United States District Court
District of Columbia

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

Plaintiffs' Reply Supporting Their Summary Judgment Motion and Opposition to FEC's Summary Judgment Motion

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Introduction

"[T]he First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Citizens United v. FEC*, 558 U.S. 310, 350 (2010). And "[t]he First Amendment does not permit Congress to make ... categorical distinctions based on the ... identity of the speaker and the content of the political speech." *Id.* at 364.Yet, based both on speaker *identity* and speech *content*, state/local committees must use federal funds for independent-communication FEA[1] while corporations and super-PACs need not for their independent expenditures.

Lest someone say there is no speech *suppression* here, because state/local committees may use just use federal funds for independent-communication FEA, recall the rejection of FEC's notion that Citizens United's independent communications were not suppressed because it could use federal funds in a PAC. 558 U.S. at 337-39. *See also FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 (2007) (plurality[2]) (rejecting just-do-something-else argument). After rejecting speech discrimination based on speaker/content, *Citizens United* held that nonfederal funds may be used for independent communications under the following controlling analysis: (i) only an anti-corruption interest can justify requiring federal funds, 558 U.S. at 359-60; (ii) only narrow quid-pro-quo corruption is cognizable, *id.* at 358-62[3]; and (iii) independent communications pose

[1] **Abbreviations**: *Ban* (52 U.S.C. 30125(b)(1)); *BCRA* (Bipartisan Campaign Reform Act); *FEC* (Federal Election Commission); *FEA* (federal election activity); *FECA* (Federal Election Campaign Act); *Fundraising Requirement* (52 U.S.C. 30125(c)); *GCA* (generic-campaign activity); *GOTV* (get-out-the-vote activity); *JPGOP* (Jefferson Parish Republican Parish Executive Committee); *LAGOP* (Republican Party of Louisiana); *Mem. Op.* (Memorandum Opinion (granting three-judge court) (Doc. 24)); *OPGOP* (Orleans Parish Republican Executive Committee); *PAC* (political committee); *PASO* (promoting, attacking, supporting, or opposing federal candidate); *Pls' Mem.* (Plaintiffs' Summary-Judgment Memo); *Reporting Requirement* (52 U.S.C. 30104(e))); *SP* (screening problem)**;** *VID* (voter identification); *VR* (voter-registration activity).

[2] This controlling opinion states the holding, *Marks v. United States*, 430 U.S. 188, 193 (1977), and is referred to herein as "*WRTL-II*" without further "plurality" indication.

[3] It held that things were so in *Buckley v. Valeo*, 424 U.S. 1 (1976), so *Buckley* joins *Citizens United* (expenditure context) and *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014) (contribution con-

no quid-pro-quo risk, *id.* at 357 ("independent expenditures ... do not give rise to corruption or the appearance of corruption"). The analytical key was not the nature of the *speaker* but the non-corrupting nature of the *speech*. That controls here: (i) only an anti-corruption interest could justify requiring federal funds for independent communications; (ii) only quid-pro-quo corruption is cognizable; (iii) independent communications of state and local committees pose no such risk, just as those of corporations do not. So Plaintiffs also should be able to use nonfederal funds for independent communications like corporations.[4]

Lest someone say political parties differ because they have a *close relation* to candidates, recall that super-PACs have close relations with candidates, as an amici attorney highlighted:

> Before officially entering the race, ... Presidential candidates including Jeb Bush, Scott Walker, and Martin O'Malley were active in creating "independent" super PACs and raising money for them. This allowed the super PACs to cover travel and staff expenses for these early candidates while the candidates themselves still claimed to only be "considering whether" to "consider" a run for president—thereby evading requirements that all exploratory activities must be paid for with campaign money subject to contribution limits and disclosure requirements. Once the race began, examples of coordination only became more brazen, as outside groups began to take on ever more responsibilities that had traditionally been handled by candidates' campaigns.[5]

Some super-PACs support just one candidate—a very close relationship[6]—yet super-PACs may

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text), as requiring "cognizable corruption" (Pls. Mem. 24 n.24 (described)) to justify restrictions. *Citizen United*'s holding is not "dicta" as amici suggest (Doc. 51 at 20 n.3), because the Court had to identify cognizable corruption to decide independent communications pose none. Anyway, *SpeechNow.org v. FEC*, 599 F.3d 686, 694-96 (D.C. Cir. 2010), recognized *Citizens United*'s "corruption" as controlling and "retract[ing]" broader definitions, *id.* at 694, which controls here.

[4] There is no constitutional difference between express-advocacy "independent expenditures" and independent-communication FEA because *independence* is the analytical key, not whether the speech expressly advocates. (*See* Pls. Mem. 31-33 (Doc. 33).)

[5] Trevor Potter, "Follow the Money" at 9-10 (April 21, 2016), http://www.campaignlegalcenter.org/sites/default/files/Trevor%20Potter%20-%20Goldstone%20Forum%20Lecture_0.pdf.

[6] And the primary purpose of such a super-PAC is to get candidates elected, in this case just one, which is what FEC argues makes parties special vehicles for large donors trying to ingratiate candidates (which is not quid-pro-quo corruption), yet super-PACs are non-corrupting, as a matter of law, because their independent communications are non-corrupting.

receive unlimited contributions, including from corporations/unions, for independent communications precisely because the independence eliminates quid-pro-quo risk. *SpeechNow*, 599 F.3d at 695 ("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 such as SpeechNow.") That does not turn on the nature of the speaker, but on the independence of the speech, which may exist despite an otherwise close relationship. So Plaintiffs also should be able to use nonfederal funds for their independent communications as super-PACs may.

If Plaintiffs cannot use nonfederal funds for independent-communications like corporations and super-PACs, speaker-identity discrimination will continue, Plaintiffs will be deprived of protected speech, and the public will be deprived of hearing it, *Citizens United*, 558 U.S. at 340-41:

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Facts

Because this is primarily a matter-of-law case—based on the non-corrupting nature of independent communications and donations used therefor—the material facts are simple, as set out in Plaintiffs Statement of Material Facts ("Pls. SMF") (Doc. 33). Essentially, Plaintiffs want to use nonfederal funds in their state accounts—including funds on hand and at the level of even $1—for independent-communication FEA[7] without the ban, burden, and chill of challenged pro-

[7] The as-applied challenges in Counts I(a), I(b), II(a), and II(b) all focus on independent *communications*. That focus on *communications* is the core of this case and easily decided based on the constitutional similarity of independent-communication FEA to independent expenditures that, as a matter of law, give rise to neither cognizable corruption or its appearance.

visions. These facts (i) allege straightforward First Amendment harms (banned/burdened/chilled expression/association), (ii) are credible (things state/local committees want to do), and (iii) are verified. (*See* Pls. SMF; Dismiss Opp'n (Doc. 54); Plaintiffs' Statement of Genuine Issues ("Pls. SGI").) FEC attempts to reframe Plaintiffs claims and the facts to eliminate standing and assert a non-cognizable just-do-something-else argument, (Dismiss Mem. (Doc. 40)), but that has been refuted, (Dismiss Opp'n (Doc. 54) (incorporated herein by reference)), and is further refuted in Plaintiffs' Statement of Genuine Issues.[8] Because some of FEC's erroneous factual assertions reappear in FEC's Memo, those are briefly addressed next.

