No. 16-865

In The
Supreme Court of the United States

Republican Party of Louisiana et al., *Appellants*

v.

Federal Election Commission, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Brief Opposing Motion to Dismiss or Affirm

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The Questions Presented Are Substantial

I.

This Case Turns on What "Corruption" Means, and No Precedent Forecloses this Case.

FEC makes two erroneous "foreclosed" arguments:

- a facial challenge is "foreclose[d]" (Mot.14) because *McConnell v. FEC*, 540 U.S. 93 (2003), held the FEA Restrictions "justified by an anticorruption interest" (Mot.15) and
- the "as-applied challenge presents no 'salient distinction' from the claims rejected in *McConnell* and *Republican National Committee* [*v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("*RNC-I*")]" (Mot.14).

A. *McConnell* Was Based on Now-Rejected "Corruption," So It Cannot Foreclose this Case.

This case turns on what "corruption" means. It meant something different in *McConnell* than before and after. (J.S. 21-26.) Yet FEC[1] says this case is "foreclosed" (Mot.17) because *McConnell* "found 'substantial evidence to support Congress' determination that large soft-money contributions to national party committees give rise to corruption and the appearance of corruption.'" (Mot.20-21 (quoting 540 U.S. at 154).)

But *McConnell* did not hold the FEA Restrictions justified by an interest in preventing *now*-cognizable quid-pro-quo corruption. FEC ignores the changed meaning of "corruption" except for a parenthetical reference (near the end of its Motion) admitting that

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[1] Appellants use abbreviations from the Jurisdictional Statement ("J.S.") and FEC's Motion ("Mot.").

McConnell rejected Justice Kennedy's definition of "corruption" as quid-pro-quo corruption in his opinion for the dissent. (Mot.24-25 (quoting 540 U.S. at 152).)[2] But FEC ignores the implications of that change. And there was *no* evidence of quid-pro-quo corruption (or appearance) in *McConnell*. *See McCutcheon v. FEC*, 134 S.Ct. 1434, 1469-70 (2014) (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting).

Before *McConnell*, only preventing narrow quid-pro-quo corruption (or its appearance) might justify campaign-finance restrictions (J.S.21-25), i.e., "dollars for political favors," *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985).

McConnell rejected that and substituted what fairly may be called "benefit-corruption." In benefit-corruption, the *quid* is some perceived "benefit"; the *quo* is merely potential "influence," "gratitude," "access," "indebtedness," or "value"; and the *pro* is merely "close ties," "close relationship," and "close connection and alignment of interests," not any actual agreement to make the exchange. *Id.* at 153-56, 161-70. (J.S.25-26.) Such broad interpretations of "quid," "quo," and "pro" "dramatically expand government regulation of the political process." *McCutcheon*, 134 S.Ct. at 1461.[3]

This Court "retracted" benefit-corruption, *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010), and now recognizes only narrow quid-pro-quo corrup-

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[2] *McConnell* said: "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." 540 U.S. at 152.

[3] For example, many things "benefit" candidates.

tion as cognizable for an anticorruption interest. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (independent-expenditure context); *McCutcheon*, 134 S.Ct. at 1441 (contribution context). (J.S.22-25 ("cognizable corruption").) This Court clarified the narrowness of what is cognizable as a *quo* in *McDonnell v. U.S.*, 136 S.Ct. 2355 (2016), and the *pro* requires some form of "commitment" to exchange the quid for the quo, *see McCutcheon*, 134 S.Ct. at 1451 ("'commitments from the candidate'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976))—both topics to be further developed in merits briefing.

The fact that *McConnell*'s use of "corruption" meant mere benefit-corruption is vital to understanding all of *McConnell*'s references to "corruption." For example, the court below says "*McConnell* held that [the FEA Ban] was . . . 'closely drawn to meet the sufficiently important governmental interest of avoiding corruption and its appearance.'" (App.7a (quoting 540 U.S. at 168-69).) "Corruption" there did not mean quid-pro-quo corruption. Rather, "[*McConnell*] found that 'the funding of [FEA] creates a significant risk of actual and apparent corruption' because FEA 'confer[s] substantial *benefits* on federal candidates.'" (App.7a (quoting 540 U.S. at 168 (emphasis added)).) So *McConnell* found the FEA Restrictions closely drawn to preventing *benefit*-corruption not *quid-pro-quo* corruption.

And when *McConnell* said the Restrictions "serve an anticircumvention interest, by '[p]reventing corrupting activity from shifting wholesale to state committees'" (Mot.16 (quoting 540 U.S. at 165-66); Mot.8 (same)), "corrupting" meant benefit-corruption, so no anticircumvention interest exists.

