No. 09-1287

IN THE

# Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
*Appellants,*

v.

FEDERAL ELECTION COMMISSION, ET AL.,
*Appellees.*

**On Appeal**
**From The United States District Court**
**For The District Of Columbia**

## BRIEF FOR APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

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## RULE 29.6 STATEMENT

The corporate disclosure statement included in the jurisdictional statement remains accurate.

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## BRIEF FOR APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

The government would evidently prefer not to defend BCRA's prohibition on nonfederal money against the substance of appellants' as-applied challenge. According to the government, *McConnell v. FEC*, 540 U.S. 93 (2003), "forecloses" appellants' as-applied claims. FEC Br. 16. But *McConnell* presented a *facial* challenge to FECA's restrictions on political parties' use of nonfederal money, and did not (and could not) resolve future *as-applied* challenges. *Cf. Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411 (2006) (per curiam).

Moreover, *McConnell*'s analysis of FECA §§ 323(a) and (b) has not stood the test of time. *McConnell* rejected a facial challenge to these speech-suppressing provisions on the ground that parties' use of nonfederal money is "likely to create actual or apparent indebtedness on the part of federal officeholders" and "buy donors preferential access." 540 U.S. at 155, 156. But this Court has since made clear that "[i]ngratiation and access . . . are *not* corruption," and that they therefore represent a constitutionally *inadequate* basis for restricting fundamental First Amendment freedoms. *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (emphasis added). Nor do "[i]ngratiation and access" become corruption—as the government suggests (at 20)—simply because they are generated by a donation to an officeholder's political party, rather than by an independent expenditure supporting the officeholder's candidacy. Indeed, the government does not even attempt to explain why the gratitude that an officeholder would purportedly feel as a result of a modest donation to his party's redistricting efforts, for ex-

ample, is a constitutionally sufficient basis for prohibiting that donation—while the undeniably deeper gratitude that an officeholder would feel toward a supporter who funds a multi-million-dollar independent advertising campaign would not be. If advertising *expressly* supporting a candidate does not give rise to corruption concerns, it cannot possibly be the case that a donation to a party's redistricting efforts, get-out-the-vote drive, or headquarters maintenance fund—which would have, at most, only attenuated benefits for a candidate—could generate a risk of corruption sufficient to justify restricting core political speech.

Because the question presented is substantial and has profound implications for the First Amendment rights of political parties and their members, probable jurisdiction should be noted.

## ARGUMENT

Political speech and association are "essential mechanism[s] of democracy." *Citizens United*, 130 S. Ct. at 898; *see also NAACP v. Button*, 371 U.S. 415, 431 (1963). The government nevertheless contends that appellants' First Amendment challenge to FECA § 323 is not only without merit but utterly *insubstantial*—and thus unworthy of this Court's plenary consideration—because *McConnell* purportedly "disposes" of appellants' claims. FEC Br. 16. The government is wrong.

This Court has made clear that, where a facial challenge fails, "whatever overbreadth may exist" in a statute restricting speech "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Indeed, "[a]s-applied challenges are the basic build-

ing blocks of constitutional adjudication," and "[i]t is neither [this Court's] obligation nor within [its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (internal quotation marks omitted).

*McConnell* is consistent with that "tradition[ ]." It held that FECA §§ 323(a) and (b) are not unconstitutional in substantially all their applications, but did not consider the constitutionality of any *particular* application of those speech restrictions—which was left for resolution in future as-applied challenges such as this. *See United States v. Raines*, 362 U.S. 17, 21 (1960) ("it would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation") (internal quotation marks omitted).[1]

The government therefore cannot evade the task of defending the constitutionality of applying FECA §§ 323(a) and (b) to each of the specific activities that appellants seek to fund with nonfederal money. In light of the sheer breadth of BCRA's prohibition on political parties' use of nonfederal money—and the First Amendment principles recently reaffirmed by this Court in *Citizens United*—that task is an impossible one.

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[1] The government's cursory invocation of a preclusion defense fails for the same reason. FEC Br. 29-30. It would be flatly inconsistent with this Court's preference for as-applied constitutional adjudication to bar a party who unsuccessfully litigated a facial challenge from subsequently pursuing an as-applied challenge to the same statute. *See Broadrick*, 413 U.S. at 615-16.

