UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN PARTY OF LOUISIANA, *et al.*,	)	
Plaintiffs,	)	Civ. No. 15-1241 (CRC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR A THREE-JUDGE COURT

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Plaintiffs seek to raise funds for use on communications and other activities affecting federal elections without complying with the longstanding contribution limits of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 ("FECA" or "Act"). Reprising a challenge they brought before this Court and then voluntarily dismissed in 2014, the Republican Party of Louisiana ("LAGOP"), the Jefferson Parish Republican Parish Executive Committee ("JPGOP"), and the Orleans Parish Republican Executive Committee have returned once again to request that the Court convene a three-judge court to hear their claims against the Federal Election Commission ("FEC" or "Commission"). The last time the Court heard this request, it ruled that the claims of these *same state and local committee plaintiffs* against the *same statutory provisions* would proceed before this single-judge district Court. Dissatisfied with that decision, plaintiffs dismissed and have now refiled a revised complaint, renewing their improper effort to leverage the special judicial review procedure of section 403 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), in order to gain access to the Supreme Court's mandatory docket.

Plaintiffs present no reason for the Court to alter its prior decision. Instead, their revised challenge adds new jurisdictional and substantiality problems to the justiciability barrier that precluded convening a three-judge court in 2014. In that earlier case, the plaintiffs acknowledged that they were targeting FECA's provisions limiting individual contributions to national, state, and local party political committees. However, plaintiffs' new complaint avoids mentioning FECA's $10,000 base annual limit on contributions to state and local committees in order to avoid admitting the obvious — that they are again challenging this limit. Plaintiffs acknowledge that they must abide by other FECA provisions restricting contributions and tellingly accept that *state* contribution limits may constitutionally restrict the amounts they can

receive for activity Congress deemed "*federal*," but they make no effort to explain this incongruity. As the Court previously held, "regardless of what other statutory provisions" plaintiffs challenge — including the restrictions on the use of non-federal funds (or "soft money") in FECA subsections 30125(b) and (c) that were targeted then and are again now — "no court can give them what they seek" without invalidating FECA's base contribution limits. *Rufer v. FEC*, 64 F. Supp. 3d 195, 203 (D.D.C. 2014). Plaintiffs are estopped from relitigating that holding, and the same redressability problem requires the same conclusion in any event.

The new detail in plaintiffs' revised complaint describing their proposed communications and other federal-election-related activities also establishes that they lack injury. The two local committee plaintiffs do not want to receive more than $5,000 *total* for this activity, an amount they can receive right now, and LAGOP could satisfy its desired budgetary goals with contributions from a small number of contributors. Furthermore, because some of plaintiffs' contemplated activities can be funded right now with an allocation of non-federal contributions, but plaintiffs have chosen not to do so, their injury is self-inflicted. Moreover, the additional detail in the complaint clarifies that certain of plaintiffs' desired activities are impeded by FEC *regulations*, not the *statutory* provisions they purport to challenge. Plaintiffs have thus revealed that Counts I and II of their new complaint actually seek invalidation of regulations implementing FECA's provisions. That Administrative Procedure Act challenge cannot be heard by a BCRA three-judge court, which may be established only to hear constitutional challenges to BCRA statutory provisions and amendments. These new jurisdictional problems separately preclude plaintiffs' request for a three-judge court.

Importantly, although this Court found plaintiffs' previous challenge substantial, their new one is not. In contrast with the last case, plaintiffs do not request to be allowed to raise

funds without regard to FECA's contribution limits for the purpose of making "independent expenditures"; they now seek to avoid those limits for the purpose of raising funds for their purported "independent" federal election activity (soft money) — *i.e.*, a legislative request to be returned to the pre-BCRA soft money regime. This reframed challenge is wholly foreclosed. It was rejected by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010), in a holding that the Court's later ruling in *Citizens United* regarding independent expenditures left "untouched," *Rufer*, 64 F. Supp. 3d at 203. For good measure, plaintiffs' challenge was rejected again, post-*Citizens United*, in *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("*RNC*"), *aff'd*, 130 S. Ct. 3544. And just last year, the Supreme Court expressly noted in *McCutcheon v. FEC* that its "holding . . . clearly does not overrule *McConnell*'s holding about 'soft money.'" 134 S. Ct. 1434, 1451 n.6 (2014). Notwithstanding their lengthy and erroneous interpretive contortions, plaintiffs' challenge is plainly frivolous.