McConnell's substitution of benefit-corruption for quid-pro-quo corruption reveals a crucial error when

the court below quoted *RNC-I* for the proposition that *McConnell* said nonfederal-fund donations pose a risk of "*quid pro quo* corruption." (App.19a (quoting 698 F. Supp. 2d at 159 (citing *McConnell*, 540 U.S. at 144)).) The error is that *McConnell* only said "corruption," not "*quid pro quo* corruption," and that the "corruption" involved only "a sense of obligation." 540 U.S. at 144. So *McConnell* meant benefit-corruption. Adding "*quid pro quo*" was error.

McConnell implicitly acknowledged that the FEA Restrictions posed *no* quid-pro-quo-corruption risk (none was in evidence) by relying on benefit-corruption instead. And when *McConnell* spoke of a "'close connection and alignment of interests,'" it linked that merely to a potential sense of "'indebtedness.'" (Mot.15 (quoting 540 U.S. at 155).) *McConnell* also expressly linked "access" with "close ties" as sufficient for "corruption." 540 U.S. at 152. So such "close" arguments are not free-standing interests and arise only in now-retracted benefit-corruption. Thus, the issue of whether the FEA Restrictions are justified by an anti-*quid-pro-quo*-corruption interest is undecided and presented here.

FEC tries to evade this by reframing the argument by saying Appellants argue that this retraction of benefit-corruption and reaffirmation of quid-pro-quo corruption "implicitly overrul[es] *McConnell*, [b]ut the relevant decisions disavow any such intent." (Mot.20.) But *Citizens United* and *McCutcheon* simply said they were not deciding issues not before them. (Mot.20; J.S.17.) And since they did *not* say that the "corruption" sea-change does *not* apply in First Amendment challenges, it does. So FEC must prove that the FEA Restrictions protect against quid-pro-quo corruption. And FEC has no such evidence. (J.S.32-35.)

Thus, this case turns on this sea-change. Simply applying that change in a First Amendment tailoring-interest analysis reveals that FEC has no anti-quid-pro-quo-corruption interest to support the FEA Restrictions, especially as applied to independent FEA. And that presents a substantial, undecided, non-foreclosed question meriting plenary consideration.

B. The As-Applied Challenge Is Distinguishable.

FEC says the challenge as applied to independent FEA "presents no 'salient distinction' from the claims rejected in *McConnell* and [*RNC-I*]." (Mot.14.) FEC errs for at least eight reasons. (Mot.22-25.) *See also* Part II.

First, FEC ignores *Get Registered* and *African-American Outreach* (J.S.9-11), communications not at issue in *McConnell* or *RNC-I*. They are like the communications at issue when this Court held BCRA's ban on corporate electioneering communications unconstitutional as applied in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*").

Second, FEC expressly relies on broad language in *McConnell* and *RNC-I* for the proposition that "all" FEA "benefits" candidates. (Mot.22 ("3.a").) But similar, broad, facial-holding language was unanimously rejected as foreclosing as-applied challenges in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), which led to *WRTL-II*'s as-applied holding.

Third, the perceived "benefit" FEA recites in the foregoing paragraph is immaterial because benefit-corruption is now replaced by quid-pro-quo corruption.

Fourth, perceived "benefit" is also irrelevant to *independent* expression because, as a matter of law, it poses no cognizable benefit. *Buckley*, 424 U.S. at 47; *Citizens United*, 558 U.S. at 357.

Fifth, FEC's arguments that "independent" FEA is indistinguishable from what *McConnell* considered (Mot.22-25 ("3.b")) relies on broad facial-holding language of the sort *WRTL-I* rejected and on benefit-corruption instead of quid-pro-quo corruption. For example, FEC argues that (non-cognizable) "indebtedness" might arise "'*regardless of how those funds are ultimately used*.'" (Mot.23 (quoting *McConnell*, 540 U.S. at 155 (emphasis by FEC)).) But how funds are used matters, e.g., use for independent expression poses no quid-pro-quo risk. (J.S.15.)

Sixth, FEC ignores responses to the no-salient-distinction argument that Appellants have already provided (J.S.4, 12-17), including the fact that *RNC-I* does not control. (J.S.16 n.18.)

Seventh, as Appellants explained previously, the challenge in *RNC-I* differed because:

> "[it was] as applied to activities that are not 'unambiguously related to the campaign of a particular federal candidate,' *Buckley*, 424 U.S. at 80," such as communications regarding state ballot measures and FEA "not targeted to any federal race or candidate."

(J.S.16 n.18 (quoting 698 F. Supp. 2d at 157, 160 (citations omitted).) By contrast, in the present challenge (as applied to independent FEA), "even if FEAs are clearly 'unambiguously campaign related,' the FEA Restrictions could not constitutionally be applied if the FEA were independent." (J.S.16 n.18.) This as-applied challenge presents the confluence of two currents: (i) the nonfederal-funds case, *McConnell*, 540 U.S. 93, and (ii) the independent-expenditure case line, e.g., *Citizens United*, 558 U.S. 310; *SpeechNow*, 599 F.3d 686; *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); and

North Carolina Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008). But FEC ignores this.