FEC says "Plaintiffs' claims focus on individual donors as the only source of funds at issue" while admitting that "plaintiffs' discovery responses and deposition answers mention that they would like to use corporate contributions." (FEC Mem. 17-18 & n.4.) But the notion that Plaintiffs' "disclaim that request" is unsupported by the citations and has been thoroughly refuted. (Dismiss Opp'n 16-19, incorporated here by reference; *see also* Pls. SGI 28-31, ¶ 39, incorporated here by reference). FEC says Plaintiffs seek only to use nonfederal funds for FEA in an allocation scheme such as exists for non-FEA activity of state/local committees. (FEC Mem. 18.) But Plaintiffs have explained that (i) they want to use nonfederal funds for FEA, (ii) they expect FEC will reimpose the pre-BCRA allocation scheme on FEA if Plaintiffs succeed, but (iii) they would be pleased to pay for FEA entirely with nonfederal funds if able. (Pls. SGI 31, ¶¶ 41-42.)

[8] Plaintiffs all currently have substantial funds in their state accounts that were not raised consistent with the Fundraising Requirement and so cannot be used for their verified, intended independent-communication FEA, of which they provide examples that do not exhaust the scope of the stated intent, but that intended activity is banned, burdened, and chilled by the challenged provisions, readily providing the standing FEC disputes. And if one plaintiff has standing, the Court need not parse the FEC's convoluted arguments trying to eliminate another plaintiff. *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (where one party has standing, "we need not address the standing of the [other parties], whose position here is identical to the [party with standing].").

FEC suggests, without citation, that "Plaintiffs acknowledge that use of Levin funds would permit them to pay for an allocated portion of their desired activities with federal funds." (FEC Mem. 18). But Plaintiffs have repeatedly explained that (i) they could *not* use Levin funds for *many* intended activities (*see, e.g.*, Pls. Mem. 3 n.7), (ii) Plaintiffs do not use them due to complexity, burdens, and restrictions (Pls. SMF 10 n.6), (iii) most state/local committees do not use them (Pls. SGI ¶ 33) (vast host of state/local committees that exist versus few using Levin funds at some point), (iv) witnesses at FEC's own public forum called for the repeal or change of many FEA laws and regulations for reasons like Plaintiffs' (Pls. SMF ¶¶ 31-35), and (v) suggesting that Plaintiffs just use Levin funds instead of what they want to do is a forbidden just-do-something-else argument (*see* Dismiss Opp'n 24-28).

Plaintiffs agree that they do not challenge the $10,000/year contribution base limit (FEC Mem. 19), as they do not challenge a corporate contribution ban, but state accounts may have funds not compliant with the base limit or corporate-contribution ban under state law.

Plaintiffs agree that all counts are based largely on the *sea-change* in what is now "cognizable corruption"[9] (FEC Mem. 17), but they also base this case on the matter-of-law fact that independent communications "do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. at 357. The *confluence* here between the independent-communication and soft-money case lines requires FEC to carry its heavy burden of proving the that challenged provisions are "narrowly tailored," *McCutcheon*, 134 S.Ct. at 1456, to a cognizable anti-corruption interest. But it cannot because donations and disbursements for independent communications pose no risk of cognizable corruption.

As Plaintiffs explain in their Statement of Genuine Issues, most of FEC's fact assertions are

[9] *See* Pls. Mem. 24 n.24 (matter-of-law "cognizable corruption" described).

erroneous, immaterial and/or inadmissible because: (**i**) they are based on noncognizable corruption (e.g., gratitude, access, influence, benefit, etc. but no "direct exchange of an official act for money," *McCutcheon*, 134 S.Ct. at 1441, which happens when a "public official *receives a payment* in return for his agreement to perform specific official acts," *Evans v. United States*, 504 U.S. 255, 268 (1992) (emphasis added) (*see* Pls. Mem. 24 n.24 (matter-of-law cognizable corruption described); (**ii**) they assert facts about coordinated activity when independent activity is at issue here; (**iii**) they presume coordination, which presumption is forbidden by *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 619 (1996) ("*Colorado-I*"); (**iv**) they rely on inadmissible hearsay; (**v**) they call political parties inherently evil, when such a belief is widely rejected, including by FEC's own expert Krasno (Pls. SGI ¶ 5 (citing Krasno Dep. 77:10-16); (**vi**) they rely on FEC's expert Krasno, whose report and conclusions (a) are based on flawed foundations, (b) lack evidence of the "explicit exchange" he concedes is required for quid-pro-quo corruption, (c) depend on a brief dip in government disapproval that he admits is primarily attributable to 9/11, and (d) admittedly rely on speculation (forbidden in this context, *McCutcheon*, 134 S.Ct. at 1441 (rejecting "conjecture") (citing *Ariz. Free Enter. Club's Freedom PAC v. Bennet*, 131 S.Ct. 2806, 2825-26 (2011)) (Pls. SGI ¶ 108 (citing Krasno Dep. 100:14-102.21)); (**vii**) they feature national parties (which now can only have federal funds) and national-party transfers (which now can only be federal funds), not state/local committees; (**viii**) they depend on a poll that fails to present the issues here to those polled, which issues are matter-of-law not subject to even proper polling questions; (**ix**) none refutes the matter-of-law fact that donations and disbursements for independent communications do not pose cognizable corruption (including its appearance); and (**x**) none contradicts the holding in *Citizens United* that "[t]he McConnell record was 'over 100,000 pages' long, ... yet it 'does not have any direct examples of votes being

exchanged for ... expenditures" .... This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, quid pro quo corruption," 558 U.S. at 360 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).[10]

So when FEC describes its evidence of cognizable corruption (including its appearance) as "[o]verwhelming," (FEC Mem. 1), that is erroneous. FEC has no evidence of cognizable corruption (including its appearance) from FEA, independent FEA, and (especially) independent-communication FEA, just as *Citizens United* held that the *McConnell* record had none.

Argument

As set out in Plaintiffs' Memo, FEC cannot meets its burden because central to the present challenge is *independent-communication* FEA (Compl. ¶ 1 (emphasis added)):

> Plaintiffs challenge provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") ... restricting "federal election activity," 52 U.S.C. 30101(20) (definition), as unconstitutional under the First Amendment (I) as applied to (a) non-individualized, *independent communications* exhorting registering/voting and (b) non-individualized, *independent communications* by Internet; (II) as applied to (a) non-individualized, *independent communications* and (b) *such communications* from an *independent-communications*-only account ("ICA"); (III) as applied to all *independent* federal election activity; and (IV) facially.

