IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 02-2052 (L) & 02-2053

NORTH CAROLINA RIGHT TO LIFE, INC., *et al.*
Plaintiffs-Appellees,

v.

LARRY LEAKE, *et al.*
Defendants-Appellants,

On Appeal from the United States District Court
for the Eastern District of North Carolina

MEMORANDUM OF THE CAMPAIGN LEGAL CENTER, DEMOCRACY 21, AND THE NATIONAL VOTING RIGHTS INSTITUTE AS AMICI CURIAE IN SUPPORT OF APPELLANTS

In the first round of litigation, both this Court and the District Court struck down North Carolina's limit on individual contributions to political committees that make only independent expenditures (IEPCs). 344 F.3d 418, 433-34; District Court Order of October 24, 2001 at 14a-30a. Amici submit that the Supreme Court's recent decision in *McConnell v. FEC*, 124 S.Ct. 619 (2003), undercuts this conclusion in two different ways.

I. *McConnell* Holds that Contributions Made for Independent Expenditures May Be Regulated

First, the Supreme Court made clear in *McConnell* that in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981)(*CalMed*), a prior case on which both this Court and the District Court prominently relied, it had actually upheld limits on contributions to independent expenditure political committees:

> [In *CalMed*], we upheld FECA's $ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 … limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, *but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures*.

124 S.Ct. at 665-66 n. 48 (emphasis added). As the last sentence states unmistakably, *CalMed* held that Congress could limit contributions to entities that would use them solely for independent expenditures. *McConnell* then made clear why: *CalMed* necessarily found that such contributions pose a danger of actual or apparent corruption. As the very next sentence in *McConnell* explains, *CalMed* could not have upheld FECA's broad limit on contributions to party and multicandidate committees

without necessarily deciding this point. With respect to party committees, the type of committee at issue in this portion of *McConnell* itself, the next sentence argues:

> If indeed the First Amendment prohibited Congress from regulating contributions to fund [express advocacy and numerous other noncoordinated expenditures], the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

Id. at 666 n. 48. In other words, if contributions ultimately used to make independent expenditures had no corruptive potential, the overall limit on contributions to multicandidate committees would have been unsustainable. Congress could have justified the limit only insofar as it remedied so-called "pass-through" corruption and much more narrowly tailored remedies, like "a strict limit on donations that could be used to fund candidate contributions," could have addressed that. Thus, the overall limit on contributions to multicandidate committees would have been unconstitutionally overbroad if contributions to IEPCs were sacrosanct. *McConnell*, then, makes clear that *CalMed* necessarily stands for two propositions that both this Court and the District Court rejected: (i) that contributions can corrupt independently of their ultimate use; and (ii) that a

state can limit contributions to political committees that the recipients would use to make independent expenditures.

McConnell's own treatment of FECA's soft money provisions reinforces both these *CalMed* holdings. If contributions that were eventually used as independent expenditures on federal elections posed no corruptive potential—if they were always and necessarily sacrosanct—then the Court would have had to strike down many of the soft money provisions it upheld in *McConnell*, particularly § 323(a), the "core" soft money provision. *Id*. at 659. Whereas FECA's contribution limits had previously applied to funds raised for the national parties' direct advocacy of federal candidates, §323(a) now subjects all funds raised by the national parties to the same contribution limits regardless of their ultimate use – whether for independent expenditures or even advertising that does not mention a candidate at all. Section 323(b) analogously prevents donors from contributing funds to state and local party committees to help finance "Federal election activity," 2 U.S.C.A. § 441i(b) (Supp. 2003), including voter registration, voter identification, and public communications promoting or opposing a clearly identified federal candidate. *See McConnell*, 124 S.Ct. at 671.

Independent expenditures in themselves have been afforded far greater First Amendment protection than coordinated expenditures and

direct candidate contributions. *See FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 442, 457-60 (2001)(*Colorado II*); *cf. Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996)(*Colorado I*)(opinion of Breyer, J.). Nevertheless, *McConnell* holds that contributions may be regulated whether ultimately used in coordination with, or independently of, candidates' campaigns. As an initial matter, *McConnell* applies deferential review because limits on contributions – including those ultimately used for independent expenditures – do not substantially infringe First Amendment rights of speech and association. *See McConnell*, 124 S.Ct. at 657 ("like the contribution limits we upheld in Buckley, § 323's restrictions have only a marginal impact on the ability of contributors, candidates, officeholders and parties to engage in effective political speech").

More fundamentally, the contribution's ultimate use did not determine its corruptive potential. Rather, the corruptive potential stemmed from the party's ability to give donors access to and influence over its candidates. 124 S.Ct. at 662-63 (influence), 664 (access and influence), 665(access). In upholding FECA's central soft money provision, then, *McConnell* necessarily found that contributions to party political committees can corrupt, even when used for independent expenditures.

The same analysis applies to *McConnell*'s treatment of FECA's ban on the use of soft money contributions by state and local party committees for federal election activities. Section 323(b) restricts the use of nonfederal funds by state and local party committees to help finance "Federal election activity." 2 U.S.C. § 441i(b)(1) (Supp. 2003). As the Court noted in *McConnell*,

> [t]he term "Federal election activity" encompasses four distinct categories of electioneering: (1) voter registration activity during the 120 days preceding a regularly scheduled federal election; (2) voter identification, get-out-the-vote (GOTV), and generic campaign activity that is "conducted in connection with an election in which a candidate for federal office appears on the ballot"; (3) any "public communication" that "refers to a clearly identified candidate for Federal office" and "promotes," "supports," "attacks," or "opposes" a candidate for that office; and (4) the services provided by a state committee employee who dedicates more than 25% of his or her time to "activities in connection with a Federal election." §§ 431(20)(A)(i)-(iv).

