No. 16-865

In the Supreme Court of the United States

REPUBLICAN PARTY OF LOUISIANA, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

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

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether *McConnell* v. *FEC*, 540 U.S. 93 (2003), and subsequent decisions foreclose appellants' facial and as-applied constitutional challenges to restrictions on the use and solicitation of funds for federal election activity by state and local political-party committees, 52 U.S.C. 30125(b) and (c) (Supp. II 2014), and associated disclosure requirements, 52 U.S.C. 30104(e)(2).

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OPINION BELOW

The opinion of the three-judge district court granting the Federal Election Commission's motion for summary judgment (J.S. App. 1a-23a) is not published in the *Federal Supplement* but is available at 2016 WL 6601420.

JURISDICTION

The judgment of the district court was entered on November 7, 2016. A notice of appeal was filed on November 14, 2016 (J.S. App. 25a-26a). On November 16, 2016, the Chief Justice extended the time within which to file a jurisdictional statement to and including January 8, 2017, and the jurisdictional statement was filed on January 6, 2017. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114 (52 U.S.C. 30110 note (Supp. II 2014)).

STATEMENT

1. Since 1907, federal law has imposed limits on donations to political-party committees for the purpose of influencing elections for federal office.

a. In 1907, Congress prohibited corporations from making a "money contribution" in connection with any federal election. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865. In the 1940s, Congress extended that prohibition to encompass labor unions as well. See *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982).

In 1940, in the midst of a scandal involving pressure on government contractors to buy books from the Democratic National Committee at hyperinflated prices, Congress established a limit of $5000 per year on individual contributions to any candidate for federal office, any committee "advocating" the election of such a candidate, or any national political party. Act of July 19, 1940, Pub. L. No. 76-753, § 13(a), 54 Stat. 770; see *Wagner* v. *FEC*, 793 F.3d 1, 11-12 (D.C. Cir. 2015) (en banc), cert. denied, 136 S. Ct. 895 (2016). Because that law applied only to national political-party committees, the general counsel of the Republican National Committee openly advised "donors desiring to give more than $5,000 to Republican candidates or committees" to give $5000 to a national committee and then direct additional amounts "to State or local committees." *Fletcher's Opinion on the Application of Hatch Act*, N.Y. Times, Aug. 4, 1940, at 2.

b. The Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (52 U.S.C. 3901 *et seq*. (Supp. II 2014)), established a more detailed framework of campaign-finance regulation that, *inter alia*, "ratified the earlier prohibition on the use of

corporate and union general treasury funds for political contributions and expenditures." *McConnell* v. *FEC*, 540 U.S. 93, 118 (2003). Shortly thereafter, however, Congress came to believe that "FECA's passage did not deter unseemly funding and campaign practices." *Ibid.* Congress documented its conclusion that Republican party committees were involved in funneling a portion of roughly $2 million in funds from the dairy industry to President Nixon's reelection campaign, after which President Nixon and his Attorney General (who had been his campaign manager) took actions favorable to that industry. *The Final Report of the Select Comm. on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. 615, 738 (1974); see *id.* at 1205, 1209 (views of Sen. Weicker).

Evidence of such practices "persuaded Congress to enact the Federal Election Campaign Act Amendments of 1974," Pub. L. No. 93-443, 88 Stat. 1263, which further regulated the financing of federal elections. *McConnell*, 540 U.S. at 118. The 1974 Amendments, *inter alia*, limited individual contributions to $1000 per election per candidate, which this Court subsequently upheld as constitutional in *Buckley* v. *Valeo*, 424 U.S. 1, 7, 12-38 (1976) (per curiam). Specific limits on individual contributions to national parties and to certain "other" political committees, including state and local party committees, were added to FECA shortly after the decision in *Buckley*. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 486.

c. FECA's contribution limits applied only to the subset of donations, known as "'federal' or 'hard' money," that are made for the purpose of influencing a

federal election. *McConnell*, 540 U.S. at 122. "Donations made solely for the purpose of influencing state or local elections," in contrast, were "unaffected by FECA's requirements and prohibitions." *Ibid.* "As a result, * * * federal law permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to federal candidates, to contribute 'nonfederal money'—also known as 'soft money'—to political parties for activities intended to influence state or local elections." *Id.* at 123.