Eighth, not only does *RNC-I* not control, as already noted, it is unpersuasive analytically because (i) it said *McConnell* found a risk of "*quid pro quo* corruption" when it did not, *see supra at* 3-4; (ii) it relied on FEA providing a "benefit" (Mot.13, 25 (quoting *RNC-I*, 698 F. Supp. 2d at162)) though independent expression provides no cognizable benefit; (iii) it erroneously equated "indebtedness" with "corruption"; and (iv) it deemed "close relationship" a freestanding interest (J.S.32-31), though "close" arguments inhered only in benefit-corruption and were expressly rejected in the quid-pro-quo corruption context in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 622 (1996) ("*Colorado-I*") (no presumed coordination based on "metaphysical identity"), and by *McConnell* itself when it held that the closeness of coordinated activity could not justify requiring political parties to choose between coordinated activity and independent expenditures, 540 U.S. at 213-19.

In sum, neither *McConnell* nor *RNC-I* forecloses this case, which turns on whether FEC can prove that the FEA restrictions are justified by now-cognizable, narrow, quid-pro-quo corruption. That is a substantial, undecided question meriting plenary consideration.

II.
The FEA Restrictions Are Unconstitutional as Applied to Independent FEA.

As applied to independent FEA, FEC lacks a cognizable interest because independent expression poses neither quid-pro-quo-corruption risk, *Citizens United*, 558 U.S. at 357, nor even cognizable benefit, *Buckley*, 424 U.S. at 47. So funds donated for independent ex-

pression may not be limited[4] because they also pose no quid-pro-quo risk, as *SpeechNow* put it:

> In light of the [Supreme] Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting "quid" for which a candidate might in exchange offer a corrupt "quo."[5]
>
> Given this analysis from *Citizens United,* we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group . . . .

599 F.3d at 694-95. This analysis led to (independent-expenditure-only) super-PACs receiving unlimited contributions and to PACs that make contributions being able to set up Non-Contribution Accounts ("NCAs") to do the same. (J.S.3.) State and local political parties are severely harmed because they can do nothing similar (J.S.1, 8), which FEC ignores.[6]

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[4] As nonfederal-fund donations to Appellants remain subject to Louisiana limits, *unlimited* donations are not at issue, but the following analysis applies.

[5] Note that the *quid* here is the independent expression. The contribution therefor is then discussed.

[6] On April 13, Campaign Finance Institute published "Political Parties and Candidates Dominated the 2016 House Elections While Holding Their Own in the Senate," purporting to show that the political parties aren't having the problems that the parties say they are having because of BCRA. *See* http:// www.cfinst.org/Press/PReleases/17-04-13/POLITICAL_PARTIES_AND_CANDIDATES_DOMI-

But political parties should be able to do something similar based on *SpeechNow*'s analysis, as follows:

- Independent expression poses no quid-pro-quo risk because there is no quid.
- So government has no anti-corruption interest to limit donations used for independent expression.
- As the foregoing is based on *non-corrupting expression* and independent political-party expression is *equally* non-corrupting, government has no anticorruption interest to limit donations therefor.

(J.S.3.) FEC says the foregoing analysis doesn't apply to political parties for two reasons.

First, FEC says the quid is giving to the political party, not the independent expression. (Mot.22-23.)

That does not square with *SpeechNow*, which said the expression is the potential quid, but since independence eliminates corruption, there is no quid. 599 F.3d at 694-95. So donations for independent expression pose no corruption risk because the quid's independence already broke any quid-pro-quo chain. *Id.*

Even if the donation could be considered the quid, any quid-pro-quo-corruption chain is also broken because one "cede[s] control over the funds" given to PACs or political parties. *McCutcheon*, 134 S.Ct. at 1452. FEC also acknowledged this by deciding that the

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NATED_THE_2016_HOUSE_ELECTIONS_WHILE_HOLDING_THEIR_OWN_IN_THE_SENATE.aspx. But as former White House Counsel Bob Bauer notes, it does so by redefining "what a political party *is*" to view them as "'networks' of allied entities" that *include* super-PACs. "CFI On the State of the Political Parties: Is It Working Out After All?," http://www.moresoftmoneyhardlaw.com/2017/04/cfi-state-political-parties-working/. Parties still have "a competitive disadvantage." *Id.*