Indeed, FECA § 323's prohibitions are virtually limitless in their scope. Under the guise of regulating federal elections, Congress has prohibited national political parties, such as the Republican National Committee ("RNC"), from using nonfederal money for *any* purpose. 2 U.S.C. § 441i(a)(1). Thus, whenever the RNC spends money to support a state candidate in a state election (even if there are no federal candidates on the ballot), to finance post-census redistricting litigation, to educate voters about issues pending in state legislatures, or even to remodel its headquarters, it must use funds that comply with the onerous source and amount restrictions imposed by federal law. Similarly, Congress has prohibited state and local political parties, such as the California Republican Party and Republican Party of San Diego County, from using nonfederal funds to conduct voter-registration drives and get-out-the-vote campaigns in support of *state* and *local* candidates if those candidates appear on the same ballot as candidates for federal office. *Id.* § 441i(b)(1).

Even the FEC itself has recognized that FECA § 323 extends to activities that have absolutely no connection to federal elections. In an Advisory Opinion issued on May 7, 2010, the FEC unanimously concluded that the use of funds "to pay for . . . litigation costs that arise" out of the "legislative redistricting process" is "not in connection with a Federal . . . election." App., *infra*, at 2a, 3a. Accordingly, the use of such funds does not implicate the restrictions that FECA § 323(e) imposes on federal officeholders when they raise or spend funds "in connection with" a federal election. *Id.* at 3a; *see also* 2 U.S.C. § 441i(e)(1). The FEC explained that, "[a]lthough the outcome of redistricting litigation often has political conse-

quences, . . . spending on such activity is sufficiently removed that it is not 'in connection with' the elections themselves." App., *infra*, at 7a. "[N]ot all activities that may have some indirect effect on elections," the FEC emphasized, are "'in connection with'" an election. *Id.* at 5a n.3.

Confronted with the burden of demonstrating a link between the funding of activities that bear no meaningful connection to a federal election and the corruption of federal officeholders, the government again looks for a way to avoid providing a substantive response to appellants' argument. As with its effort to invoke *McConnell* to avoid the merits of appellants' as-applied challenge, the government suggests that, in fact, it need not identify *any* federal interest to justify the disputed applications of FECA §§ 323(a) and (b). According to the government, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), relieves it of the obligation of making a "particularized showing" that, if funded by nonfederal money, each political activity to which FECA § 323 applies would create a risk of corrupting federal officeholders. FEC Br. 19. "Congress's interest in guarding against the inherent appearance of abuse," the government contends, "justifie[s] *uniform* application" of FECA § 323. *Id.* (emphasis added).

The portion of *Buckley* on which the government relies, however, pertained exclusively to *contribution* limits. FEC Br. 19 (citing *Buckley*, 424 U.S. at 29-30). FECA § 323, in contrast, is not only a contribution limit but also a restriction on the type of "funds" that political parties can "*spend*." 2 U.S.C. § 441i(a)(1) (emphasis added).

In any event, even if FECA § 323 is examined only as a contribution limit, *Buckley* does not elimi-

nate the government's obligation to demonstrate that each challenged application of this speech restriction is "closely drawn" to serve a "sufficiently important" government interest. *McConnell*, 540 U.S. at 136. While *Buckley* makes clear that the government need not prove that a *particular* donor and *particular* recipient would use a prohibited contribution for an illicit purpose (424 U.S. at 29-30), the government still must demonstrate that the *class* of prohibited contributions is a type that would generate a risk of corrupting federal officeholders. If that were not the case, then there would be *no* meaningful limits at all on Congress's authority to regulate political contributions: Congress could, for example, extend the federal source and amount restrictions to *local* political parties supporting candidates in *local* elections in which no federal candidate appeared on the ballot. Not even the FEC—or, at least, not the FEC's *Commissioners* (who issue advisory opinions but do not necessarily direct the course of litigation)—would claim such limitless federal authority over purely local elections. Thus, in this case, it is the government's obligation to demonstrate that the application of FECA § 323 to each challenged class of activity furthers its interest in preventing the actual or apparent corruption of federal officeholders.