Following the Court's decision in *Buckley*, "questions arose concerning the treatment of contributions intended to influence both federal and state elections." *McConnell*, 540 U.S. at 123. Beginning in 1977, regulations promulgated by the Federal Election Commission (FEC or Commission) interpreted federal law to permit national political parties and their state and local affiliates to "fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money." *McConnell*, 540 U.S. at 123; see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 196-199 (D.D.C.) (per curiam) (discussing Commission's regulations), aff'd in part and rev'd in part, 540 U.S. 93 (2003); see also 52 U.S.C. 30106(b)(1), 30107(a)(6) and (7), 30108, 30109, 30111(a)(8) and (d) (current codification of Commission's authority to enforce federal campaign-finance laws).

Over time, the concern arose that the existing regulatory regime allowed "parties and candidates to circumvent FECA's limitations on the source and amount of contributions in federal elections." *McConnell*, 540 U.S. at 126. According to some reports, political parties received and transferred hun-

dreds of millions of soft-money dollars from their national organizations to their state and local affiliates, which could spend the parties' funds on the same mixed-purpose activities but subject to more favorable allocation rules. See *id.* at 124, 131. In 1998, after an extensive investigation, the Senate Committee on Governmental Affairs issued a report on the influence that it believed soft money had on the electoral process. S. Rep. No. 167, 105th Cong., 2d Sess. 105-167 (1998) (Senate Report); see *McConnell*, 540 U.S. at 129. The Senate Report concluded that parties' ability to solicit and spend soft money had rendered FECA's source-and-amount limitations ineffective. See 540 U.S. at 129-132. The Senate Report "emphasized the role of state and local parties," asserting that such parties used soft-money funds transferred from the national parties to conduct purportedly nonfederal activities that "ultimately benefit[ed] federal candidates." *Id.* at 131 (brackets in original) (quoting Senate Report 4466).

d. In response, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, one of the central provisions of which was designed to regulate soft money. See *McConnell*, 540 U.S. at 132-133. BCRA Section 101 prohibits national political parties and their officers from soliciting, receiving, or disbursing soft money. 52 U.S.C. 30125(a). Section 101 also prohibits state and local parties from using soft money for "Federal election activity," 52 U.S.C. 30125(b)(1), subject to an exception that allows certain activities to be funded with a combination of hard money and additional donations of up to $10,000 per person (to the extent per-

mitted by relevant state law), 52 U.S.C. 30125(b)(2); see *McConnell*, 540 U.S. at 162-164.

BCRA defines the term "Federal election activity" to include (1) voter registration activity during the 120 days preceding a regularly scheduled federal election; (2) voter identification, get-out-the-vote, 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, district, or local committee employee who dedicates more than 25% of his or her time in a month to "activities in connection with a Federal election." 52 U.S.C. 30101(20)(A)(i)-(iv); see 52 U.S.C. 30101(20)(B) (specifying certain exclusions from the definition of "Federal election activity"). In addition to imposing limitations on directly using soft money for such activity, BCRA also bars all party entities from using soft money to raise funds for that activity. 52 U.S.C. 30125(c). And BCRA § 103(a), 116 Stat. 87, requires state and local committees to report their federal election activity if they spend at least $5000 on such activity in a calendar year. 52 U.S.C. 30104(e)(2).

BCRA does not impose any limits on political-party committees' expenditures of hard money. BCRA also raised FECA's limits on hard-money contributions to party committees, which now permit an individual to contribute up to $10,000 annually to state and local committees. BCRA § 102, 116 Stat. 87; 52 U.S.C. 30116(a)(1)(D).

2. This Court has rejected both facial and as-applied constitutional challenges to BCRA's soft-money provisions.

a. In *McConnell* v. *FEC*, *supra*, this Court upheld Title I of BCRA, including the soft-money limitations on state and local parties, against a facial constitutional challenge. 540 U.S. at 133-189. The Court determined, as a threshold matter, to "apply the less rigorous scrutiny applicable to contribution limits," rather than the more rigorous scrutiny applicable to limits on direct election-related expenditures, in reviewing the soft-money restrictions' constitutionality. *Id.* at 141. Under that approach, a contribution limit is "valid if it * * * [is] closely drawn to match a sufficiently important interest." *Id.* at 136 (citations and internal quotation marks omitted). The Court took the view that BCRA's restraints on the use of funds raised in excess of FECA's contribution limits are in substance contribution limits, not expenditure limits, because they "simply limit the source and individual amount of donations," and do not restrain political party committees from spending as much as they wish so long as they comply with those fundraising limits. *Id.* at 138-139. The Court accordingly viewed those restraints as "regulat[ing] contributions on the demand rather than the supply side," and deemed the fact "that Congress chose * * * to regulate contributions on the demand" side "irrelevant" in "determining the level of scrutiny." *Id.* at 138.

