UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
FEDERAL ELECTION COMMISSION,	)	MOTION TO DISMISS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Defendant Federal Election Commission respectfully moves the Court for an order dismissing this action for failure to state a claim on which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A memorandum in support of this motion and a proposed order are attached.

Respectfully submitted,

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FEDERAL ELECTION COMMISSION, Defendant.	)	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Federal Election Commission ("Commission") hereby submits this memorandum in support of its motion to dismiss this action in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Republican National Committee ("RNC"), Robert M. (Mike) Duncan, and the California Republican Party ("CRP") asserted, argued, and lost causes of action that encompass those that they now assert here, and these Plaintiffs are therefore barred by *res judicata* from attempting to relitigate their claims. Plaintiff Republican Party of San Diego County ("RPSD"), although not a party to *McConnell*, premises its claims on legal grounds that the Supreme Court rejected in that case as a matter of law. Accordingly, Plaintiffs' complaint should be dismissed in its entirety for failure to state a claim on which relief can be granted.

I. STATUTORY AND PROCEDURAL BACKGROUND

A. The Bipartisan Campaign Reform Act of 2002

In 1907, Congress prohibited corporations from making any monetary contribution in connection with any federal election. *McConnell*, 540 U.S. at 115. Over the years, Congress

gradually refined the manner in which it responded to concerns about the "'political potentialities of wealth'" and their "'untoward consequences for the democratic process,'" *id.* at 116 (quoting *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 577-78 (1957)), first by extending the definition of "contribution" to include "anything of value," *id*., and then by extending the limit to encompass labor unions. *Id*. at 116-17. Even these expanded provisions, however, "did not deter unseemly fundraising and campaign practices. Evidence of those practices persuaded Congress to enact the Federal Election Campaign Act ["FECA"] Amendments of 1974." *Id*. at 118. The 1974 Amendments, *inter alia*, limited individuals to contributing $1,000 per election per candidate and an aggregate of $25,000 each year. *See Buckley v. Valeo*, 424 U.S. 1, 7 (1976). The constitutionality of these limits was upheld in *Buckley*. *See id*. at 12-38.[1]

FECA's "source-and-amount limitations" refer to, *inter alia*, the prohibition on corporate and labor union contributions and the dollar limits on individual contributions. *See McConnell*, 540 U.S. at 122. Funds raised pursuant to the source-and-amount limitations are known as "federal funds" or "hard money," while funds raised outside these limitations — *i.e.*, funds raised from corporate or union sources or in excess of the contribution limits — are known as "non-federal funds" or "soft money."

Although FECA prohibited any donation of soft money for the purpose of influencing any federal election, "[d]onations made solely for the purpose of influencing state or local elections [were] . . . unaffected by FECA's requirements and prohibitions." *McConnell*, 540 U.S. at 122. The question that arose under this statutory scheme, therefore, was how to treat

[1] As of the 2009-2010 election cycle, the individual contribution limits had been raised to $2,400 per election per candidate, $30,400 per national party per year, and $115,500 in the aggregate for the two-year election cycle. *See* FEC, *Contribution Limits 2009-2010*, http://www.fec.gov/pages/brochures/contriblimits.shtml (last visited Jan. 26, 2009).

donations to entities, such as national political parties, that engage in both federal and non-federal activity. From 1977 to 1995, the Commission promulgated a series of regulations permitting the national political parties and their state 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; *McConnell v. FEC*, 251 F. Supp. 2d 176, 196-99 (D.D.C. 2003) (discussing Commission's regulations). Pursuant to these "allocation" regulations, political parties accumulated and transferred hundreds of millions of soft-money dollars from their national organizations to their state and local affiliates, which were subject to more favorable allocation rules. *See McConnell*, 540 U.S. at 124. The national parties also spent hundreds of millions of soft-money dollars themselves — including $498 million in the 2000 election cycle alone — on putatively mixed-use activities, such as "legislative advocacy media advertisements." *Id*. at 123-24 (quoting FEC Advisory Op. 1995-25). Federal candidates, although prohibited by law from receiving soft money, directly solicited soft-money donations to their own national and state parties, and these candidates provided lucrative benefits and access to the highest government officials in exchange for the largest donations. *Id*. at 125, 130-31. All of this soft money, by definition, was donated either by a corporation, by a labor union, or by an individual who had exceeded his or her contribution limit. "The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id*. at 126.

In 1998, after an extensive investigation, the Senate Committee on Governmental Affairs issued a report detailing the influence that soft money had come to wield in the electoral process. *Id*. at 129; S. Rep. No. 105-167 (1998). The report concluded that the parties' ability to solicit and spend soft money, particularly on "issue advertising designed to influence federal elections,"

had decimated FECA's source-and-amount limitations. *See McConnell*, 540 U.S. at 129-32. The report also noted that state and local parties had played a crucial role in the soft-money process, as the national parties had made a practice of transferring funds to the state and local parties to conduct putatively non-federal activities "'that in fact ultimately benefit[ed] federal candidates.'" *Id*. at 131 (quoting S. Rep. 105-167 at 4466 (alteration in original)). In sum, the national, state, and local political parties, as well as federal candidates themselves, had all become players in a system that was designed to evade FECA's contribution limits and that bestowed on large and corporate donors the corrupting influence of which FECA was intended to deprive them.

In response to the conduct detailed in the Senate report and similar conduct that continued in relation to subsequent elections, Congress passed and the President signed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. BCRA is "the most recent federal enactment designed 'to purge national politics of . . . the pernicious influence of "big money" campaign contributions.'" *McConnell*, 540 U.S. at 115 (quoting *United Auto. Workers*, 352 U.S. at 572). Title I of BCRA, entitled "Reduction of Special Interest Influence," closed the soft-money loophole. Specifically, BCRA section 101(a) prohibited national political parties and their officers from soliciting, receiving, or disbursing soft money. BCRA § 101(a) (codified at 2 U.S.C. § 441i(a)); *McConnell*, 540 U.S. at 133 ("[Section 101(a)] takes national parties out of the soft-money business."). With one notable exception,[2] BCRA

[2] In the "Levin Amendment," Congress provided an exception to the requirement that state, district, and local party committees spend only federal funds for certain "Federal election activity." *See McConnell*, 540 U.S. at 162-64; 2 U.S.C. § 441i(b)(2); 11 C.F.R. §§ 300.2(i), 300.31, 300.32. Under the Amendment, the federal election activity described in 2 U.S.C. § 431(20)(A)(i) & (ii) can be financed by state and local party committees with either federal funds or a combination of federal and "Levin funds." Individuals can donate as much as $10,000 per year in Levin funds to a state or local political party.

section 101(b) also prohibited state and local parties from receiving soft money for "federal election activity." 2 U.S.C. § 441i(b).