Independence eliminates quid-pro-quo risk from communications. *Buckley*, 424 U.S. at 47. "[I]ndependent expenditures ... do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. at 357. So contributions for making independent expenditures may not be limited. *SpeechNow*, 599 F.3d at 696. Consequently, just as other political committees may establish a "Non-Contribution Account" ("NCA"),[11] political parties should be able to do the lesser thing of having an independent-communication account ("ICA") because (i) they are *capa-*

[10] This *Citizens United* statement is the *Court*'s holding, not just dissenters saying that the *McConnell* record lacked cognizable corruption.

[11] NCAs receive unlimited contributions to "financ[e] independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives." FEC, *FEC Statement on* Carey v. FEC (Oct. 5, 2011).

ble of making independent expenditures, *Colorado-I*, 518 U.S. at 619 (rejecting "Government's conclusive presumption that all party expenditures are 'coordinated'"),[12] (ii) their independent communications *also* pose no corruption risk, *id.* at 613-22, so there is no cognizable-corruption basis to restrict donations/disbursements for independent-communication FEA through an ICA. The use of an ICA in particular eliminates any "appearance of corruption" problems (about which FEC and its expert profess special, though unfounded, concern) because the ICA will comply with the Reporting Requirement (making it *extra*-transparent as to its donations/disbursements for independent-communication FEA), the funds it will receive will only be used for independent-communication FEA which everyone should know poses no risk of corruption or its appearance as a matter of law, and contributions to it will only be from individuals (eliminating any concerns FEC or others may have about corporate/union donations). Moreover, an ICA is simply individuals directly pooling their resources for making independent communications (clearly *speech*) that they could do separately in unlimited amounts, so that they must be allowed to engage in expressive association without the Ban and Fundraising Requirement. FEC, Advisory Opinion 2010-11 (Commonsense 10) (if entities can do independent expenditures separately, they must be allowed to pool their resources for effective advocacy by doing them together). Furthermore, the controlling constitutional analysis above readily reveals that Plaintiffs are also constitutionally entitled to similar protection for independent-communication and other independent FEA even if not done through an ICA, because the analytical key is the nature of the communications not the speaker. As set out in the Introduction, *supra*, doing otherwise is speaker-based discrimination.

[12] The Breyer plurality opinion (Breyer, J., joined by O'Connor & Souter, JJ.) states the holding, *Marks*, 430 U.S. at 193, so "plurality" indicators are sometimes omitted herein.

Absent the anti-corruption interest, the Ban must fall (along with the derivative Fundraising Requirement and Reporting Requirement requiring the same anti-corruption justification) *as applied* to an ICA, independent-communication FEA, and other independent activity. The provisions fail *facially* because the "corruption" used to uphold them in *McConnell* 540 U.S. at 168 ("officeholders are grateful for contributions to state and local parties"), was rejected in *Citizens United*, 558 U.S. at 360, and *McCutcheon*, 134 S.Ct. at 1441, and now-cognizable corruption (including its appearance) was absent in *McConnell*'s record, *Citizens United*, 558 U.S. at 360.

I. FEC Must Prove Narrow Tailoring to Cognizable Corruption.

This case is at the confluence of the independent-expenditure case line and the campaign-contribution case line, so there are sound arguments for applying strict scrutiny. (Pls. Mem. Part I.) For example, when persons donate to an ICA they are pooling their money for effective *speech together* (that each could do separately), not for anything else. This expressive association differs from *Buckley*'s description of a contribution enabling someone *else* to speak. 424 U.S. at 21. In other words, when giving to an ICA, an individual is not giving general funds to a state/local party that it *might* use for its *own* speech, rather, one is part of an expressive association of individuals that choose to pool resources in the ICA for effective speech that will be done by the ICA. The ICA is an association of donors, just as *Citizens United* held that a PAC is an association of donors. 558 U.S. at 337. So just as a PAC speaks for its donors, *id.*, so an ICA speaks for its donors.

But the challenged provisions are also unconstitutional under *McCutcheon*'s scrutiny. That scrutiny is not the weak version FEC portrays. Rather, *McCutcheon* held[13] that "closely drawn"

[13] FEC repeatedly portrays the controlling *McCutcheon* opinion as a mere "plurality" opinion, but that plurality opinion controls and thus states the holding, *Marks*, 430 U.S. at 193. The opinion was by four Justices, with Justice Thomas also arguing for reconsidering part of *Buckley*.

means "narrowly tailored," 134 S.Ct. at 1456-57 (emphasis added), not something looser:

> Quite apart from the foregoing, the aggregate limits violate the First Amendment because they are not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S., at 25. In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' ... that employs not necessarily the least restrictive means but ... a means *narrowly tailored* to achieve the desired objective." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Here, because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

And the only legitimate interest here is cognizable corruption (including its appearance). (*See* Pls. Mem. 24 n.24 (matter-of-law "cognizable corruption" described).)[14] So FEC must prove that the challenged provisions are narrowly tailored to cognizable corruption. But the relief sought in Plaintiffs' as-applied challenges, e.g., an ICA, is far better tailored than the one-size-fits-all approach of the challenged provisions. Here a Justice Scalia quote seems in order (given that FEC's briefing shows fondness for Scalia witticisms, e.g., "applesauce" and "jiggery pokery") about the

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[14] FEC argues for a disclosure interest to support the Reporting Requirement (FEC Mem. 50), but that would only be true if the information is constitutionally regulable to begin with. FEC has already acknowledged that the challenged provisions rise or fall together. (FEC's Three-Judge Court Opp'n 41 n.12 (Doc. 15).) If disclosure may be imposed on activity for which there is no other justification for regulation than disclosure, there would be no limit on the subjects of government-mandated disclosure. For example, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court upheld Mrs. McIntyre's right to engage in anonymous issue advocacy, so government could not then require her to file monthly reports on her check register based on a disclosure interest. "Disclosure" is no magic talisman that allows anything done in its name. This is clear from *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), which emphasizes that: "[d]isclosure chills speech," *id.* at 488; disclosure is a "value" that is "on an ineluctable collision course" with the right to speak, *id.*; because BCRA had a purpose of "broader disclosure does not mean that anything less than maximal disclosure is subversive," *id.* at 494; disclosure of this sort imposes an onerous burden, *id.* at 498; "the constitutional interests in privacy" are vital, *id.* at 499; disclosure regimes "'have their real bite when flushing small groups, political clubs, or solitary speakers into the limelight, or reducing them to silence," *id.* at 501 (citation omitted); "the Supreme Court's campaign finance jurisprudence subsists ... on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents. But 'the centre cannot hold,'" *id.* (citation omitted). Disclosure for its own sake fails as an interest.

challenged provisions: if narrow tailoring means sweeping in—for causing cognizable corruption—independent communications that merely exhort registering/voting (including online) or independent communications from an ICA, "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting). But ultimately even finer tailoring won't save the challenged provisions because independent communications pose no risk of corruption, so there is no interest to tailor to. Finally, FEC urges "deference" (FEC Mem. 20), but there was none in *McCutcheon*, and *Citizens United* said that deference must yield to the Constitution. 558 U.S. at 361.