The Court held that the government's "strong interests in preventing corruption, and in particular the appearance of corruption," are "sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA."

McConnell, 540 U.S. at 156. Surveying the record that was before Congress when it enacted BCRA, the Court concluded that the "close connection and alignment of interests" between federal officeholders and the national political parties meant that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id.* at 155.

The Court further upheld the soft-money restrictions on state and local party committees. *McConnell*, 540 U.S. at 165-166; see *id.* at 161-173. As with the national party committees, the Court found that "the record demonstrates close ties between federal officeholders and the state and local committees of their parties," which "make[] state and local parties effective conduits for donors desiring to corrupt federal candidates and officeholders." *Id.* at 156 n.51. The Court also observed that the soft-money restrictions on state and local committees are "designed to foreclose wholesale evasion" of the national-party restrictions, which Congress "recognized * * * would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations." *Id.* at 161. "Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA," the Court concluded, "clearly qualifies as an important governmental interest." *Id.* at 165-166. And, after examining the four categories of federal election activity to which the soft-money limitations apply, the Court held that those limitations are "a closely drawn means of countering both corruption and the appearance of corruption." *Id.* at 167; see *id.* at 166-171.

b. In *Republican National Committee* v. *FEC*, 561 U.S. 1040 (2010), this Court summarily affirmed the decision of a three-judge district court upholding the constitutionality of BCRA's soft-money restrictions as applied to, *inter alia*, federal election activities by state and local party committees. See *Republican Nat'l Comm.* v. *FEC* 698 F. Supp. 2d 150, 160-162 (D.D.C.), aff'd, 561 U.S. 1040 (2010).

The district court (per Judge Kavanaugh) had rejected the argument, which the plaintiffs renewed in their appeal to this Court, that the rationale for *McConnell*'s soft-money holding is inconsistent with the Court's subsequent decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010). See *Republican Nat'l Comm.*, 698 F. Supp. 2d at 158; see, *e.g.*, J.S. at 2-3, *Republican Nat'l Comm.*, *supra* (No. 09-1287). The district court agreed with the plaintiffs "that *Citizens United* undermines any theory of limiting contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officeholders and candidates." 698 F. Supp. 2d at 158. The Court further held, however, that "*McConnell*'s decision to uphold the soft-money ban rested on something more specific: record evidence of the *selling* of *preferential access* to federal officeholders and candidates in exchange for soft-money contributions." *Ibid.* (citing *McConnell*, 540 U.S. at 153-154, and *Citizens United*, 558 U.S. at 360-361).

The district court in *Republican National Committee* also rejected an as-applied challenge, which was likewise renewed in this Court, to the soft-money restrictions on state and local parties. See 698

F. Supp. 2d at 160-162; see, *e.g.*, J.S. at 18, *Republican Nat'l Comm.*, *supra* (No. 09-1287). The plaintiffs contended that the soft-money limits could not constitutionally be applied to state- and local-party activities that were not "targeted to" federal elections, but instead touched on them only "incidentally." *Republican Nat'l Comm.*, 698 F. Supp. 2d at 160. The district court reasoned that *McConnell* itself had "squarely rejected" such claims, by "ma[king] clear that whether [BCRA's soft-money limits] can be constitutionally applied to a particular state or local party activity depends, not on whether the party's primary 'target' is federal, but on whether the activity would provide a direct benefit to federal candidates." *Id.* at 161, 162. The court noted in particular that *McConnell* had "examined each of the categories of activity that [BCRA] requires state and local parties to pay for with hard money" and had "found that expenditures in each category had a significant potential to 'directly assist' federal candidates." *Id.* at 161 (quoting *McConnell*, 540 U.S. at 167).