Federal election activity, in relevant part, was defined as:

> (i) voter registration activity during the period . . . 120 days before . . . a regularly scheduled Federal election . . . ;
>
> (ii) voter identification, get-out-the-vote activity, or generic campaign activity[3] conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot); [or]
>
> (iii) a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports . . . or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) . . . .

2 U.S.C. § 431(20)(A)(i)-(iii). Through these provisions, BCRA eliminated the receipt of soft money by national political party committees and the receipt of soft money by state and local parties for federal election activity. State and local parties remain free to receive funds under applicable state and local law for all other activities, and all political parties remain free to spend an unlimited amount of hard money for any activity.

B. *McConnell v. FEC*

Immediately after BCRA was passed, eleven complaints challenging the Act's constitutionality were filed in this Court. One such complaint was *Republican National Committee v. FEC*, which named as plaintiffs the RNC, Mike Duncan, and several state and local party affiliates. *Republican Nat'l Comm. v. FEC*, Compl., Civ. No. 02-874 (D.D.C. filed May 7, 2002) (appended hereto as Exhibit 1); *see also McConnell*, 251 F. Supp. 2d at 220, 225. Another

[3] "Generic campaign activity" is "campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate." 2 U.S.C. § 431(21).

complaint was filed jointly by the CRP and the California Democratic Party. *Cal. Democratic Party v. FEC*, Compl., Civ. No. 02-875 (D.D.C. filed May 7, 2002) (appended hereto as Exhibit 2); *see also McConnell*, 251 F. Supp. 2d at 220, 225. Together, the complaints challenged, *inter alia*, the constitutionality of BCRA Title I's prohibition on federal parties' receipt of soft money and state parties' receipt of soft money to engage in federal election activity. *See infra* Part II.B.1.

All of the BCRA complaints were consolidated before this Court with *McConnell v. FEC*, Civ. No. 02-582 (D.D.C.). After expedited discovery, all parties filed cross motions for judgment. *See infra* Part II.B. In their respective briefs, the RNC, Duncan, and the CRP argued that Title I unconstitutionally limited the national and local parties' ability to engage in activities that were not intended to influence federal elections. *Id*. On May 1, 2003, this Court issued an opinion that, in large part, agreed with the plaintiffs and struck down much of BCRA Title I as unconstitutional. *See McConnell*, 251 F. Supp. 2d at 184, 187 (summarizing holdings). Specifically, this Court held that the soft-money provisions in BCRA subsections 101(a) and 101(b) were unconstitutional in all respects, except for the prohibition on national or state parties' receipt of soft money for "public communications," as described in subparagraph (iii) of the definition of federal election activity. *See id*.

On direct appeal to the Supreme Court pursuant to BCRA section 403, the RNC, Duncan, and the CRP argued in favor of upholding the district court's rulings striking down Title I in light of the parties' receipt and disbursement of soft money for putatively non-federal activities. *See infra* Part II.B. The Supreme Court, however, rejected the plaintiffs' argument, reversed the district court, and upheld BCRA Title I in its entirety. *See McConnell*, 540 U.S. at 188-89. The Court held that BCRA section 101(a) was constitutional because "there [was] 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, and that the state and local party limits were also "closely drawn to match the important governmental interests of preventing corruption and the appearance of corruption," *id*. at 173. *See infra* Part II.B.

II. ARGUMENT

A. Standard of Review

Dismissal of a complaint is appropriate where, accepting the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) (holding dismissal appropriate "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief"); *Kassem v. Wash. Hosp. Ctr*., 513 F.3d 251, 253 (D.C. Cir. 2008) (citing *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)). In deciding a motion to dismiss, the court may consider the complaint itself and "'matters about which the Court may take judicial notice.'" *Camp v. Kollen*, 567 F. Supp. 2d 170, 172 (D.D.C. 2008) (quoting *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002)). Matters appropriate for judicial notice include complaints, filings, and decisions in prior court proceedings. *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (taking judicial notice of prior proceedings); *see also Tembec Inc. v. United States*, 570 F. Supp. 2d 137, 138-42 (D.D.C. 2008) (examining filings and judgment in prior action in granting motion to dismiss for *res judicata*); *Camp*, 567 F. Supp. 2d at 172-74 & n.2 (same); *Nader v. Democratic Nat'l Comm.*, --- F. Supp. 2d ---, Civ. No. 08-589, 2008 WL 5273109, at *5 (D.D.C. Dec. 22, 2008) (holding that *res judicata* arguments are properly raised in Rule 12(b)(6) motion).

B. The Claims of the RNC, Duncan, and the CRP Are Barred by *Res Judicata*

Res judicata encompasses two distinct doctrines: (1) claim preclusion, which bars a party from asserting a cause of action that it litigated or could have litigated in a prior action; and (2) issue preclusion, which bars a party from challenging specific findings of fact or law that were actually litigated and judicially decided in a prior matter. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 & n.5 (2008). "Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. 147, 153 (1979). As discussed below, each form of *res judicata* applies in this case. Claim preclusion forecloses this action as to the RNC, Duncan, and the CRP because these plaintiffs raised in *McConnell* the precise claims they now assert here, *i.e.*, that BCRA's prohibition on using soft money is unconstitutional in light of the parties' allegedly non-federal activities. And issue preclusion forecloses this action because *McConnell* explicitly rejected Plaintiffs' legal assertion that BCRA's soft-money contribution restriction was unconstitutional in relation to certain disbursements for non-federal elections. Because *McConnell* rejected this argument as a matter of law — holding instead that BCRA Title I was constitutional as a *contribution* limit regardless of the ultimate *disbursement* of the prohibited funds — and because the entirety of the instant action is premised on this rejected contention, Plaintiffs' allegations regarding the effect of Title I on Plaintiffs' non-federal activities fail to state a claim on which relief can be granted.