II. The Independent-Communication Case Line and *McCutcheon* Control.

A. In a Confluence of Three Case Lines, the Underlying Issue Is Which Control(s).

This case presents a confluences of three case lines and analyses. (*See* Pls. Mem. Parts I-II.) Deciding which control(s) is the real issue. If Plaintiffs are correct as to which control, all FEC's erroneous, immaterial efforts to prove cognizable corruption where there is none may be set aside. (*See* Pls. SGI.) So this is a matter-of-law case.

First is the cognizable-corruption line, which traces the anti-corruption interest from *Buckley*'s quid-pro-quo corruption (424 U.S. 1) through *McConnell*'s gratitude/access/influence/benefit "corruption" (540 U.S. 93) to the retraction of that broad "corruption" and a return to *Buckley*'s narrow quid-pro-quo corruption in both *Citizen United*'s independent-communication context (558 U.S. 310) and *McCutcheon*'s contribution-restriction context (134 S.Ct. 1434). Based on this case line, only narrow quid-pro-quo corruption (including its appearance) is cognizable. (*See* Pls. Mem. 24 n.24 (matter-of-law "cognizable corruption" described).) FEC does not dispute that its only anti-corruption interest is narrow quid-pro-quo corruption (including its appearance), but frequently slips back into *McConnell*'s now-rejected broad "corruption" in its efforts

to prove the existence of an anti-corruption interest here. (*See* Pls. SGI.) So this line clearly controls what is cognizable corruption, which *McCutcheon* holds is the "only ... legitimate governmental interest for restricting campaign finances." 134 S.Ct. at 1450. And *McCutcheon* held that just reciting "large" donations, even if intended to provide access/gratitude/influence/benefit, does not suffice to prove cognizable corruption: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *Id.* at 1450. So whether this case is viewed as a campaign-contribution case, an independent-communication case, or both, FEC must prove "that [cognizable corruption] supports *each application*," *WRTL-II*, 551 U.S. at 478 (emphasis added), at issue. But as noted in the next case line, neither independent communications nor communications used therefor pose cognizable corruption (including its appearance).

Second is the independent-communication case line, which consistently holds—from *Buckley* (424 U.S. 1), through *Colorado-I* (518 U.S. 604) to *Citizens United* (558 U.S. 310), and *SpeechNow* (599 F.3d 686)—that independent communications do not cognizably benefit a candidate or pose any risk of corruption or its appearance, so that donations for independent communications also pose no risk of corruption or its appearance. (*See* Pls. Mem. Part II.) Because this case involves independent communications and donations used therefor, this case line clearly applies to show that FEC cannot meet its burden of proving cognizable corruption (including its appearance) as applied to independent communications and donations used therefor. And *McCutcheon* holds that mere "large" donations are not cognizable corruption, 134 S.Ct. at 1450, so even if donations used for independent communications are large, no cognizable corruption thereby arises, which of course is the controlling analysis underlying super-PACs and NCAs.

Third is the BCRA line, in which *McConnell facially* upheld BCRA's restrictions. But

BCRA's ban on corporate electioneering-communications yielded to speech protections in as-applied challenges in *WRTL-II*, 551 U.S. 449, then *Citizens United*, which relied on the First Amendment doctrines that (i) discrimination among speakers is prohibited, on which doctrine Plaintiffs also rely here, *see supra* Introduction, and (ii) independent communications "do not give rise to corruption or the appearance of corruption," 558 U.S. at 357, on which Plaintiffs also rely here. And BCRA's aggregate contribution limit yielded to speech and association protections in the as-applied challenge in *McCutcheon*. A subset of the BCRA line is the contribution-restriction, soft-money holding in *McConnell* that was followed in *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("*RNC-I*"), on the ground that the challenge presented the *same* "it's-not-really-federal" argument rejected in *McConnell*. But that is not so with the present challenge, which argues not that the activities are not "federal" enough for federal regulation but that, given the foregoing case lines and their analyses, FEC cannot prove cognizable corruption as applied to an ICA, independent communications, independent online communications merely exhorting registering/voting, donations for all those as-applied activities, and so on. *McConnell* did not consider such challenges and any reliance on mere language without constitutional analysis to say that *McConnell* forecloses such as-applied challenges if foreclosed by *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"). (*See* Pls. Mem. Part II.)

Note that *McConnell* is part of two case lines (#1 and #3). But as to #1, its broad "corruption" has been retracted by the Supreme Court in *Citizens United* and *McCutcheon.* So the central issue here is which case lines and constitutional analyses control. Do First Amendment protections control, as in the independent-communication case line, so that non-corrupting independent communications by state committees and their ICAs cannot be treated differently than constitutionally similar speech by super-PACs and NCAs? Or can the independent communication line be

brushed aside in fealty to *McConnell*'s facial-challenge language—an analysis based on now-rejected "corruption" and now-rejected deferential scrutiny, and an analysis that certainly did not considered narrow tailoring to cognizable corruption as applied to the situations in Counts 1-III? Plaintiffs argue that the case lines and analyses in #1 and #2 control, i.e., First Amendment analysis controls. FEC wants #3 (*McConnell* and *RNC-I*) to control (especially certain *language*).

B. FEC's Reliance on *McConnell* and *RNC-I* Fails FEC's Tailoring-Interest Burden.

Because the challenged provisions burden First Amendment rights (Pls. Mem. Part II.A), FEC bears the First Amendment duty to, at least, prove that the challenged provisions are narrowly tailored to cognizable corruption as applied to the situations in the as-applied challenges. *See supra* Part I. This requires it to disprove the controlling, matter-of-law holdings and analysis in case lines #1 and #2 above.[15]

FEC's first effort to steer this case into sole reliance on case line #3, is to largely ignore the other two case lines. In fact, FEC's list of "Court Challenges After BCRA" (FEC Mem. Part II) discusses *McConnell*, *RNC-I*, and *RNC-II*, but has *no* discussion of the post-BCRA cases in case line #1 and #2, i.e., *WRTL-I*, *WRTL-II*, *Citizens United*, and *McCutcheon*. So it first tries to divert attention by ignoring those controlling cases.