Accordingly, the Court should once again deny plaintiffs' application for a three-judge court because their claims do not qualify for that extraordinary procedure. Rather, this case should resume where plaintiffs were when they dismissed last year — in this single-judge Court.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. FECA's $10,000 Contribution Limit for State and Local Committees

In 1976, Congress amended FECA's contribution limits to establish a specific, annual limit of $5,000 on individual contributions to certain "other" political committees, including state and local party committees. Federal Election Campaign Act Amendments of 1976, Pub. L. No.

94-283, § 112, 90 Stat. 486-87 (now codified at 52 U.S.C. § 30116(a)(1)(D)).[1] Following the enactment of this contribution limit and others, "certain corporations, labor unions, and wealthy individuals sought to bypass these contribution limits by making so-called 'soft money' contributions to political parties." *Rufer*, 64 F. Supp. 3d at 199. The national parties used unlimited soft money donations, together with a proportion of "hard money" raised pursuant to FECA's source and amount limits, for "mixed" activities purportedly affecting both federal and state elections, including advertising that "did not expressly advocate the election or defeat of a federal candidate," but which nevertheless influenced federal elections. *RNC*, 698 F. Supp. 2d at 153; *see also Rufer*, 64 F. Supp. 3d at 199 (explaining that soft money contributions were "ostensibly earmarked for state and local elections or 'issue advertising' and thus not subject to the same FECA requirements as contributions explicitly intended to influence federal elections").

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 and legislative processes. *McConnell*, 540 U.S. at 129; S. Rep. No. 105-167 (1998). The six-volume, 9,500-page report concluded that the parties' ability to solicit and spend soft money had completely undercut FECA's source-and-amount limitations. *See McConnell*, 540 U.S. at 129-32. The report explained that national, state, and local committees had played a crucial role in the soft-money system: 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)).

[1] Effective September 1, 2014, the provisions of FECA formerly codified in Title 2 of the United States Code were recodified in Title 52. The Office of Law Revision Counsel has published a table showing how the provisions have been reclassified. *Editorial Reclassification Table*, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html.

"Congress responded to this circumvention of FECA's contribution limits in 2002 with the enactment of BCRA, a sweeping series of amendments to FECA which, among other things, limited soft money contributions to political parties." *Rufer*, 64 F. Supp. 3d at 199 (citing *McConnell*, 540 U.S. at 122-26); *McConnell*, 540 U.S. at 126, 133 (BCRA was enacted in part to plug the "soft-money loophole" that had "enabled parties and candidates to circumvent . . . limitations on the source and amount of contributions [made] in connection with federal elections"). "Rather than specifically defining and prohibiting soft money contributions, BCRA imposed a general ban on collecting funds in excess of FECA's base contribution ceilings for certain entities involved in federal elections." *Rufer*, 64 F. Supp. 3d at 199.

BCRA also adjusted FECA's base limits, including by doubling the limit for individual contributions to state and local committees, from $5,000 to $10,000. *Rufer*, 64 F. Supp. 3d at 199; BCRA § 102(3). Congress increased these limits in order to compensate the political parties for some of the funds they were expected to lose as a result of the soft money ban. 148 Cong. Rec. S2153 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein) ("The soft money ban will work because we came to a reasonable compromise with regard to raising some of the existing hard money contribution limits by modest amounts . . . ."); 147 Cong. Rec. S2964 (daily ed. Mar. 27, 2001) (statement of Sen. Nickles) ("If we are going to ban soft money, we should allow some increases in hard money."). The $10,000 contribution limit for contributions to state and local committees remains the limit today. 52 U.S.C. § 30116(a)(1)(D).[2]

[2] The limit is shared between a state party and "affiliated" local committees, but local committees of a given political party may receive separate contributions of up to $5,000 per year from individuals if the committee's fundraising is generally separate from — and thus the committee is not "affiliated" with — the state committee of their political party. *See, e.g.*, FEC Advisory Op. 2005-02 (Corzine), at 6-7 & n.3, http://saos.fec.gov/aodocs/2005-02.pdf.