1. Claim Preclusion: The Claims of the RNC, Duncan, and the CRP Were Decided in *McConnell*

The doctrine of claim preclusion "holds that a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action." *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004); *see also Montana*, 440 U.S. at 153.

"To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54; *see also Apotex*, 393 F.3d at 217 (quoting *Montana*). Under the D.C. Circuit's test for determinations of claim preclusion, a claim is precluded "'if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction.'" *Natural Res. Def. Council v. EPA*, 513 F.3d 257, 260 (D.C. Cir. 2008) (quoting *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006)); *see also Nuckols v. Fed. Bureau of Prisons*, 578 F. Supp. 2d 79, 83 (D.D.C. 2008); *Tembec*, 570 F. Supp. 2d at 140-41. If this test is met, claim preclusion "extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Zellars v. United States*, 578 F. Supp. 2d 1, 3 (D.D.C. 2008) (internal quotation marks omitted).

As to the latter three prongs of the claim preclusion test, there does not appear to be any dispute between the parties. The RNC, Duncan, and the CRP were plaintiffs in *McConnell*, and the Commission was a defendant in that suit.[4] Jurisdiction was proper in this Court and the Supreme Court under BCRA section 403(a)(1),(3), *see McConnell*, 540 U.S. at 133; *McConnell*, 251 F. Supp. 2d at 239, and the case was decided on its merits. Thus, the only possible dispute

[4] The RPSD's relationship with the CRP and the RNC may be such that the RPSD is in privity with either or both of them for purposes of *res judicata*. *See Taylor*, 128 S. Ct. at 2172-73 (discussing grounds for applying *res judicata* to litigant that was not party to prior proceedings). Demonstrating this relationship, however, arguably requires the submission of extrinsic evidence inappropriate for a motion to dismiss; thus, for purposes of the instant motion only, the Commission does not argue that *McConnell* is *res judicata* as to the RPSD.

regarding claim preclusion is whether Plaintiffs' current claims are the same as the claims asserted in *McConnell*. They are.

"Whether two cases implicate the same cause of action turns on whether they share the same 'nucleus of facts.'" *Apotex*, 393 F.3d at 217 (quoting *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002)); *see also Natural Res. Def. Council*, 513 F.3d at 261 (quoting *Apotex*). Given a single "nucleus of facts," claim preclusion prohibits a plaintiff from engaging in piecemeal litigation by offering one legal rationale in a first lawsuit, losing that claim, and then offering a new rationale on the same set of facts in a later suit: "[I]t is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984) (internal quotations omitted); *Nuckols*, 578 F. Supp. 2d at 82 (quoting *Page*); *Zellars*, 578 F. Supp. 2d at 3-4; *see Tembec*, 570 F. Supp. 2d at 141. Stated differently, a plaintiff is precluded from relitigating not only the legal claims it specifically raised in the earlier action, but also those claims that the plaintiff "could have" litigated — but chose not to — based on the same set of facts. *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); *Natural Res. Def. Council*, 513 F.3d at 261; *Apotex*, 393 F.3d at 218; *Zellars*, 578 F. Supp. 2d at 4; *Capitol Hill Group v. Pillsbury Winthrop Shaw Pittman, LLP*, 574 F. Supp. 2d 143, 149 (D.D.C. 2008). A plaintiff that loses a challenge to a particular governmental action is therefore precluded from challenging that same action in a later suit, even if the plaintiff presents a different legal theory in the second suit. *See Natural Res. Def. Council*, 513 F.3d at 261 (holding challenge precluded despite plaintiff's offering new legal rationale in second suit); *Apotex*, 393 F.3d at 217-18 (same).

In the current action, the parties who were plaintiffs in *McConnell* allege that BCRA Title I is unconstitutional in relation to:

(1) the RNC's and Duncan's plans to solicit and receive soft money to

(a) support state candidates (Compl. ¶¶ 16-17, 20, 22, 29-34, 41-42 (Counts 1, 2, and 5));

(b) "support the redistricting efforts of various states['] Republican parties" (Compl. ¶ 18, 22, 35-37 (Count 3));

(c) "support grassroots lobbying efforts for federal legislation and issues" (Compl. ¶ 19, 22, 38-40 (Count 4));

(d) "pay[ ] the expenses and fees attributable to this case" (Compl. ¶ 21-22, 43-45 (Count 6));

(2) Duncan's plan to solicit direct soft-money donations to state candidates and parties (Compl. ¶ 22, 46-48 (Count 7)); and

(3) the CRP's plan to receive soft money for activities that the CRP alleges may constitute "federal election activity," specifically:

(a) "public communications" that "will 'attack' or 'oppose' federal candidates" in the context of state ballot initiatives (Compl. ¶¶ 23-24, 49-51 (Count 8)); and

(b) "voter registration, voter identification, and get-out-the-vote activities, as well as 'generic campaign activity,' in future elections where both state and federal candidates appear on the ballot" (Compl. ¶¶ 25, 52-54 (Count 9) (internal citation omitted)).

Plaintiffs argue that BCRA Title I's prohibition of each of these activities is "unconstitutional under the First Amendment guarantees of free speech and association." (*See, e.g.*, Compl. ¶¶ 31, 34, 37.)

The above-listed claims are virtually indistinguishable from the claims these same parties asserted in *McConnell*. The RNC's and Duncan's *McConnell* complaint challenged the constitutionality of BCRA Title I as it related to those plaintiffs' soliciting and receiving soft money to:

(a) "provid[e] support, including direct monetary contributions, to state and local candidates and party committees" (Exh. 1 ¶¶ 32, 36-38; *see also id.* ¶ 47);

(b) conduct "'issue advertising' through print, broadcast, and other media for the purpose of articulating the Party's views on important public policy issues" (Exh. 1 ¶ 47; *see also id.* ¶¶ 69-82);

(c) "participat[e] in" state referenda (Exh. 1 ¶ 36);

(d) conduct "voter registration, voter identification, voter education, and get-out-the-vote efforts in state and local elections" (Exh. 1 ¶ 47).