FEC tries to show that *McConnell* controls. In describing *McConnell*, it recites *McConnell*'s reliance on "close ties" between candidates and political parties, a "conduit" potential, and the

[15] FEC also tries to show some sort of "corruption" somewhere, but it is a general free-floating notion that political parties are naughty, they cannot do independent communications (wrong as a matter of law), they have plenty of money, national parties sometimes transfer federal funds, parties and candidates sometimes do fully legal coordination, some contributions seem linked to gratitude/access/influence/benefit (but not "explicit exchanges"), and so on, all of which is immaterial to cognizable corruption, the non-corrupting nature of independent communications and donations therefor, and the as-applied challenges here (or the facial one). *See supra* Facts. (S*ee also* Pls. SGI.)

potential to "'influence federal elections.'" (FEC Mem. 13 (citation omitted).) But it omits in that discussion the fact that, in *McConnell*, the "corrupting" power of close ties, conduit potential, and influencing-federal-elections potential all turn on the now-retracted broad interpretation of "corruption." Absent forbidden gratitude/access/influence/benefit "corruption," none of those things is true. Considered in reverse order, an "influence" on a federal election is not cognizable corruption after *Citizens United* and *McCutcheon* retracted *McConnell*'s broad "corruption." A true "conduit" concern requires a contribution to actually reach a candidate/official, *McCutcheon*, 134 S.Ct. at 1455, not just that some candidate may be grateful for, or benefit from, a donation or disbursement. And "close ties" do not cause donations to, or disbursements by, state and local committees to corrupt (*see* Pls. Mem. 24 n.24 ("cognizable corruption")), and are not a sufficient response to prove a risk of cognizable corruption as applied to *independent* communications, including from an ICA, because (i) *Colorado-I* rejected FEC's presumption that political-party communications are coordinated, despite close ties, and affirmed that political-party independent communications pose no risk of corruption or its appearance, 518 U.S. at 619; (ii) *McConnell* held that political parties may not be required to choose between coordinated and independent expenditures, 540 U.S. at 213-19; (iii) *Citizens United* held that independent communications "do not give rise to corruption or the appearance of corruption," 558 U.S. at 357; and *SpeechNow* held that, absent corruption in independent communications, donations for those communications pose no corruption risk, 599 F.3d at 696. Moreover, if "close ties" cause corruption where groups receive donations for, and make disbursements for, independent communications, then single-candidate super-PACs—with their very close ties to a candidate—*also* corrupt candidates, but they do not, as a matter of law. But if the constitutional analysis were to turn on close ties instead of cognizable corruption, then the challenged provisions would be underinclusive for not sweep-

ing in single-candidate super-PACs. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) (underinclusiveness undercuts government's asserted interest).

In arguing that this Court must follow *McConnell*, FEC argues that *McConnell* rejected the argument that some donations and their use were for *non*federal-election purposes. (FEC Mem. 25.) But that was the argument made and rejected in *RNC-I* and is inapplicable here. FEC argues that *McConnell* says large soft-money donations might create "indebtedness." (FEC Mem. 25-26.) But "indebtedness" is not cognizable corruption and independent communications (or funds donated therefor) do not cause cognizable corruption. *Citizens United*, 558 U.S. at 357-61; *McCutcheon*, 134 S. Ct. at 1441, 1450, 1454, 1460-61; *SpeechNow*, 599 F.3d at 696. FEC says that *McConnell* was concerned about possible "influence," "circumvention," and "corrupting activity" resulting from soft-money donations to political parties. (FEC Mem. 26.) But all that was premised on now-non-cognizable "corruption," and independent communications (or funds donated therefor) do not cause cognizable corruption. *Citizens United*, 558 U.S. at 357; *SpeechNow*, 599 F.3d at 696. And of course, FEC recites *McConnell*'s statement that it upheld soft-money restrictions "'regardless of how th[e] funds are used.'" (FEC Mem. 27-28 (quoting *McConnell*, 540 U.S. at 153).) But to rely on that language as controlling would be (i) to foreclose an as-applied challenge based on facial-opinion language in a case that was not considering later as-applied challenges and (ii) to make the exact mistake that the unanimous Supreme Court rejected in *WRTL-I*, 546 U.S. 410 (2006) (use of some seemingly broad language did not foreclose as-applied challenge, which Plaintiffs later won in *WRTL-II*). FEC argues that the recited language in *McConnell* was left "untouched" in subsequent cases. (FEC Mem. 27.) But of course portions of cases that are not *at issue* in subsequent litigation *are* left untouched, including broad language in a facial challenge, but that does not foreclose as-applied challenges, as *WRTL-I* held. After all,

the *whole* of *McConnell* was untouched until *WRTL-I*, *WRTL-II*, *Citizens United*, and *McCutcheon* touched different parts of the opinion. In each case, an argument that the portion of the opinion at issue was "untouched" would not have availed. Carried to its logical conclusion, the "untouched" argument would mean that no as-applied challenge to a facial holding could ever be brought (or reversal of precedent sought) because the opinion at issue would be "untouched." That is not the law.

FEC next tries to show that *RNC-I* controls. (FEC Mem. 14-15.) But in describing *RNC-I*, FEC shows why it does not control here. As FEC acknowledges, *RNC-I* was based on the idea that the as-applied activity was "insufficiently federal," and *McConnell* had already decided such an argument. (FEC Mem. 14 (citing 698 F. Supp. 2d at 157).) But that is not this case. FEC also notes that *RNC-I* recited the "close relationship" language of *McConnell* as creating a situation where quid-pro-quo corruption or its appearance might arise. (FEC Mem. 15.) Of course *McConnell* did not rely on *quid-pro-quo* corruption. In fact, it rejected Justice Kennedy's now-prevailing view that cognizable corruption only involves narrow quid-pro-quo corruption and actual contributions to candidates: "Justice Kennedy likewise takes too narrow a view of the appearance of corruption. He asserts that only those transactions with 'inherent corruption potential,' which he again limits to contributions directly to candidates," will be cognizable corruption, 540 U.S. at 153. Rather, *McConnell* relied on access and influence as "corruption," as stated next, *id.* at 153-54 (emphasis in original):

> As the record demonstrates, 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. Implicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence. It is no surprise then that purchasers of such access unabashedly admit that they are seeking to purchase just such influence.

So *McConnell*'s close-relation corruption potential was built on now rejected "corruption." As

McCutcheon put it, gratitude and access "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." 134 S.Ct. at 1441. Close relations are now welcome, not suspect. Apart from now-rejected gratitude/access/influence/benefit corruption, the close-relationship argument has no cognizable weight in constitutional analysis. And that is especially true in a case, like this one, where independent communications and donations used therefor lack any potential for cognizable corruption (including its appearance). As a matter of law, independent communications do not cognizably "benefit" a candidate, *Buckley*, 424 U.S. at 47 ("independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive").

From the foregoing, it is clear that *McConnell* and *RNC-I* do not control this as-applied challenge. Yet FEC portrays the sound constitutional analysis Plaintiffs present as a "funhouse mirror" reflection and "jiggery pokery," all built on "the faulty syllogism at the root of plaintiffs' claims," and asserts that "this case, like *McConnell*, is about soft money, not the right to make independent expenditures." (Mem. 28 (citations omitted).) That is not a convincing argument.