3. Appellants in this case are state and local Republican-party organizations in Louisiana. J.S. App. 5a. They allege an intent to engage in "independent" federal election activity that would not be coordinated with a federal candidate or campaign. *Id.* at 5a-6a. They brought suit against the FEC, raising facial and as-applied First Amendment challenges to BCRA's prohibitions on the use of soft money to conduct or to raise funds for such activity, 52 U.S.C. 30125(b) and (c), and its requirement to disclose federal election activity above a $5000 annual threshold, 52 U.S.C. 30104(e)(2). J.S. App. 5a. In accordance with the procedures for constitutional claims set forth

in Section 403(a)(3) of BCRA, 116 Stat. 113-114 (52 U.S.C. 30110 note), the case was assigned to a three-judge district court.

4. The district court entered summary judgment in favor of the Commission. J.S. App. 1a-23a. Although the record contained no evidence of any prospective individual contributions that the three appellants would be barred from accepting, the court held that the state-party appellant had standing to challenge the soft-money restrictions because it had received donations from corporations that it wished to use on federal election activity. *Id.* at 8a-11a. On the merits, the court concluded, "in line with" *Republican National Committee*, "that *McConnell* compels granting summary judgment to the FEC" on "both the facial and as applied claims." *Id.* at 11a. With respect to both claims, the district court focused on the constitutionality of 52 U.S.C. 30125(b)'s restrictions on the use of soft money for federal election activity. The court explained that appellants had presented no meaningful argument that the other two provisions they had challenged (the fundraising limitation and the disclosure requirement) would violate the First Amendment if Section 30125(b) did not. J.S. App. 14a-15a, 23a.

a. The district court concluded that "*McConnell*'s holding forecloses [appellants'] facial challenge." J.S. App. 13a. The court rejected appellants' contention that the standard-of-scrutiny holding in *McConnell* had been "superseded," *ibid.*, by this Court's subsequent decision in *McCutcheon* v. *FEC*, 134 S. Ct. 1434 (2014). The court observed that, although "the *McCutcheon* plurality struck down the aggregate contribution limits at issue [in that case] as an invalid restriction of speech, the plurality found no reason to

depart from the less rigorous standard long applied to contribution restrictions." J.S. App. 14a (internal citation omitted). The court also emphasized the *McCutcheon* plurality's statement that the Court's "holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about 'soft money.'" *Ibid.* (quoting *McCutcheon*, 134 S. Ct. at 1451 n.6).

b. The district court recognized that "*McConnell*'s rejection of a facial challenge to [Section 30125(b)] does not necessarily preclude the possibility of a successful as-applied challenge." J.S. App. 15a. The court found, however, that appellants' challenge to the application of the soft-money restrictions to putatively "independent" federal election activity was premised on arguments "incompatible with *McConnell*'s approach in rejecting the facial challenge" advanced in that case. *Id.* at 16a. The court viewed the "rejection of a comparable as-applied claim" in *Republican National Committee* to be "highly instructive on this score." *Id.* at 16a-17a.

The district court explained that *McConnell* had rejected the contention that the relevant restrictions "encompassed 'activities that cannot possibly corrupt or appear to corrupt federal officeholders.'" J.S. App. 16a (quoting *McConnell*, 540 U.S. at 166); see *id.* at 17a (citing *Republican Nat'l Comm.*, 698 F. Supp. 2d at 162). The court observed that *McConnell* had "canvassed the full range of" federal election activity as defined in BCRA and had determined that, because all the categories of such activity "confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." *Id.* at 16a (quoting *McConnell*,

540 U.S. at 168) (citation omitted); see *id.* at 17a (citing *Republican Nat'l Comm.*, 698 F. Supp. 2d at 162). The court found that the same risk existed "with regard to the independent [federal election activities] sought to be conducted by [appellants] in this case." *Id.* at 16a. The court reasoned that as in *Republican National Committee*, appellants "cannot 'deny that their proposed activities'—independent [federal election activity]—'would provide such a benefit'" to federal candidates. *Id.* at 17a (quoting *Republican Nat'l Comm.*, 698 F. Supp. 2d at 162).