The complaint also alleged that Title I unconstitutionally limited Duncan's right to solicit funds on behalf of state candidates (Exh. 1 ¶ 37), and it challenged BCRA's definition of "federal election activity" as unconstitutionally vague. (Exh. 1 ¶¶ 84-91.) Finally, although it was not specifically mentioned in the complaint, the RNC introduced substantial evidence before the *McConnell* district court showing that it used soft money "to support redistricting efforts, including redistricting litigation." *See McConnell*, 251 F. Supp. 2d at 338 (opinion of Henderson, J.), 462, 508, 687 (opinion of Kollar-Kotelly, J.), 831-32 (opinion of Leon, J.).

As to the CRP, its complaint in *McConnell* asserted extensive claims against the constitutionality of the prohibition on state parties' receiving soft money for federal election activity. (See Exh. 2 ¶¶ 43-61.) The CRP alleged in *McConnell* that the definition of federal election activity was unconstitutional in light of the CRP's putatively non-federal activities, including:

(a) "voter registration activity . . . before an election in which a federal candidate is on the ballot; any voter identification, get-out-the-vote, or generic campaign activity in connection with such an election, [and] any public communication that 'promotes,' 'supports,' 'attacks,' or 'opposes' a candidate for federal office" (Exh. 2 ¶ 45; *see also id*. ¶¶ 51-52, 54); and

(b) "broadcast communications in support of or opposition to ballot measures" (Exh. 2 ¶ 56; *see also id*. ¶ 55).

As these complaints demonstrate on their face, the overwhelming majority of the claims in the current complaint repeat the same plaintiffs' claims in *McConnell*. The RNC's allegations regarding the national party's "support" of state and local candidates and parties, the RNC's allegations regarding "issue advertising" or "grassroots lobbying,"[5] Duncan's allegations regarding soliciting soft money for state candidates, and the CRP's allegations regarding party-building and ballot initiative advertising were each explicitly asserted by the same parties, respectively, in *McConnell*.

[5] The terms "grassroots lobbying" and "issue advertising" are often used interchangeably in the campaign finance context. *See, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2659-60 (2007) (referring to WRTL's ads as "issue advocacy" and noting that WRTL referred to them as "grassroots lobbying"); *see also id*. at 2685-86 (Scalia, J., dissenting) (discussing application of BCRA to "issue ads" and "grassroots advocacy").

In addition to raising these claims in their complaints, the *McConnell* plaintiffs also made specific, detailed arguments regarding them in their briefs. For example, in their merits brief before this Court, the RNC and Duncan argued for the unconstitutionality of BCRA Title I in relation to the receipt of soft money for "participation in state and local elections . . . in odd-numbered years . . . when no federal candidates appear on the ballot." *See McConnell v. FEC*, Civ. No. 02-582, Consol. Br. for Pls. in Support of Mot. for J. at RNC 6, 25-28, 41, 59 (D.D.C.) (attached hereto as Exhibit 3).[6] Indeed, the RNC and Duncan specifically argued for the unconstitutionality of Title I as it affected the RNC's planned activities in New Jersey's and Virginia's off-year elections (Exh. 3 at RNC 6, 25-26) — the same state elections these parties raise in the instant case. (*See* Compl. ¶¶ 16-17.) The RNC and Duncan also contended that Title I was unconstitutional in relation to the RNC's support for state parties (*see* Exh. 3 at RNC 9-10, 15-16, 41, 54), solicitations of soft money by party leaders (*see id*. at RNC 10, 25, 41, 47-50), and funding "issue speech" (*see id*. at RNC 52, 59). The CRP's brief similarly expanded on the claims in its *McConnell* complaint, raising constitutional arguments against the "limitation on the use of state-regulated contributions for state and local election activities" (*see id*. at CDP/CRP 1), as well as Title I's effect on get-out-the-vote activities (*id*. at CDP/CRP 19), "television or radio advertisements" (*id*. at CDP/CRP 31), "grass-roots campaign activities" (*id*.), and soft-money solicitations by party leaders (*id*. at CDP/CRP 39-43).

These arguments were reiterated in the parties' briefs opposing the Commission's motion for judgment in this Court. In their opposition brief, the RNC and Duncan discussed at length the purported unconstitutionality of BCRA's restriction on solicitations of soft money by party

[6] The *McConnell* plaintiffs filed consolidated briefs with the district court; within each brief, each of the various plaintiff groups submitted separately paginated sections. Because of the length of the consolidated briefs, the attached exhibits comprise only the sections submitted by the RNC, Duncan, and the CRP in support of their challenges to Title I.

officers, including Duncan himself. *See McConnell v. FEC*, Civ. No. 02-582, Consol. Opp. Br. for Pls. at RNC 16-18, 20, 23, 29-30, 34-35 (D.D.C.) (attached hereto as Exhibit 4). The RNC also raised further arguments regarding the party's support for state candidates (Exh. 4 at RNC 18, 23), and the receipt of soft money for "issue ads" (*see id*. at RNC 30-31). The CRP's opposition brief likewise reiterated plaintiffs' arguments concerning the receipt of soft money for "generic" and get-out-the-vote party activities (*see id*. at CDP/CRP 7-11, 14, 19), receipt of soft money for communications regarding state ballot measures (*see id*. at CDP/CRP 7-8), and solicitations of soft money by party leaders (*see id*. at CDP/CRP 21-23).

The opinions of this Court in *McConnell* also readily demonstrate that the same nucleus of facts at issue here were at issue in that case. For example, all three members of the Court discussed the use of soft money by the CRP to pay for generic campaign activity, such as voter identification, voter registration, and get-out-the-vote efforts to assist state candidates. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 342-48 (opinion of Henderson, J.), 460-62 (opinion of Kollar-Kotelly, J.), 836-45 (opinion of Leon, J.). All three judges also discussed solicitation by national party officers — including Duncan — of funds for state parties and candidates. *See, e.g.*, *id*. at 339 (Henderson, J.), 522-23 (Kollar-Kotelly, J.), 833-34 (Leon, J.). And, as mentioned above, all three members of the Court referred to the RNC's use of soft money to support redistricting efforts, including litigation. *See supra* p. 12. The opinion is replete with examples like these of this Court discussing the same conduct for which plaintiffs RNC, CRP, and Duncan now seek relief for the second time.