What FEC (studiously) ignores is that this Court has already recognized that "this case sits at the confluence of two currents of First Amendment jurisprudence concerning campaign finance." (Mem. Op. 8 (citation omitted).) One current involves campaign-finance restrictions (*id.*), on which the latest word is *McCutcheon*, 134 S.Ct. 1434. "The second jurisprudential current" (*id.* at 9) is the independent-communication case line, in which key cases are *Buckley*, 424 U.S. 1 (independent communications provide no cognizable benefit or corruption), *Colorado-I*, 518 U.S. 604 (coordination may not be presumed, political parties are capable of doing independent communications, and independent communications pose no corruption risk), *McConnell*, 540

U.S. 93 (political parties need not choose between coordinated and independent expenditures), *Citizens United v. FEC*, 558 U.S. 310 (as a matter of law independent communications pose no risk of corruption or its appearance), and *SpeechNow*, 599 F.3d 686 (given the non-corrupting nature of independent communications, donations therefor are non-corrupting), and *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011) (recognizing analysis allowing NCAs for same reasons).

So this case is about whether that second current, arising from *Buckley*'s headwaters controls, i.e., whether "[w]hat's sauce for the PAC geese ... should be sauce for the party ganders." (Mem. Op. 9.) FEC's simple declaration that this is a contribution-restriction case, and using pejorative terms for the possibility that it might also be an independent-communication case, does not carry its burden here. As discussed next, Plaintiffs' allegedly "faulty syllogism" is neither a "syllogism" nor "faulty" (being based on controlling cases).

C. The Independent-Communication Case Line and *McCutcheon* Control.

FEC recites as a "syllogism" Plaintiffs' argument to the effect that (i) only narrow quid-pro-quo corruption is cognizable; (ii) independence eliminates it; and (iii) political parties' independent communications are equally non-corrupting as those by super-PACs and NCAs. (FEC Mem. 28.) That argument is not a "syllogism," which is a term of art in logic for a three-part statement in which a conclusion is drawn from two assumed premises. More importantly, it is not "faulty." And though FEC at long last, and for about the only time in its briefing, joins issue on the core independent-communication analysis in this case, it immediately breaks off from the engagement and turns elsewhere. It does not show how those three statements are "faulty." It does disprove that only narrow quid-pro-quo corruption is cognizable (it cannot after *Citizens United*, *SpeechNow*, and *McCutcheon*). It does disprove that independence eliminates it (it cannot, given

the independent-communication case line). It does not disprove that political parties' independent communications are equally non-corrupting given that independence (it cannot, given the independent-communication case line).

Instead, FEC simply *asserts* that "Plaintiffs are wrong" because "this case ... is about soft money, not the right to make independent expenditures." (FEC Mem. 28.) That is a bare conclusion followed by a an erroneous strawman. Just asserting that this is a soft-money case does not eliminate the recognized confluence with the independent-communication current flowing here. And this case is *decidedly not* about "the right to make independent expenditures," which was settled for political parties in *Colorado-I*. So FEC fails its burden to show that this is *not* an independent-communication case in the long, controlling, constitutional analysis—from *Buckley* to *SpeechNow* and *Carey*—that allows super-PACs and NCAs to receive unlimited contributions (including from corporations/unions). That analysis is not "faulty," being comprised of controlling cases in what this Court called the "[t]he second jurisprudential current" (Mem. Op. 9), i.e., the independent-communication case line. Given that FEC has failed to show that this case is *not* in the independent-communication current, and Plaintiffs' showing that it *is*, for the obvious reason that they challenge the provision at issue as applied to independent-communication FEA, including from an ICA that is constitutionally like an NCA, this case must be analyzed under the independent-communication case line. And under the constitutional analysis of that case line, employing the same foundation and analytical superstructure here should allow state and local committees to operate an ICA that makes only independent-communication FEA funded by contributions only from individuals in compliance with state law (and applicable, non-challenged federal laws that also apply to super-PACs and NCAs, such as no foreign-national contributions). And that analysis should also allow state and local committees to use nonfederal funds in their

state accounts, including funds on hand and at the level of even $1, for independent-communication FEA and other independent FEA.

Because this case represents the confluence of two currents, *McCutcheon*'s current, controlling analysis in the contribution-restriction context is also important. *McCutcheon* provides this by establishing the sort of corruption (or appearance) currently cognizable in that context. What constitutes cognizable corruption in campaign-finance law is a third case line running through these cases. It is important because *McConnell*'s concept of gratitude/access/influence/benefit "corruption" was vital and foundational to all of its analysis in facially upholding the challenged provisions. So everything that FEC argues that *McConnell* said in upholding the challenged provisions facially relies on this broad definition of corruption, and without this broad "corruption" all those analytical statements and the holding itself collapses (though the facial holding only is at issue in Count IV because Counts I-III can be decided without confronting the facial holding). Of course, *McCutcheon* expressly, emphatically affirms *Citizens United*'s retraction of *McConnell*'s broad "corruption" and extends narrow quid-pro-quo corruption to govern the contribution-restriction context. 134 S.Ct. 1441, 1450-51. It holds that quid-pro-quo corruption requires a contribution to reach a candidate/officeholder: "In analyzing the base limits, *Buckley* made clear that the risk of corruption arises when an individual makes large contributions *to the candidate or officeholder himself*. 134 S.Ct. at 1460 (emphasis added).[16] But that never happens with

[16] So it comes as a surprise that FEC asserts that *McCutcheon* said "it would be corrupting to funnel money to a candidate 'for which the candidate feels *obligated*.'" (FEC Mem. 33 (emphasis in FEC's Memo) (quoting 134 S.Ct. at 1461)). But the cited passage readily reveals that FEC is again relying on *language* instead of constitutional analysis, the mistake for which the unanimous *WRTL-I* rejected a similar argument. The *McCutcheon* passage comes right after a full paragraph in which *McCutcheon* asserts that cognizable corruption occurs only when a contribution actually reaches a candidate, as just recited above, and then asserts this, 134 S.Ct. at 1461:

> Of course a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party, to party committees, and to PACs

disbursements for independent communications or donations made therefor, so neither independent communications nor donations used for them pose any risk of cognizable corruption (including its appearance).

Consequently, FEC must prove what it cannot, that independent communications and donations used for them pose a risk of cognizable corruption. Because the communications are independent, neither those communications nor donations for making them cause cognizable corruption under standard analysis in the independent-communication case line—as a matter of law.

III. FEC Fails Its Tailoring-Interest Burden.

Because the challenged provisions burden First Amendment rights, FEC has the burden to prove that they are (at least) narrowly tailored to preventing cognizable corruption (including its appearance). But if this case is analyzed in the independent-communication case line the independence of the communications eliminates any cognizable benefit to, or corruption of, a candidate, and has since *Buckley*, 424 U.S. at 47. So donations to an ICA for independent communications are no more corrupting than those made to an NCA for independent communications. And the possibility that donations to an ICA might be "large" does not matter because "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corrup-

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> supporting the party. But there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate—for which the candidate feels obligated—and money within the base limits given widely to a candidate's party—for which the candidate, like all other members of the party, feels grateful.