c. The district court rejected appellants' contentions that *Citizens United* and *McCutcheon* had effectively overruled the soft-money holding of *McConnell*. J.S. App. 17a-20a. The court noted that the plurality opinion in *McCutcheon* had "specifically left intact '*McConnell*'s holding about soft money.'" *Id.* at 22a (quoting *McCutcheon*, 134 S. Ct. at 1451 n.6) (internal quotation marks omitted). The court recognized that *Citizens United* had "invalidated a ban on independent expenditures by corporations and labor unions" on the ground that "such independent expenditures, as a matter of law, do not give rise to the appearance or reality of *quid pro quo* corruption." *Id.* at 17a. It observed, however, that the decision in *Citizens United* had distinguished *McConnell* on the ground that *Citizens United* was "about independent expenditures, not soft money." *Id.* at 18a (quoting *Citizens United*, 558 U.S. at 360-361).

The district court explained that "*Citizens United*'s holding about independent expenditures did not displace *McConnell*'s recognition of the inherent capacity of soft-money contributions to create a risk of *quid pro quo* corruption or its appearance, regardless of

whether political parties ultimately spend those contributions independently of—or instead in coordination with—federal candidates and campaigns." J.S. App. 19a-20a. The court observed that, "[u]nder *McConnell*, the inducement occasioning the prospect of indebtedness on the part of a federal office holder is not the *spending* of soft money by a political party," but "instead * * * the *contribution* of soft money to the party in the first place." *Id.* at 18a. Like the district court in *Republican National Committee*, the district court here construed *McConnell* to uphold Congress's authority, in light of the "close relationship between parties and their officeholders and candidates," to regulate soft money contributions to political parties because they have "much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption." *Id.* at 19a (quoting *Republican Nat'l Comm.*, 698 F. Supp. 2d at 159).

ARGUMENT

The district court correctly held, in accord with its decision in *Republican National Committee* v. *FEC*, 698 F. Supp. 2d 150, 157-160 (D.D.C.), aff'd 561 U.S. 1040 (2010), that this Court's decision in *McConnell* v. *FEC*, 540 U.S. 93 (2003), forecloses appellants' facial and as-applied constitutional claims. Appellants' facial challenge is contrary to the square holding of *McConnell*, which this Court has not overruled, that BCRA's restrictions on soft-money donations to state and local political parties are facially valid under the First Amendment. And appellants' as-applied challenge presents "no salient distinction" from the claims rejected in *McConnell* and *Republican National Committee* (J.S. App. 2a). The appeal should there-

fore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.[1]

1. In *McConnell*, this Court applied the intermediate scrutiny it has long used in examining contribution limits to hold that BCRA's restrictions on soft-money donations to national, state, and local parties are justified by the government's anticorruption interests and therefore are constitutional. 540 U.S. at 156, 173; see *id.* at 134-142. The Court held that, "[g]iven th[e] close connection and alignment of interests" between federal officeholders and national parties, "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id.* at 155. The Court similarly held that "close ties between federal officeholders and the state and local committees of their parties * * * make[] state and local parties effective conduits for donors desiring to corrupt federal candidates and officeholders." *Id.* at 156 n.51.

The Court further explained that, "[l]ike the rest of Title I," BCRA's restrictions on state and local parties' use of soft money for federal election activity (currently codified at 52 U.S.C. 30125(b)) are "premised on Congress' judgment that if a large donation is

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[1] Appellants contend that the reasoning of this Court's decisions in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), and *McCutcheon* v. *FEC*, 134 S. Ct. 1434 (2014), undercuts *McConnell*'s justifications for upholding the soft-money restrictions on state and local parties. See J.S. 35-36. If that contention is rejected, appellants have not developed arguments or a record showing why *McConnell* should be overruled. This case therefore does not present an appropriate opportunity for the Court to reconsider its decision in *McConnell*.

capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption." *McConnell*, 540 U.S. at 167. The Court described Section 30125(b) as "narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption," namely "those contributions to state and local parties that can be used to benefit federal candidates directly." *Ibid.* Specifically, it found the law's coverage of "Federal election activity" as defined in BCRA to be "reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anticorruption interests to be served." *Ibid.*; see *id.* at 166-171. The Court further found that the restrictions also serve an anticircumvention interest, by "[p]reventing corrupting activity from shifting wholesale to state committees" in response to the limitations on national parties. *Id.* at 165-166.