B. BCRA's Restrictions on Soft Money and "Federal Election Activity"

BCRA's new section of FECA — titled "Soft Money of Political Parties," BCRA § 101(a), now codified as 52 U.S.C. § 30125 — distinguishes between "[n]ational committees" and "[s]tate, district and local committees." Subsection (a) establishes that national committees may no longer accept any soft money for any purpose. 52 U.S.C. § 30125(a). Subsection (b) provides that state, district, and local committees are likewise generally barred from using any soft money for "Federal election activity." *Id.* § 30125(b)(1). And subsection (c) bars national, state, district, and local committees from using soft money to pay for fundraising costs for "Federal election activity." *Id.* § 30125(c).

"Federal election activity" ("FEA") is a term Congress added in BCRA. 52 U.S.C. § 30101(20) (defining FEA); BCRA § 101(b). FEA includes four distinct categories of election activity: (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 (the four verbs "promotes," "supports," "attacks," or "opposes" are sometimes known by the shorthand "PASO"); 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 also id.* § 30101(20)(B)(i)-(iv) (excluding four categories of activity from FEA).

BCRA also required that state and local committees report their FEA above a $5,000 threshold. *Id.* § 30104(e)(2); BCRA § 103(a). "In addition to any other reporting requirements

applicable under this Act, a political committee . . . to which section 30125(b)(1) of this title applies[,] shall report all receipts and disbursements made for" FEA "unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000." 52 U.S.C. § 30104(e)(2)(A). The provision also requires state and local committees to disclose "certain nonfederal amounts permitted to be spent on" FEA, including "receipts and disbursements described in section 30125(b)(2)(A) and (B) of this title." *Id.* § 30104(e)(2)(B).

These "nonfederal amounts" are also known as "Levin funds," after the sponsor of the relevant amendment. Levin funds are an exception to the general rule that FEA by state and local party committees must be paid for entirely with funds subject to the Act's source and amount restrictions. *Id.* § 30125(b)(2); BCRA § 101(a). "[T]he Levin Amendment allows state and local party committees to pay for certain types of [FEA] with an allocated ratio of hard money and 'Levin funds' — that is, funds raised within an annual limit of $10,000 per person." *McConnell*, 540 U.S. at 162-63 (citing 52 U.S.C. § 30125(b)(2)); 52 U.S.C. § 30125(b)(2)(B)(iii) (setting a $10,000 per "person" per year limit). The $10,000 Levin funds limit is reduced if state law establishes a lower limit, and it is separate from FECA's $10,000 limit on contributions from individuals to state and local committees. 11 C.F.R. § 300.31(d). Apart from the "$10,000 cap and certain related restrictions to prevent circumvention of that limit, § [30125](b)(2) leaves regulation of such contributions to the States"; thus, persons such as corporations and unions that are restricted from contributing under federal law can provide Levin funds. *McConnell*, 540 U.S. at 163; 52 U.S.C. § 30125(b)(2)(C) (barring involvement of national parties and others and joint activities by "2 or more State, local, or district committees of any political party").

Levin funds may only be used to fund certain activities falling within the first two categories of FEA: (1) voter registration activity in the run up to a federal election, and (2) voter

identification, get-out-the-vote, and certain generic campaign activity. 52 U.S.C. § 30125(b)(2)(A). And Levin funds cannot be used to pay for any activities that refer to "a clearly identified candidate for Federal office," even if the candidate is not promoted, supported, attacked, or opposed. *Id.* § 30125(b)(2)(B)(i). Levin funds also "cannot be used to fund broadcast communications unless they refer 'solely to a clearly identified candidate for State or local office.'" *McConnell*, 540 U.S. at 163 (quoting 52 U.S.C. § 30125(b)(2)(B)(ii)). Finally, "both the Levin funds and the allocated portion of hard money used to pay for such activities must be raised entirely by the state or local committee that spends them." *Id.*; 52 U.S.C. § 30125(b)(2)(B)(iv); *McConnell v. FEC*, 251 F. Supp. 2d 176, 210 (D.D.C. 2003) (per curiam) (describing this "homegrown" rule).[3]

C. FEC Regulations Implementing BCRA's Soft Money Provisions

Following BCRA's passage, the FEC promulgated regulations implementing these provisions and others, as Congress had required. Certain of these regulations were challenged and invalidated in a series of cases.