In the context, *McCutcheon* is discussing an "administrable line," not discussing the already established nature of quid-pro-quo corruption, which excludes any mere sense of "obligation" and instead requires a quid-pro-quo agreement. Moreover, *McCutcheon* is clearly referring to contributions actually reaching candidates (above the base level, at or below which Congress asserts no anti-corruption interest), which is not the case with disbursements for independent communications. So this *McCutcheon* language has no bearing here.

tion." *McCutcheon*, 134 S.Ct. at 1450. Just as a billionaire's huge contribution to a single-candidate super-PAC or NCA is non-corrupting, so a much more modest donation to an ICA is non-corrupting—all as a matter of law.

And if this case is analyzed as a contribution-restriction case, like *McCutcheon*, the same outcome results. FEC has the same burden, but again it cannot prove a governmental interest in preventing corruption (including its appearance) because of the fact that independent communications and contributions therefor are involved, and they are non-corrupting. The confluence is inescapable. As the just-cited *McCutcheon* quote says, there must be an effort to control an officeholders official actions—which *McCutcheon* makes clear must be by a quid-pro-quo-corruption agreement with contributions actually reaching a candidate/officeholder—for donations to pose any risk of cognizable corruption (including its appearance). That just does not happen in these as-applied challenges (or the facial one either because FEA all involves disbursements, not contributions to candidates).

Now, as noted in the Facts discussion, *supra*, and in Plaintiffs' Statement of Genuine Issues and Objections, FEC argues many things trying to prove "corruption," but as noted in the cited places it is all immaterial to the matter-of-law issues here. As just discussed, FEC fails its tailoring-interest burden because, as a matter of law, independent communications and contributions therefor pose no cognizable corruption.

Though the foregoing matter-of-law analysis resolves this case in Plaintiffs' favor, Plaintiffs next address some of FEC's efforts to prove cognizable corruption (including its appearance). As shall be shown, its effort to swim upstream against the confluence of the independent-communication and the cognizable-corruption currents fails.

FEC argues that state and local committees and their ICAs are different from super-PACs and

NCAs. (FEC Mem. 28-32.) Of course they are, but only in ways that are superficial to the core analysis here. The constitutional key fact here is that their *independent communications* are equally independent and so equally non-corrupting, which is the matter-of-law constitutional fact that FEC *cannot* escape. FEC has not disproved that.[17] So FEC's attempts to recite differences is ultimately unavailing.

For example, FEC asserts that political parties "'determine who will serve on legislative committees, elect congressional leadership or organize legislative caucuses.'" (FEC Mem. 29 (quoting *McConnell*, 540 U.S. at 188).) But while FEC recites *McConnell* for that purported fact, it is not correct that political parties do those things, though *members* of political parties do. (*See* Pls. SGI ¶¶ 53, 100 (FEC's conflicting statements, one accurate, the other wrong).) But that does not prove that the ICAs and independent communications of state and local committees are not equally independent with super-PACs and NCAs, and therefore non-corrupting.

FEC argues that FEA "'benefits'" candidates. (FEC Mem. 29 (citation omitted).) But "benefit" is not cognizable corruption after *Citizens United* and *McCutcheon*. And since *Buckley*, 424 U.S. at 47, *independent* communications and activity does not cognizably "benefit" a candidate. Moreover, super-PACs and NCAs regularly do VID, VR, and GOTV and other activities that

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[17] FEC does argue that "[d]espite plaintiffs' assurances that certain planned communications will not be coordinated ..., section 30125 is premised on the tight 'nexus' between national parties and federal officeholders ...." (FEC Mem. 29 (citation omitted).) But even if national parties were involved here, FEC's assertion is the very *presumption* of coordination that *Colorado-I* rejected when FEC said there that political parties could not make independent expenditures. 518 U.S. 604. *Colorado-I* expressly held that political parties are *capable* of making independent expenditures, so FEC may not change the as-applied nature of this case (as to independent communications and other independent FEA) by removing independence from the equation. And its evidentiary assertions nowhere establish that Plaintiffs are not fully capable, like all committees of political parties, of making independent expenditures. FEC makes a feeble attempt at some such proof by asserting that Plaintiffs have no plans for maintaining independence, which Plaintiffs dispute to the effect that they intend to follow all applicable laws and regulations governing coordination and independence, which is all that the law requires.

would be FEA for state and local committees, and those super-PACs and NCAs may do so with nonfederal funds (despite any perceived benefit) because their activities are independent.

FEC argues that because political parties seek to win elections they are susceptible to being used for "contributors who want to create a quid pro quo relationship with an officeholder." (FEC Mem. 30.) But this is wrong for several reasons. The recited passage from *Colorado-II*, was about *coordinated* spending, not independent, and independence eliminates corruption. The quoted passage from *Colorado-II* speaks of "obliged," which is not quid-pro-quo corruption, so FEC's use of "obliged" to try to establish "quid pro quo corruption" is erroneous. Independent communications pose no risk of cognizable corruption, as discussed at length above. (*See also* Pls. Mem. 24 n.24 ("cognizable corruption").) And super-PACs and NCAs also seek to win elections, often for just one candidate, yet that focus on winning elections does not make their independent-communications (and donations therefor) corrupting. This purported distinction fails.

FEC recites special benefits that political parties receive. (FEC Mem. 31.) But "'[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'" *Citizens United*, 558 U.S. at 351. Such benefits do not make their rights less compelling or their independent communications more corrupting. And of course corporations that engage in independent expenditures enjoy corporate benefits, but *Citizens United* expressly held that their independent communications "do not give rise to corruption or the appearance of corruption." *Id.* at 357.

FEC recites the potential to use Levin funds. (FEC Mem. 32.) But that is a just-do-something-else argument that must be rejected as it was in prior cases. (*See* Dismiss Opp'n 24-28.) And the vast majority of political committees do not make use of Levin funds for sound reasons articulated to FEC in its own public forum. *See supra* at 5.

FEC says that "Plaintiffs core argument" is that cognizable corruption has changed since *McConnell* and *RNC-I* rejected that argument. (FEC Mem. 32-33.) But Plaintiffs have *two* core arguments: (i) cognizable corruption has changed in both the expenditure and contribution context (the *McCutcheon* holding occurring after *RNC-I*) and (ii) independent communications (and donations therefor) pose no cognizable corruption (based on the independent-communication case line not at issue in *RNC-I*). *RNC-I* is not controlling. *See supra* at 17-18. But two currents in the confluence do control: (i) the cognizable-corruption current and (ii) the independent-communication current. And FEC's assertions about *RNC-I* ignore both those controlling currents and the different nature of the as-applied challenges here.

FEC again argues that this case is a challenge to the $10,000 base limit. (FEC Mem. 34.) But that has been rejected already in this case, including by the granting of a three-judge court in rejection of the notion that a FECA base limit is at issue.