2. As appellants recognize (J.S. 35-36), *McConnell* forecloses their facial challenge to 52 U.S.C. 30125(b) and (c). They acknowledge that *McConnell* "upheld the challenged [state-party soft-money] provisions facially." J.S. 35. Indeed, although the soft-money provisions they challenge serve "largely [to] reinforce" the soft-money limitations on national parties, which *McConnell* also upheld, 540 U.S. at 133, appellants do not directly challenge (J.S. 7-8) the national-party restrictions.[2]

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[2] Appellants do not dispute here that, if Section 30125(b)'s prohibition on state and local parties' use of soft money for federal election activity is constitutional, then BCRA's prohibition against their use of soft money to fundraise for such activity, 52 U.S.C. 30125(c), and its reporting requirements for expenditures on such

Instead, appellants urge the Court to invalidate the state-party soft-money provisions *in toto*. J.S. 35-36. Those provisions, they argue, should be "subject to strict scrutiny," rather than the "reduced level of scrutiny under which *McConnell* upheld" them. J.S. 18, 19 (capitalization altered). Appellants further contend that subsequent cases have undermined *McConnell*'s rationale for upholding the state-party soft-money provisions, by defining the type of corruption that can support contribution restrictions to include only *quid pro quo* corruption. J.S. 35-36. Appellants' arguments are foreclosed by this Court's case law.

a. Appellants contend that the soft-money restrictions should be subject to strict scrutiny because they "function as an expenditure limit." J.S. 21; see J.S. 18-21. As the district court correctly held (J.S. App. 13a), that argument is contrary to *McConnell*, which "ruled that all of the [soft-money restrictions] were contribution limits" and "thus applied 'closely drawn' scrutiny rather than strict scrutiny" to them all, *Republican Nat'l Comm.*, 698 F. Supp. 2d at 156 (quoting *McConnell*, 540 U.S. at 137-141).

While recognizing that "restrictions on campaign expenditures" are subject "to closer scrutiny than limits on campaign contributions," *McConnell*, 540 U.S. at 134, the *McConnell* Court rejected the plaintiffs' contention that BCRA Title I imposes an expenditure limit. The Court stated that, although the statute both sets contribution limits and restrains the use of funds raised in excess of those limits, the latter restriction is simply a contribution regulation imposed

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activity, 52 U.S.C. 30104(e)(2), are likewise constitutional. See J.S. 7-8; see also J.S. App. 14a-15a, 23a.

"on the demand rather than the supply side." *Id.* at 138; see *id.* at 161 ("The core of [Section 30125(b)] is a straightforward contribution regulation."). The Court concluded that BCRA "simply limit[s] the source and individual amount of donations"; it does not restrain political party committees from spending as much as they wish so long as they comply with those fundraising limits. *Id.* at 139. BCRA also leaves state and local party committees free to spend unlimited sums (however raised) on nonfederal activities. See *id.* at 139 n.41. The plurality opinion in *McCutcheon* v. *FEC*, 134 S. Ct. 1434 (2010), accordingly described the soft-money restrictions as an "extension of" FECA's base contribution limits, *id.* at 1451 n.6, which regulate "how much a donor may contribute to a particular candidate or committee," *id.* at 1443.

Appellants contend (J.S. 20) that, although Section 30125(b) takes the "form" of a contribution limit, a "functional analysis" would identify it as an expenditure limit because party committees would be able to raise and spend more in its absence. That reasoning is inconsistent with *McConnell*'s holding. Under that approach, every contribution limit would be viewed as an expenditure limit. Appellants' argument is thus at odds with the distinction between expenditure limits and contribution limits that the Court established in *Buckley* and numerous other cases. See *Buckley* v. *Valeo*, 424 U.S. 1, 20-22 (1976) (per curiam); see also *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 734-735 (2011); *Davis* v. *FEC*, 554 U.S. 724, 737 (2008); *FEC* v. *Beaumont*, 539 U.S. 146, 161-162 (2003); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-388 (2000);

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986).