124 S.Ct. at 671. Significantly, none of these four categories necessarily involves contributions to candidates and categories 1, 2, and 3 necessarily do *not* unless there is coordination. Thus, if Congress could restrict the use of only those contributions to state and local party committees that the committees in turn contribute to candidates, § 323(b), just like § 323(a), would have necessarily been overbroad and unconstitutional. *McConnell* held, however, that Congress could restrict the use of *all* nonfederal contributions by state party committees "for the purpose of influencing

federal elections." *Id*. at 674. The reason was clear. Although these activities might not pose a threat of state and local parties themselves corrupting federal candidates, they would allow the contributors to corrupt through these committees. As the Court explained it,

> Congress … made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to §323(a)[, the national party committee ban,] by scrambling to find another way to purchase influence. It was neither novel nor implausible for Congress to conclude that political parties would react to §323(a) by directing soft-money contributions to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. …. Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

Id. at 673 (internal citations and quotation marks omitted). Section 323(b) is premised on the simple "judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat or corruption or the appearance of corruption." *Id*. at 674.

Contributions to political committees are equally capable of putting a candidate "in the debt of the contributor." Since an organization not under the control of a candidate must necessarily have the "major purpose" of nominating or electing candidates for federal office to qualify as a political committee, *Buckley v. Valeo*, 424 U.S. at 79, contributions to such an

organization, even more than those covered by § 323(b), will likely be used to benefit federal candidates. Regardless of whether the political committee actually uses the contributions for direct candidate contributions, coordinated expenditures, or independent expenditures, the donations create gratitude and debt to the donors. Moreover, those who make contributions to a political committee whose chief aim is to nominate or elect federal candidates often do so in an attempt to purchase influence. North Carolina's attempt to impose reasonable limits on such contributions in order to safeguard the integrity of the political process is constitutional because it is "'closely drawn' to match a 'sufficiently important interest.'" *McConnell*, 124 S. Ct. at 656 (quoting *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (quoting *Shrink Missouri*, 528 U.S. at 387-88)).

II. ***McConnell* Requires Reconsideration of Evidence Erroneously Rejected by the District Court**

McConnell undercuts this Court and the District Court's holding on IEPCs in another way. This Court held that North Carolina's limit on contributions to IEPCs was unconstitutional because the State had "failed to proffer sufficiently compelling evidence … demonstrat[ing] that there is a danger of corruption due to the presence of unchecked contributions to [IEPCs]." 344 F.3d at 434. The State, however, had actually proffered such

evidence at summary judgment. District Court order of October 24, 2001 at 25a-26a. It put forward evidence that, among other things, an advocacy group "threatened the legislative leadership that it would run advertisements [in] retaliation for votes against the hog industry in North Carolina." *Id.* at 25a.

The District Court rejected this evidence for a reason that *McConnell* clearly overturned. As the District Court reasoned:

> Defendants claim that this [evidence] supports a finding that allowing unlimited contributions to committees that will run such advertisements will encourage "corruption." However, in *Perry v. Bartlett*, the Fourth Circuit determined that the Farmers for Fairness group engaged solely in "issue advocacy," which is speech that is afforded the "broadest protection" under the First Amendment. *Perry v. Bartlett*, 231 F.3d 155, 158-59 (4th Cir. 2000)("While Farmers does make expenditures that may incidentally influence … an election, it does not in explicit words … advocate the election or defeat of a candidate."). Therefore, the Fourth Circuit held that the actions of Farmers for Fairness were not "corruptive," but, rather, constituted protected speech under the First Amendment.

Id. at 25a-26a. In other words, the District Court, following this Court in *Perry*, rejected the proferred evidence because it believed "explicit words … advocat[ing] the election or defeat of a candidate" were necessary to cause corruption. *McConnell* forcefully rejects this view. In upholding the "electioneering communication" provisions of the Bipartisan Campaign

Reform Act of 2002, the Supreme Court found that no "explicit words" were necessary:

> [T]he unmistakable lesson … is that [the] magic-words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. [The] express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system."

124 S.Ct. at 689. The District Court wrongly rejected the State's evidence because of the absence of "magic words." If for no other reason than this, the case should be remanded for reconsideration of these issues in light of the significant change in the law occasioned by *McConnell* and for the presentation of any additional facts that might be appropriate. Such a remand is especially appropriate where, as here, the case was disposed of below in summary judgment motions.

Conclusion

For the foregoing reasons, *amici* respectfully urge this Court to vacate the district court's decision and to remand the case to the District Court for reconsideration in light of the new legal standards the Supreme Court enunciated in *McConnell v. FEC*.

Respectfully submitted this __ day of July, 2004.

For the Campaign Legal Center:

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TREVOR POTTER
J. GERALD HEBERT
Campaign Legal Center, Inc.
1640 Rhode Island Avenue, NW
Suite 650
Washington, DC 20036
Tel.: (202) 736-2200
Fax: (202) 736-2222

DANIEL R. ORTIZ
University of Virginia School of Law
580 Massie Rd.
Charlottesville, VA 22903
Tel.: (434) 924-3127
Fax: (434) 982-2643

For Democracy 21:

FRED WERTHEIMER
Democracy 21
1825 I St., NW, Suite 400
Washington, DC 20006
Tel.: (202) 429-2008
Fax: (202) 293-2660

DONALD J. SIMON
Sonosky, Chambers, Sachse,
Endreson & Perry LLP
1425 K Street, Suite 600
Washington, DC 20005
Tel.: (202) 682-0240
Fax: (202) 682-0249

For the National Voting Rights Institute:

BONITA P. TENNERIELLO
National Voting Rights Institute
27 School Street
Boston, MA 02108
Tel.: (617) 624-3900
Fax: (617) 624-3911