FEC again relies on *McConnell*'s "regardless of how ... used" dictum. (FEC Mem. 34.) But that has already been shown to be non-controlling, mere *language* not present tailoring-interest analysis, and dependent on now-retracted "corruption." *See supra* at 16.

FEC recites *Buckley*'s approval of base limits based on the appearance of corruption with "large" contributions and tries to extract from that the notion that "large" donations are inherently corrupting. (FEC Mem. 34.) But that notion was rejected in *McCutcheon*: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S.Ct. at 1450. If, as a matter of law, contributions cannot create cognizable corruption just by being "large," they cannot create any cognizable *appearance* of cognizable corruption just by being "large." Anyway, *Buckley* expressly extracted independent communica-

tions from any such analysis, holding that they neither cognizably benefit nor corrupt a candidate. 424 U.S. at 47. And independent communications "do not give rise to corruption or the appearance of corruption," *Citizens United*, 558 U.S. at 357, so donations (even if "large) that are used for them are non-corrupting, *SpeechNow*, 599 F.3d at 696.

FEC argues that *McConnell* showed that national committees could "stretch their soft money" with transfers to state and local committees. (FEC Mem. 36.) But national committees no longer have soft money, and what they transfer is all federal funds. So transfers are immaterial to the issues here.

FEC recites that candidate Cassidy and staff raised funds into a joint fundraising account, some of it without LAGOP knowing about it at the time. (FEC Mem. 37.) But all work done with the Cassidy campaign was lawful under various laws and regulations (e.g., allowing joint fundraising accounts, coordination on exempt activities, and use of the statutorily allotted funds for coordinated spending). This has nothing to do with whether LAGOP can do independent communications, as to which no presumption of coordination may attach since *Colorado-I*, and *McConnell* held that Congress could not require political parties to choose between coordinated activity and independent expenditures, 540 U.S. at 93.

Yet FEC argues that "LAGOP is unaware of the circumstances in which [contributions to the joint fundraising account] were given," and "[i]t is thus easy to see how" a contribution "to LAGOP could be a quid for which the contributor extracts a quo from a candidate." (FEC Mem. 38.) Taking FEC's argument to its logical conclusion, all joint fundraising accounts with candidates must be banned because no one knows what unknown agreements might lie behind a contribution. And many other legal things in the election-law world should also be banned because some unknown quid-pro-quo corruption agreement might be involved somewhere. Even a sub-

base-limit contribution could theoretically be given as the result of an illicit quid-pro-quo corruption agreement, so perhaps those should be banned. But FEC cannot spin the *lack* of any evidence of a quid-pro-quo-corruption agreement into evidence for the existence, or potential existence, of quid-pro-quo corruption. Anyway, "cognizable corruption" involves a contribution *to a candidate* (Pls. Mem. 24 n.24, citing *McCutcheon*) not a state committee, so FEC's cloak-and-dagger scenario collapses for that reason alone.

FEC notes that donors have preferences, e.g., as to issues they support, that guide how they donate, and then baldly asserts: "Those motivations can certainly go beyond seeking mere 'influence' to seeking an exchange of funds for political favors." (FEC Mem. 38. (citing SOMFs that Plaintiffs dispute in their SGI).) The use of "can" highlights the speculation here. If persons actually engage in quid-pro-quo corruption, laws that will remain in existence if Plaintiffs succeed can be used to prosecute such persons. But to extrapolate from mere preferences to crimes is unfounded and erroneous.

FEC recites independent PASO ads as a "particular ... tool" for actual quid-pro-quo corruption. (FEC Mem. 38.) But as discussed repeatedly, an independent communication involves no contribution to a candidate, so it cannot constitute cognizable corruption (*see* Pls. Mem. 24 n.24), and its independence removes any potential for corruption or its appearance. Notably, an independent PASO ad is *most like* the express-advocacy ad that constitutes the protected "independent expenditures" that super-PACs and NCAs do all the time (and receive unlimited contributions to fund) without cognizable corruption (including its appearance). FEC is effectively saying that the *more* like a protected independent expenditure an ad is, the *less* it is protected. This is in the same genre, though in reverse, as its argument in *WRTL-II* that the controlling opinion described thus: "[T]he argument perversely maintains that the *less* an issue ad resembles express

advocacy, the more likely it is to be the functional equivalent of express advocacy. This 'heads I win, tails you lose' approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads ...." 551 U.S. at 471 (emphasis in original). Since independent PASO ads (though not express advocacy) are most like independent expenditures (because both name candidates),[18] they are constitutionally entitled to the same recognition of their non-corrupting nature as applies to independent expenditures. The independent-communication case line applies with full force to protect *independent*-communication FEA, including PASO ads.

FEC recites laws against "bribes and illegal gratuities" that "encompass[] payment made to a third party designated by the relevant federal official" for the notion that "a donor's provision of those funds is *itself* what can be traded for a candidate's quo." (FEC Mem. 39.) Of course this ignores the whole independent-communication case line (whereby neither independent communications nor donations therefor give rise to corruption or its appearance), and it ignores the definition of cognizable corruption (which requires a contribution to a candidate (Pls. Mem. 24 n.24 ("cognizable corruption"))). The fact that a cited law takes cognizance of something that cannot, as a matter of law, constitute cognizable corruption does not change the controlling analysis here.

FEC then recites "decades of evidence" that it claims meets its tailoring-interest burden. Space precludes responding to the assertions here, but Plaintiffs have responded to them extensively in their Statement of Genuine Issues and Objections, to which the Court is referred for responses to the purported evidence in FEC's Memo. As explained there (and *supra* in Facts), most of FEC's assertions are immaterial to the issues here, rely on non-cognizable corruption, are in-

[18] Despite naming a candidate, a PASO ad may be an issue ad under *WRTL-II*. *Id.* at 470 ("Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions.").

admissible hearsay, and so on. FEC's fundamental problem, of course, is that it is trying to generate cognizable facts in an essentially matter-of-law case.

Has FEC met its tailoring-interest burden? It has not. As set out in Plaintiffs opening Memo, the present Memo, and Plaintiffs' Statement of Genuine Issues and Objections, this is an essentially matter-of-law case involving a confluence of case lines. Because Plaintiffs' challenge is primarily brought as applied to independent communications, the independent-communication case line applies, along with the cognizable-corruption case line (which *McCutcheon* brought into the contribution-restriction case line). FEC has been unable to show that those currents of the confluence do not control this case. They do control it. Therefore, the same analysis that applies to super-PACS and NCAs must apply to ICAs and state and local committees' independent-communication FEA and other FEA, as well as funds used for such activity. And that means that Plaintiffs should receive all of their requested relief. To do otherwise would be to discriminate among speakers, which is forbidden as explained in the Introduction.

Conclusion

For the foregoing reasons and those stated in Plaintiffs' opening Memorandum, Plaintiffs' summary judgment motion should be granted and the FEC's should be denied.

Respectfully submitted,

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Certificate of Service

I certify that on May 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will notify:

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