The government does not dispute that this anticorruption interest is the only interest that could be constitutionally sufficient to sustain a restriction on political parties' First Amendment right to raise and spend nonfederal money. Indeed, the government characterizes FECA § 323 as a "valid anti-corruption measure[ ]" (FEC Br. 26), and fails to identify any other interest that could potentially support that restriction. According to the government, however, the anticorruption interest extends beyond the preven-

tion of classic *quid pro quo* arrangements to the eradication of any political activity that might facilitate "access" to federal officeholders. FEC Br. 22. Intervenor similarly argues that "Congress may limit contributions to avoid the risks of favoritism toward and improper influence by large contributors." Int. Br. 19 (capitalization altered).

These arguments are squarely foreclosed by *Citizens United*, which held that the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." 130 S. Ct. at 910. "Reliance on a generic favoritism or influence theory," the Court continued, "is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.* (internal quotation marks omitted).

As the three-judge district court correctly recognized below, the fact that *Citizens United* arose in the expenditure setting does not undermine its force in this case. J.S. App. 13a-14a. "Favoritism and influence are not . . . avoidable in representative politics" and thus do not constitute corruption (*Citizens United*, 130 S. Ct. at 910)—whether they are the product of a contribution, an independent expenditure, or a nonfinancial form of political expression. Ingratiation and access do not somehow become more nefarious—and more damaging to our political system—simply because they are the product of a contribution. *See id.* ("The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.").

Without its "favoritism or influence theory," the government must establish that BCRA's prohibition on nonfederal money is "closely drawn" to further the government's interest in eradicating actual and ap-

parent *quid pro quo* corruption of federal officeholders. *See Citizens United*, 130 S. Ct. at 909 (the "governmental interest in preventing corruption . . . [is] limited to *quid pro quo* corruption"). But there was no evidence before Congress—and no evidence before this Court in *McConnell*—that political parties' solicitation and expenditure of nonfederal money was a vehicle for illicit *quid pro quo* arrangements between donors and federal officeholders. J.S. 17. In fact, the *McConnell* district court expressly found that the "record contain[ed] no evidence of quid pro quo corruption." *McConnell v. FEC*, 251 F. Supp. 2d 176, 851 (D.D.C. 2003) (Leon, J.); *id.* at 481 (Kollar-Kotelly, J.) (the "record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money").

In the face of this unambiguous district court finding, neither the government nor intervenor is able to identify any evidence that political parties' use of nonfederal funds gave rise to *quid pro quo* arrangements with federal officeholders. The only potential support that the government and intervenor can muster is this Court's statement in *McConnell* that "evidence connect[ed] soft money to manipulations of the legislative calendar." 540 U.S. at 150 (citing 251 F. Supp. 2d at 482 (Kollar-Kotelly, J); 251 F. Supp. 2d at 852 (Leon, J.)). But, the purported "connect[ion]" was not (and was not alleged to be) a *quid pro quo* arrangement in which nonfederal money was exchanged for an officeholder's agreement to "manipulat[e]" the "legislative calendar"—the classic exchange of "dollars for political favors" that this Court has described as the "hallmark of corruption." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). The example referenced on the cited pages of the district court's

opinion instead involved Congress's amendment of a bill without a hearing in response to concerns raised by a donor of nonfederal money. *See* 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.); *id.* at 852 (Leon, J.). Such legislative "favoritism" toward campaign supporters is *not* corruption. *Citizens United*, 130 S. Ct. at 910; *cf. McCormick v. United States*, 500 U.S. 257, 272 (1991) ("to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents . . . shortly before or after campaign contributions are solicited . . . would open to prosecution . . . conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions").

The government's defense of FECA §§ 323(a) and (b) is thus both legally flawed and factually insupportable. Plenary review is necessary to eliminate the unconstitutional restrictions that these provisions impose on the fundamental speech and associational rights of political parties and their members.[2]

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[2] That some political parties have been successful in raising "hard money" in recent election cycles does not alleviate FECA § 323's constitutional shortcomings. FEC Br. 27. A restriction on core political speech cannot withstand First Amendment scrutiny simply because it preserves other modes of political expression. *See, e.g., Citizens United*, 130 S. Ct. at 897 (invalidating prohibitions on corporate independent expenditures even though those prohibitions did not apply to corporations' use of PACs to fund political speech).

## CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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