b. Appellants contend (J.S. 21-26, 35-36) that the rationale for *McConnell*'s soft-money holding has been undermined by subsequent decisions of this Court. Decisions postdating *McConnell*, however, have explicitly disavowed any suggestion that *McConnell*'s soft-money holding is no longer good law. In *Citizens United* v. *FEC*, 558 U.S. 310 (2010), the Court invalidated a prohibition on independent expenditures by corporations, but it expressly distinguished the soft-money provisions at issue in *McConnell*, noting that *Citizens United* was "about independent expenditures, not soft money." *Id.* at 361. In *Republican National Committee*, the Court summarily affirmed a three-judge district court decision that had rejected a similar challenge to BCRA's soft-money restrictions. See pp. 9-10, *supra*. As the district court in *Republican National Committee* recognized, "*Citizens United* did not disturb *McConnell's* holding with respect to the constitutionality of BCRA's limits on contributions to political parties," and "*Citizens United* expressly left intact" *McConnell*'s holding applying intermediate rather than strict scrutiny to those provisions. 698 F. Supp. 2d at 153, 156. And in *McCutcheon*, *supra*, while invalidating an aggregate limit on total contributions by an individual, the plurality emphasized that its "holding * * * clearly does not overrule *McConnell*'s holding about 'soft money.'" 134 S. Ct. at 1451 n.6.

Appellants rely (J.S. 22-23) on the Court's description in *Citizens United* of the "sufficiently important governmental interest in preventing corruption or the appearance of corruption" recognized in *Buckley* as

"limited to *quid pro quo* corruption." *Citizens United*, 558 U.S. at 359. "That Latin phrase," the *McCutcheon* plurality explained, "captures the notion of a direct exchange of an official act for money," with the "hallmark of corruption" being the exchange of "dollars for political favors." 134 S. Ct. at 1441 (citation omitted). "Ingratiation and access," the *Citizens United* Court stated, "are not corruption." 558 U.S. at 360.

Although appellants view those statements as implicitly overruling *McConnell*, the relevant decisions disavow any such intent. As noted above, the *McCutcheon* plurality described the soft-money restrictions at issue in *McConnell* as an "extension," 134 S. Ct. at 1451 n.6, of the base contribution limits that the Court has "upheld as serving the permissible objective of combatting corruption," *id.* at 1442. And in the context of the independent-expenditure question before the Court in *Citizens United*, the statement that "[i]ngratiation and access * * * are not corruption," 558 U.S. at 360, simply reflects the Court's determination that an elected representative does not behave corruptly by feeling greater sympathy for, or giving increased access to, persons who publicly advocate on his behalf.

c. The Court's decision in *McConnell* also explained that the "special relationship and unity of interest" between national parties and federal candidates and officeholders had "placed national parties in a unique position * * * to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" 540 U.S. at 145 (quoting *Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 452). The Court accordingly found "substantial evidence to support Congress' determination that large soft-

money contributions to national political parties give rise to corruption and the appearance of corruption." *Id.* at 154. The Court did not view the risk of corruption to be confined to expenditures that are coordinated with a candidate, but instead stated that "soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id.* at 155. And the Court declined to disturb Congress's determination, "based on the evidence before it," that "state committees function as an alternative avenue for precisely the same corrupting forces." *Id.* at 164.

As the district court recognized (J.S. App. 18a-20a), the Court's reasoning in *McConnell* relied upon a view that party organizations are connected to their candidates in a way that other political committees are not. The Court in *McConnell* rejected an argument that Title I of BCRA "discriminates against political parties in favor of special interest groups," in violation of constitutional equal-protection principles. 540 U.S. at 187; see *id.* at 187-189. The Court held that Congress "is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." *Id.* at 188. "Political parties have influence and power in the Legislature that vastly exceeds that of any interest group," as they "select slates of candidates for elections," "determine who will serve on legislative committees," "elect congressional leadership," and "organize legislative caucuses." *Ibid.* More generally, "party affiliation is the primary way by which voters identify candidates," and "parties in turn have special

access to and relationships with federal officeholders." *Ibid.*

3. In light of this Court's decision in *McConnell*, as well as its subsequent decisions not to revisit *McConnell*'s soft-money holdings, the district court correctly held that Section 30125(b) is constitutional as applied to their particular federal election activity under this Court's precedents.

