that holding.

5. Although the district court did not address the Commission's preclusion defense, that defense provides an independent basis for affirmance of the district court's judgment, at least with respect to appellants' challenges to BCRA's restrictions on national-party fundraising. The RNC and the California Party were plaintiffs in the *McConnell* litigation and are bound by the judgment entered against them. Chairman Steele is a plaintiff only by virtue of his official position as an officer of the RNC, and he is precluded by the judgment rejecting his predecessor RNC officer's identical arguments. See *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2172-2173 (2008) (discussing preclusion of nonparties based on their relationship to parties). Chairman Steele could not assert the claims of the national party in any event. And while the San Diego Party was not a plaintiff in

McConnell, it is not a national political party and therefore cannot challenge those statutory restrictions that apply only to such national organizations.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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MAY 2010