The *McConnell* plaintiffs continued to raise these arguments before the Supreme Court. On jurisdictional briefing, the RNC and Duncan asked the Court to uphold this Court's determination striking down the portions of Title I that "make[ ] it a felony for the Chairman of

the RNC" to solicit soft money, *Republican Nat'l Comm. v. FEC*, S. Ct. No. 02-1727, Jurisdictional Statement at 3, 12 (attached hereto as Exhibit 5), and that restrict receipt of soft money in relation to off-year state elections (Exh. 5 at 5-6, 13), redistricting activities (*id*. at 8 & n.3), and advertising (*id*. at 14-15). The CRP requested that the Supreme Court affirm this Court's holding regarding the invalidity of Title I as to the CRP's "federal election activity," including "public communications" in general, *Cal. Democratic Party v. FEC*, S. Ct. No. 02-1753, Jurisdictional Statement at 3, 5, 13, 15-17 (attached hereto as Exhibit 6), and communications regarding ballot measures specifically (Exh. 6 at 16-17). The CRP also sought the Supreme Court's affirmance of this Court's holdings regarding voter registration and get-out-the-vote activity (*id*. at 3-5, 11-13), and solicitations of soft money by national party officers (*id*. at 6, 14-15).

At the merits stage before the Supreme Court, the RNC, Duncan, and the CRP filed a joint brief. *Republican Nat'l Comm. v. FEC*, S. Ct. Nos. 02-1727, 02-1733, 02-1753, Br. of Political Parties (attached hereto as Exhibit 7). This brief went into great detail regarding the same activities raised in the instant case, including soft-money solicitations by the RNC's officers (*see* Exh. 7 at 1, 13, 34, 41, 43-44, 59-60, 78), the RNC's and CRP's spending on putative issue advertising (*see id*. at 12-13, 17-18, 34, 48-50, 51-56), the CRP's spending regarding ballot measures (*see id*. at 37, 52-55, 62, 79, 88-89), and the CRP's spending on voter registration and mobilization efforts (*see id*. at 1, 12, 16-19, 50-53, 57, 87-90). Most prominently, the brief discussed the RNC's desire to support state and local candidates (*see id*. at 1, 9-12, 14, 19-20, 34, 40-41, 58-59, 63-64, 78-79, 86-87), including those in states holding their elections in odd-numbered years, such as New Jersey and Virginia. (*Id*. at 11-12 ("[T]he RNC . . . devoted considerable 'in-house' efforts to the Virginia and New Jersey gubernatorial and

state legislative races in 2001, committing staff and other resources to those campaigns.").) The plaintiffs' joint reply brief before the *McConnell* Court discussed these activities in further depth. *Republican Nat'l Comm. v. FEC*, S. Ct. Nos. 02-1727, 02-1733, 02-1753, Reply Br. of Political Parties at 1-2 (solicitations by party officers), 2, 4-5, 7, 33 (RNC support of state parties), 2-5, 7, 19-25 (state party registration and GOTV), 2, 21 & n.13, 24-25 (ballot measures) (attached hereto as Exhibit 8).

The Supreme Court ruled on these claims, denying them both categorically and individually. In its decision on the merits, the Court first rejected the plaintiffs' premise that the constitutionality of Title I — which is a statutory limit on contributions to political parties — should be judged based on the activities for which the contributed funds would ultimately be spent. *See McConnell*, 540 U.S. at 138-39, 154-56; *see also infra* Part II.B.2. The Court's reasoning and holding are dispositive here:

> Plaintiffs and THE CHIEF JUSTICE contend that [section 101(a)] is impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including, for example, *funds spent on purely state and local elections in which no federal office is at stake.* Such activities, THE CHIEF JUSTICE asserts, pose "little or no potential to corrupt . . . federal candidates and officeholders." This observation is beside the point. Section [101(a)], like the remainder of [§ 101], regulates contributions, not activities. As the record demonstrates, it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made *all large soft-money contributions* to national parties suspect.

McConnell, 540 U.S. at 154-55 (second and third emphases added; footnote and citations omitted). In making these points, the Court explicitly acknowledged that thirty percent of the nonfederal funds the RNC had raised in 2001 was spent on "purely state and local election activity." *Id.* at 154 n.50. However, despite this fact, the Court found the ban on all soft-money contributions justified by the extensive evidence demonstrating the influence that soft-money

donors to the national parties wielded over the federal officeholders affiliated with those parties. *See generally id*. at 143-54; *id*. at 150 ("The evidence connects soft money to manipulations of the legislative calendar," and "[t]he record . . . is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations."). The Court therefore upheld the soft-money prohibition, finding that "large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *Id*. at 154.

The Court then addressed the prohibition on officers of national parties soliciting soft money for state and local parties, 2 U.S.C. § 441i(a)(2), which is one of the claims that Duncan raised in *McConnell* and raises again here. The Court rejected Duncan's claim, holding that the prohibition on officer solicitation "follows sensibly from the prohibition on national committees' receiving soft money." *McConnell*, 540 U.S. at 157-58. Thus, the Court held that the solicitation prohibition was constitutional for the same reasons as the national party prohibition. *Id*.

Turning to the prohibition on state and local parties' receipt of soft money for federal election activity, 2 U.S.C. §§ 441i(b), 431(20), the Court held that prohibiting these affiliates of the national parties from receiving soft money for the enumerated activities was a necessary corollary to the national party soft-money ban. *McConnell*, 540 U.S. at 161. The Court noted the evidence that the national limit would be "wholly ineffective" without the state and local limit, *id*. at n.53 (internal quotation omitted), and so held that the latter "promotes an important governmental interest by confronting the corrupting influence that soft-money donations to political parties already have." *Id*. at 165. Accordingly, the Court upheld the state and local limit on the grounds that "[p]reventing corrupting activity from shifting wholesale to state

committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *Id*. at 165-66.

The Court discussed the state and local parties' contention that some conduct meeting the "federal election activity" statutory definition is non-federal activity relating only to state and local elections. *See id*. at 166-68. The Court rejected this contention, finding that the statutory definition of federal election activity — particularly "voter registration, voter identification, GOTV, and generic campaign activity" — "clearly capture[s] activity that benefits federal candidates" and that "funding of such activities creates a significant risk of actual and apparent corruption." *Id*. at 167-68. The Court held that section 101(b) "is a reasonable response to that risk," and therefore constitutional. *Id*.