Democratic Senatorial Campaign Committee no longer had to put a notice on solicitations saying that it could do whatever it wants with contributions after it was required to include such notices in the wake of this court citing DSCC's "tallying" system, in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), as some evidence of why parties should not be able to spend unlimited funds on expenditures *coordinated* with candidates, *id.* at 459. Matter Under Review 3620 (DSCC).[7] FEC relieved DSCC of that notice requirement because everyone already knows that parties may do what they will with contributed funds, even under a "tallying" system. So even if the initial donation were the quid, there could be no quid-pro-quo corruption.[8]

Second, FEC argues that political parties differ because of their "special relationship and unity of interest" with candidates. (Mot.20-22.) But as FEC acknowledges with its own quotations, this "close" argument is inextricably linked to "obligat[ion]" and "indebtedness" (Mot.20-21), which inhere in benefit-corruption, not quid-pro-quo corruption. *See supra* at 4, 7. And such "closeness" inheres in coordinated, but not independent, expenditures. (J.S.14-15.) FEC resurrects a presumption of coordination between political parties and candidates that this Court expressly rejected in *Colorado-I*, 518 U.S. 604. (J.S.30-31, 33.)

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[7] Available through http://fec.gov/em/mur.shtml.

[8] "[T]he risk of *quid pro quo* corruption is generally applicable only to 'the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder.'" *McCutcheon*, 134 S.Ct. at 1452 (quoting *McConnell,* 540 U.S. at 310 (op. of Kennedy, J.)).

So neither *Get Registered* (J.S.9-10), nor *African-American Outreach*, (J.S.10-11), nor any of Appellants' other intended independent communications and expressive activities in the record can even cognizably benefit candidates, due to independence, let alone corrupt anyone. FEC studiously ignores those concrete examples of independent FEA. But it has the burden to prove that such concrete examples pose a quid-pro-quo risk. And as mentioned above, those communications were not considered in *McConnell* or *RNC-I* and so are like the genuine-issue ads that this Court considered, as applied, in *WRTL-II*, 551 U.S. 449, after *McConnell* facially upheld the ban on corporate electioneering communications. And FEC makes no attempt to show how simply posting *Get Registered* online could corrupt any candidate, when it (i) is *independent* (so cannot even cognizably benefit); (ii) merely *exhorts* registration and voting in a nonpartisan way; and (iii) was on the state party's *website*, though elsewhere similar online activity remains unregulated, 11 C.F.R. § 100.26 ("public communication" generally excludes "communications over the Internet").

FEC disputes that strict scrutiny applies. (Mot.17-19.) Appellants showed that strict scrutiny should apply (J.S.18-21), but said that, "regardless of scrutiny level," quid-pro-quo corruption is the only interest that might justify campaign-finance restrictions. So while this Court should decide that strict scrutiny always applies wherever the "right to participate in democracy" by free speech and association is involved, *McCutcheon*, 134 S.Ct. at 1441, even if the Court decides, as in *McCutcheon*, to postpone that decision, there still must be a "fit," *id.* at 1445, between the FEA Restrictions and the interest in preventing quid-pro-quo corruption. And FEC has shown no fit.

Finally, Appellants showed that, though FEC has had decades to do so, it has not provided evidence of state and local political parties corrupting candidates, under a now-cognizable "corruption" definition, as a result of independent expressive activity, including independent FEA. (J.S.32-35.) The only argument FEC has come up with is that there might be "benefit," "closeness," "access," "gratitude," and the like, but that is all part of now-retracted benefit-corruption.

In sum, this is an undecided, substantial question meriting plenary consideration.

III.
The FEA Restrictions Are Unconstitutional Facially.

Regarding their facial challenge, Appellants highlighted two crucial elements of a First Amendment tailoring-interest analysis. (J.S.35-36.)

First, this Court's retraction of benefit-corruption and reaffirmation of narrow quid-pro-quo corruption removed *McConnell*'s benefit-corruption foundation.

Second, *McConnell*'s record has no evidence of quid-pro-quo corruption resulting from state and local parties engaging in FEA, and FEC has provided no such evidence for nearly three decades.

So *McConnell*'s foundation has been undercut both as a constitutional matter and an evidentiary matter. Thus, no anticorruption interest supports *McConnell*.

FEC's response—relying on rejected benefit-corruption and broad facial-holding language inextricably linked to benefit corruption—has already been refuted in Parts I and II above. And FEC's no-"record" and no-"arguments" assertion that this is not a proper case to reconsider *McConnell* (Mot.15 n.1) fails for at least three reasons. First, no "record" is required regarding

the matter-of-law "corruption" sea-change. Second, the "arguments" are already made, i.e., there has been a "corruption" sea-change and there is no quid-pro-quo-corruption evidence. Third, FEC's absent evidence of quid-pro-quo corruption from state- and local-party FEA is well established. *See McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting). No more is needed.

In sum, *McConnell* should be facially overruled—a substantial question meriting plenary consideration.

Conclusion

Probable jurisdiction should be noted.

Respectfully submitted,

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