a. As the district court recognized (J.S. App. 16a), appellants' as-applied challenge "is incompatible with *McConnell*'s approach in rejecting the facial challenge" raised in that case. *McConnell* "canvassed the full range of activity constituting" federal election activity under BCRA and "'concluded that because all of those activities confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption.'" *Ibid.* (quoting *Republican Nat'l Comm.*, 698 F. Supp. 2d at 161-162) (citation and internal quotation marks omitted). Accordingly, appellants here, like the plaintiffs in *Republican National Committee*, "cannot 'deny that their proposed activities,'" which meet the statutory definition of federal election activity, "'would provide such a benefit'" and can be restricted based on the government's compelling interests in combating corruption and its appearance. *Id.* at 17a (quoting *Republican Nat'l Comm.*, 698 F. Supp. 2d at 162).

b. Appellants are wrong in suggesting (J.S. 12-17, 26-35) that *McConnell*'s rationale does not extend to political parties' "independent" federal election activities that are not coordinated with a candidate. As the district court correctly explained (J.S. App. 18a), *McConnell* described "the potential *quid*" in the ex-

changes prohibited by Title I of BCRA not as "the *spending* of soft money by a political party," but instead as "the *contribution* of soft money to the party in the first place." The Court in *McConnell* concluded that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used*." 540 U.S. at 155 (emphasis added).

The Court reached a similar conclusion in respect to soft-money donations to state and local parties that may be used for federal election activity. The Court found that "the record demonstrates close ties between federal officeholders and the state and local committees of their parties" that "make[] state and local parties effective conduits for donors desiring to corrupt federal candidates and officeholders." *McConnell*, 540 U.S. at 156 n.51. The Court took note of record evidence demonstrating that "candidates * * * ask donors who have reached the limit on their direct contributions to donate to state committees." *Id.* at 164. And it rejected the argument that Section 30125(b)'s restriction on the use of soft money by state and local parties "represents a new brand of pervasive federal regulation of state-focused electioneering activities that cannot possibly corrupt or appear to corrupt federal officeholders." *Id.* at 166.

Examining each of the categories of "Federal election activity," 52 U.S.C. 30101(20)(A), as to which the use of soft money is restricted, *McConnell* found that a donation applied to any of them can "be used to benefit federal candidates directly." 540 U.S. at 167; see *id.* at 167-171. First, it found that "voter registration, voter identification, [get-out-the-vote efforts],

and generic campaign activity all confer substantial benefits on federal candidates" because those candidates are directly advantaged by increases in the number and enthusiasm of party-affiliated voters. *Id.* at 167-168; see 52 U.S.C. 30101(20)(A)(i) and (ii). Second, it found that "'[p]ublic communications' that promote or attack a candidate for federal office * * * undoubtedly have a dramatic effect on federal elections." *McConnell*, 540 U.S. at 169 (citation omitted); see *id.* at 170 ("The record on this score could scarcely be more abundant."); see also 52 U.S.C. 30101(20)(A)(iii). Finally, it found that retaining an "employee spending more than 25% of his or her compensated time on activities in connection with a federal election" allows "for the equivalent of a full-time employee engaged in federal electioneering, by the simple expedient of dividing the federal workload among multiple employees." *McConnell*, 540 U.S. at 170-171; see 52 U.S.C. 30101(20)(A)(iv).

The Court's analysis of the potential of soft-money donations used for particular activities to corrupt, or appear to corrupt, federal candidates, did not depend on the premise that such activity would be coordinated with a candidate's own campaign. Rather, although the definition of "Federal election activity" contains no coordination requirement, the Court held that BCRA's limitations on state and local parties' use of soft money for such activity are "reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anticorruption interests to be served." *McConnell*, 540 U.S. at 167; see *id.* at 152 (rejecting the view that the interest in preventing corruption can justify, at most, regulation of "contributions made directly to,

contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate"). The Court concluded that a federal candidate affiliated with a party will enjoy the benefits of a state or local committee's federal election activity, such as increased turnout of party voters, even if that activity is not coordinated with the candidate. See *Republican Nat'l Comm.*, 698 F. Supp. 2d at 162 ("The Supreme Court made clear [in *McConnell*] that whether [Section 30125(b)] can be constitutionally applied to a particular state or local party activity depends * * * on whether the activity would provide a direct benefit to federal candidates."). All of this forecloses appellants' challenges here.

CONCLUSION

This case is governed by precedent that this Court has declined to overrule. As the district court concluded in both *Republican National Committee* and below, that precedent forecloses appellants' claims. Accordingly, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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