Finally, the Court addressed the state and local parties' arguments regarding the prohibition on receiving soft money for advertising that promotes, attacks, supports, or opposes a federal candidate. 2 U.S.C. § 431(20)(A)(iii). The Court found that, as to the substantial influence of such advertising on federal elections, "[t]he record on this score could scarcely be more abundant." *McConnell*, 540 U.S. at 169-70. Because the evidence regarding such influence was clear, the Court held that the statutory limit is "closely drawn to the anticorruption interest it is intended to address," *id*., and does not unconstitutionally limit state and local parties' "ability to engage in effective advocacy," *id*. at 173.

In sum, each of the duplicative claims that Plaintiffs raised in *McConnell* and now raise again was rejected by the Supreme Court. Accordingly, these claims are *res judicata*, and they cannot be relitigated here.

There are two superficial differences between *McConnell* and the instant action that Plaintiffs may cite in an attempt to salvage their case. First, Plaintiffs style the current case an

"as applied" constitutional challenge, and they imply that this distinguishes it from *McConnell*, which was a facial challenge. But, as the foregoing indicates, the "nucleus of facts" of the two cases is essentially identical: The *McConnell* plaintiffs presented extensive evidence regarding the activities that they alleged were not intended to influence federal elections, and the current Plaintiffs present factual allegations of these same activities. Indeed, in seeking expedited summary judgment briefing, Plaintiffs themselves argued that the Commission would not require discovery in this case because "activities of the Plaintiffs were fully investigated and included in the *McConnell* record." (Pls.' Reply in Support of Mot. to Expedite at 2.) By conceding that there are few, if any, facts to be developed in this case beyond those found by the *McConnell* courts, Plaintiffs concede that the facts underlying the two cases are the same. As a matter of law, this renders *McConnell* preclusive as to any claims Plaintiffs now wish to reassert under the alternate theory of an as-applied challenge, for a party cannot bring the same suit twice simply by devising a new legal theory under which the same facts entitle the party to relief that has already been denied. *Page*, 729 F.2d at 820; *Nuckols*, 578 F. Supp. 2d at 82; *Zellars*, 578 F. Supp. 2d at 3-4; *Tembec*, 570 F. Supp. 2d at 141. Plaintiffs' characterization of this case as an "as applied" challenge is therefore legally irrelevant: Plaintiffs are "simply raising a new legal theory. This is precisely what is barred by *res judicata*." *Apotex*, 393 F.3d at 218; *see also Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 22-23 (D.D.C. 1998) (holding constitutional challenge to agency determination precluded by plaintiff's prior action challenging same determination on statutory grounds).

Second, two of the specific activities that Plaintiffs allege they plan to conduct — the redistricting and litigation activities — were not specifically referenced in the *McConnell* complaint. As to redistricting activity, however, the RNC introduced substantial evidence to

support a claim that such activity was one of the soft-money funded activities on which BCRA unconstitutionally infringed. *See supra* p. 12; *McConnell*, 251 F. Supp. 2d at 338 (opinion of Henderson, J.), 462, 508, 687 (opinion of Kollar-Kotelly, J.), 831-32 (opinion of Leon, J.); *see also* Exh. 7 at 89 (countering one of Commission's arguments regarding redistricting). Because the preclusive effect of a prior judgment turns on the "nucleus of facts" a plaintiff presents to support its claim, the RNC's presentation in *McConnell* of facts regarding redistricting to support its constitutional argument precludes the RNC from attempting to raise the same facts here in support of renewed constitutional claims. *See Am. Fed'n of Gov't Employees, AFL-CIO v. Loy*, 332 F. Supp. 2d 218, 223 (D.D.C. 2004) (holding that plaintiff's First Amendment challenge to firing of government employee was precluded by prior suits in which plaintiff introduced evidence regarding same firing). In any event, it is beyond dispute that facts regarding redistricting and litigation activities "could have been presented" in *McConnell*, and so the RNC is precluded from now raising claims based on those facts. *See id*.; *see also Allen*, 449 U.S. at 94; *Natural Res. Def. Council*, 513 F.3d at 261; *Capitol Hill Group*, 574 F. Supp. 2d at 149. As the Supreme Court has explained,

> when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy . . . , not only as to every matter which was offered and received to sustain or defeat the claim or demand, but *as to any other admissible matter which might have been offered for that purpose*." The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever."

Nevada v. United States, 463 U.S. 110, 129-30 (1983) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876), and *Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948)). Because the RNC's redistricting and litigation activities were undoubtedly "admissible" in support of the RNC's *McConnell* claims that BCRA was unconstitutional because the political parties wished to fund

activities allegedly unrelated to federal elections — indeed, facts regarding the former were actually admitted — this Court should reject any attempt by Plaintiffs to relitigate *McConnell* based on such allegations. *See Nader*, 2008 WL 5273109, at *5-6 (holding second suit precluded where plaintiffs had "voluntarily" withdrawn facts underlying it from earlier litigation; previous withdrawal of facts demonstrated that they "could have been raised" in first case).

Finally, Plaintiffs have cited *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), for the proposition that the instant case should be permitted to proceed as an "as-applied challenge to a prohibition in BCRA that had been facially upheld in *McConnell*." (Pls.' Mem. of P. & A. in Support of Mot. to Expedite 2-4.) But the *WRTL* cases simply do not speak to the *res judicata* issue presented here. Indeed, the Commission never asserted a claim preclusion defense in *WRTL*, for the plaintiff in those cases had not been a plaintiff in *McConnell*. Instead, the issue in *WRTL* was simply whether *McConnell* had already decided the constitutional question raised by WRTL (as the Commission argued), or whether *McConnell* had left that question to be decided at a later time (as WRTL argued). *See WRTL I*, 546 U.S. at 411-12. The Supreme Court agreed with WRTL, holding that *McConnell* had not resolved the issue. *Id*. No question of *res judicata* was raised or decided in *WRTL*, and Plaintiffs' attempt to rely on that case to avoid preclusion here is therefore misplaced.

Furthermore, because of the substantive differences between the constitutional issues in *WRTL* and the present case, it would be inappropriate to extend *WRTL*'s holding to apply to the Commission's motion to dismiss. The question in *WRTL* was how to reconcile two apparently conflicting portions of the *McConnell* opinion: the statements that (1) "[w]e uphold all applications of the primary definition" of "electioneering communication" and (2) that BCRA

section 203 was not overbroad "to the extent that" advertisements subject to that section were "the functional equivalent of express advocacy." *See McConnell*, 540 U.S. at 190 n.73, 206. In *WRTL I*, the Court explained that the "all applications" statement in *McConnell* "merely notes that . . . it was unnecessary to consider the constitutionality of the backup definition Congress provided." 546 U.S. at 412. In *WRTL II*, the Court was called on to determine the boundaries of the "functional equivalent of express advocacy" test — an issue that had not been decided by *McConnell* itself. *See WRTL II*, 127 S. Ct. at 2664-65. In other words, *McConnell* had created a test in facially upholding BCRA section 203, and *WRTL* fleshed out that test through an as-applied challenge, granting relief to a plaintiff that had not been a party to *McConnell* and whose claims were premised on specific facts — three particular communications — that had not been presented to the *McConnell* Court.[7]

This case presents the reverse situation: In upholding Title I of BCRA, the Supreme Court *did* consider the same general facts — categories of political party activity — that Plaintiffs now allege, and the Court *did not* create a test requiring further explication. On the contrary, as discussed above, the Court upheld Title I on the basis of long-established contribution-limit jurisprudence. It explicitly rejected the plaintiffs' request to draw a constitutional boundary based on how the soft-money contributions would be spent.[8] Thus, this

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[7] The advertisements at issue in *WRTL* were intended to be broadcast in July 2004, more than one year after *McConnell* was decided. *See WRTL II*, 127 S. Ct. at 2660-61.

[8] The Commission does not argue that all conceivable as-applied challenges to BCRA Title I are precluded, but challenges to it based on the activities to be funded with the intended large contributions are clearly foreclosed under *McConnell*. In any event, Plaintiffs' characterization of the present case as an as-applied challenge elevates form over substance, as the Complaint challenges the great majority of the activities that are subject to BCRA Title I. For example, the CRP's challenge to the constitutionality of the definition of "federal election activity" encompasses all of the particular activities listed in the first three clauses of that definition. *Compare* Compl. ¶¶ 23-25 *with* 2 U.S.C. § 431(20)(A)(i)-(iii). An "as-applied" challenge to the entirety of a statute is merely a facial challenge under a different label.

case is nothing more than a second attempt to seek relief regarding the same conduct litigated in *McConnell*, but with no opening from that decision to do so. Because preventing such repeat actions by according finality to litigation is the very purpose of the claim preclusion doctrine, this matter must be dismissed as to the RNC, Duncan, and the CRP.

2. Issue Preclusion: The Claims of the RNC, Duncan, and the CRP Are Premised on a Legal Argument that Was Litigated and Decided in *McConnell*

Even if their *claims* were not precluded, the RNC, Duncan, and the CRP would nonetheless be prohibited from relitigating the *issues* of law that they argued and lost in *McConnell*. The doctrine of issue preclusion provides that a party that litigates a factual or legal question and receives a final decision on that question may not litigate it again in a subsequent action. *See Montana*, 440 U.S. at 153; *Tembec*, 570 F. Supp. 2d at 141-42 (citing *Allen*, 449 U.S. at 94). Issue preclusion "relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, prevents inconsistent decisions, and encourages reliance on adjudication." *Safadi v. Novak*, 574 F. Supp. 2d 52, 55 (D.D.C. 2008) (citing *Montana*, 440 U.S. at 153-54). For issue preclusion to apply, "[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case[; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case[; and] [3], preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)) (alterations in original).

The RNC, Duncan, and the CRP extensively litigated and "submitted for judicial determination" in *McConnell* whether the contribution limit of BCRA Title I was constitutional

in relation to specific types of disbursements of soft money. As detailed previously, their *McConnell* complaints explicitly raised these issues, and their briefs were replete with arguments in support of them. *See supra* Part II.B.1. Before the district court, Plaintiffs' briefs discussed at length the effect that Title I would have on different spending activities; indeed, the brief of the RNC and Duncan specifically argued that Title I should be considered "an [e]xpenditure [c]ap" because of the burdens it allegedly imposed on disbursements for particular activities that the RNC wished to conduct with soft money. (*See* Exh. 3 at RNC 51-56; *see also id*. at RNC 6-10 (discussing soft-money activities), 25-29 (state election activities), 46-51 ("speech" accompanying solicitations).) In opposing the Commission's motion for judgment, the RNC and Duncan asserted not only that the Commission was wrong to view Title I as a contribution limit, but that "the use to which a contribution is put is also important." (Exh. 4 at RNC 37.) These plaintiffs then argued that such uses were deserving of heightened constitutional protection. (*See id*. at RNC 15-16, 34-41.) Similarly, the CRP's district court briefs were devoted almost entirely to discussing Title I's alleged constitutional infringements on particular CRP activities. (*See* Exh. 3 at CDP/CRP 1-7, 11-20, 27-36; Exh. 4 at CDP/CRP 6-11, 14-23.) Like the RNC and Duncan, the CRP specifically argued that BCRA "*does* act as a direct limit" on the conduct of state parties. (Exh. 4 at CDP/CRP 15.) This Court largely agreed with the plaintiffs, striking down much of Title I. *See supra* Part I.B.

On jurisdictional briefing of the Commission's cross-appeal to the Supreme Court, the RNC and Duncan sought affirmance of this Court's determination that "Title I [of] BCRA as enacted would severely restrict the traditional associational activities of political parties" (Exh. 5 at 9), in part because "Title I regulates, *inter alia*, the *spending* of nonfederal funds." (*Id*. at 12; *see also id*. at 12-15 ("Title I restricts political parties' freedom to engage in pure speech and a

wide range of associational activities that are essential to their ability to function effectively.").) The CRP also asked the Supreme Court to accept the case and find that "BCRA prohibits a broad range of speech, conduct and associational activity"; the CRP devoted nearly its entire Jurisdictional Statement to discussing the alleged unconstitutionality of these putative prohibitions. (*See* Exh. 6 at 2, 3-17.)

In the joint Supreme Court merits brief of the RNC, Duncan, and the CRP, more than half of the ninety-nine page filing was devoted to asserting facts regarding how national, state, and local parties spend soft money. (*See* Exh. 7 at 9-23, 32-64, 86-90.) The plaintiffs presented at length their legal arguments as to why BCRA Title I was "[f]ar more restrictive than a mere contribution limit" (*id*. at 32), and unconstitutional in light of the putatively nonfederal way that the parties spend soft money (*see id*. at 32-64). These parties' reply brief similarly focused heavily on "Title I's Many Restrictions on Party Association, Spending, and Solicitation." (*See* Exh. 8 at 1-7, 19-25.)

Ultimately, the Supreme Court rejected these arguments unequivocally. First, the Court found that Title I's restrictions were a contribution limit rather than an expenditure limit:

> Plaintiffs contend that we must apply strict scrutiny to § 323 because many of its provisions restrict not only contributions but also the spending and solicitation of funds raised outside of FECA's contribution limits. But for purposes of determining the level of scrutiny, it is irrelevant that Congress chose in [Title I] to regulate contributions on the demand rather than the supply side. The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.
>
> For example, while [BCRA section 101(a)] prohibits national parties from receiving or spending nonfederal money, and [section 101(b)] prohibits state party committees from spending nonfederal money on federal election activities, neither provision in any way limits the total amount of money parties can spend. Rather, they simply limit the source

> and individual amount of donations. That they do so by prohibiting the spending of soft money does not render them expenditure limitations.

McConnell, 540 U.S. at 138-39 (internal citations omitted). Next, as explained above, the Court held that the plaintiffs' allegations regarding activities funded by soft money were "beside the point. Section [101(a)], like the remainder of [section 101], regulates *contributions*, not activities." *McConnell*, 540 U.S. at 154 (emphasis in original). Accordingly, the Court assessed the constitutionality of Title I as a contribution limit — which must be "closely drawn to match a sufficiently important interest," *id*. at 136 (internal quotation marks omitted) — and upheld Title I regardless of how the plaintiffs planned to spend soft money. *See supra* Part II.B.1.

As the foregoing demonstrates, the RNC, Duncan, and the CRP fully litigated the issue of whether BCRA Title I might be unconstitutional in relation to disbursements of soft money for specific types of putatively nonfederal activities, and the Supreme Court "actually and necessarily" decided that question in the negative. Instead, the Court held that all relevant aspects of Title I were constitutional because they were contribution limits closely drawn to match the government's important interest in preventing actual and apparent corruption, regardless of how contributed funds would be disbursed. *See McConnell*, 540 U.S. at 154-73. That holding is binding and preclusive here: The Plaintiffs who were parties to *McConnell* had their opportunity to litigate the question of whether BCRA Title I was unconstitutional if contributed funds were used only for certain purposes, and they were unsuccessful in making that argument.[9] *See Martin*, 488 F.3d at 454-55 (precluding plaintiff from relitigating FOIA

[9] Applying preclusion here would not "work a basic unfairness" under the D.C. Circuit's test. Such "unfairness" is found primarily in cases where the issue to be precluded played only a small role in the earlier action, such that the party against whom preclusion is sought may not have had sufficient motivation to litigate it fully. *See Martin*, 488 F.3d at 455 (finding no unfairness where plaintiff's "incentives to litigate the point now disputed were no less present in the prior case, nor are the stakes of the present case of 'vastly greater magnitude'") (quoting

argument he had lost in prior case); *Stonehill v. IRS*, 534 F. Supp. 2d 1, 6-8 (D.D.C. 2008) (holding defendant's privilege argument precluded where it had been rejected in prior case between parties, even though first case concerned tax law and second was FOIA action); *Newdow v. Bush*, 355 F. Supp. 2d 265, 275 (D.D.C. 2005) (holding constitutional challenge to 2005 presidential inauguration precluded by jurisdictional dismissal of plaintiff's constitutional challenge to 2001 inauguration, despite minor differences between two inaugurations and complaints). Accordingly, the constitutionality of Title I on the grounds of how the funds will be disbursed, irrespective of the specific activities alleged in Plaintiffs' complaint, is *res judicata*.[10] Because each of Plaintiffs' claims is premised on the precluded argument regarding the way that soft money will be spent, these claims all fail to state a claim on which relief can be granted.

C. Plaintiffs' Claims Fail as a Matter of Law Under *McConnell*

Even apart from the claim and issue preclusion doctrines, *McConnell*'s holding that BCRA Title I was constitutional without regard to how contributed funds were to be spent controls the entirety of the present case. Each count of the Complaint — those of the Plaintiffs who were parties to *McConnell*, as well as of the RPSD — assumes that allegations regarding Title I's effects on particular categories of Plaintiffs' spending state a viable claim. But this assumption is invalid, for, as discussed above, *McConnell* held that Title I survives the appropriate level of scrutiny for a contribution limit because it is narrowly tailored to the

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Yamaha, 961 F.2d at 254); *see generally* 18 Wright, Miller & Cooper, *Federal Practice & Procedure* 2d § 4426 (2002) (discussing "[t]ruly exceptional cases" in which "unfairness" limitation may apply). Given Plaintiffs' focus on the particular uses on which they intended to spend contributed funds, the enormous factual record, and the multiple rounds of substantial briefing, there is no viable argument that Plaintiffs litigated Title I's constitutionality as applied to particular types of activities at less than full force in *McConnell*.

[10] Because *McConnell* decided that the ultimate spending of the soft money was irrelevant, its preclusive effect extends to *all* of the soft money that the instant Plaintiffs seek to obtain, including that sought for purposes that were not explicitly referred to in the *McConnell* complaints, such as litigation and redistricting activities.

government's interest in preventing actual and apparent corruption, regardless of what activities the prospective large contributions would fund. Plaintiffs' allegations, even if true, could not raise a claim of entitlement to relief because the purported unconstitutionality of Title I rests exclusively on the argument that soft money will be used to fund only certain categories of activities. Because this is not a valid basis for challenging the constitutionality of BCRA's contribution limits under *McConnell*, Plaintiffs' claims fail as a matter of law for essentially the same reason that they are subject to issue preclusion.

III. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court dismiss this action.

Respectfully submitted,

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