As relevant here, the FEC had defined "voter registration activity" and "get-out-the-vote activity" as requiring "'contacting individuals by telephone, in person, or by other individualized means.'" *Shays v. FEC*, 528 F.3d 914, 931 (D.C. Cir. 2008) (quoting former 11 C.F.R. § 100.24(a)). The D.C. Circuit found that these definitions "exclude[d] efforts that actively encourage[d] people to vote or register to vote . . . [,] dramatically narrow[ed] which activities are covered" and "entirely exclude[ed] mass communications targeted to many people." *Id.* at 931. It thus held that, under the familiar two-step analysis in *Chevron U.S.A. Inc. v. Natural*

[3] The FEC's guidebook *Political Party Committees* (Aug. 2013), http://www.fec.gov/pdf/partygui.pdf, provides a summary of how Levin funds may be raised, spent, and allocated. *Id.* at 57-58 (raising and spending); *id.* at 116-17 (allocation).

Resources Defense Council, Inc., 467 U.S. 837 (1984), "the definitions fail at . . . step two because they conflict with BCRA's purpose of 'prohibiting soft money from being used in connection with federal elections.'" *Id.* at 932 (quoting *McConnell*, 540 U.S. at 177 n.69). The FEC has since revised its regulations to broaden the definitions of these kinds of FEA, including by covering the encouragement of registration and voting by various means such as email. *See* 11 C.F.R. § 100.24(a)(2)-(3); *see also generally id.* § 100.24 (defining FEA).

In addition, the FEC currently defines generic campaign activity to mean "a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate." 11 C.F.R. § 100.25. A public communication is "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." *Id.* § 100.26. But general public political advertising does "not include communications over the Internet, except for communications placed for a fee on another person's Web site." *Id.*

II. COURT CHALLENGES AFTER BCRA

A. *McConnell v. FEC*

Numerous individuals and entities, including Republican party national, state, and local committees, challenged BCRA as soon as it was passed. *McConnell*, 251 F. Supp. 2d at 220 n.55 (listing dozens of parties in the case). Among other things, the plaintiffs facially challenged new FECA § 323 (section 30125) under the First Amendment. *McConnell*, 540 U.S. at 134.

In upholding most of BCRA, the Supreme Court considered and rejected the plaintiffs' arguments that section 30125(b) was unconstitutional. It upheld the requirement that state and local committees fund FEA with hard money subject to FECA's $10,000 contribution limit (or in

some circumstances with an allocated mix of hard money and Levin funds), the definition of FEA, and the requirements governing use of Levin funds. *McConnell*, 540 U.S. at 161-73. "Congress recognized that, given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations." *Id.* at 161. Section 30125(b), the Court wrote, "is designed to foreclose wholesale evasion of § [30125](a)'s anticorruption measures by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections." *Id.*

Applying the "closely drawn" standard of review that applies to FECA's contribution limits, *id.* at 136, the Court held 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. Separately discussing each of the four categories of FEA, *id.* at 167-71, the Court found that they "all are reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anticorruption interests to be served," *id.* at 167. Accordingly, the Court held that section 30125(b) "is a closely drawn means of countering both corruption and the appearance of corruption." *Id.* at 167, 173.

B. *RNC v. FEC*

In 2008, Republican party national, state, and local committees brought another challenge in this Court. Again they "target[ed]," among other things, "§ [30125](b), which prohibits them from using soft-money contributions for any '[FEA].'" *RNC*, 698 F. Supp. 2d at 160. The state and local party committees contended that section 30125(b) was unconstitutional "as applied" to certain proposed FEA that they planned. *Id.* "Specifically, they assert[ed] that the First Amendment entitles them to receive and spend soft-money contributions (that is, contributions

above the current $10,000 annual limit) on . . . public communications that promote the [state committee's] ballot initiatives and incidentally criticize or oppose federal candidates." *Id.* They also claimed that they were entitled to receive and spend soft money on "voter registration, voter identification, get-out-the-vote activities, and 'generic campaign activity' in connection with elections where both state and federal candidates appear on the ballot, but not 'targeted to' any federal race or candidate." *Id.*

The district court first rejected plaintiffs' argument that Congress, through BCRA, could not regulate certain activities that were insufficiently federal, finding that plaintiffs' argument was "not so much an as-applied challenge as . . . an argument for overruling a precedent," which the district court could not do. *Id.* at 157. The court next addressed the plaintiffs' contention that the Supreme Court's recent decision in *Citizens United* striking down financing restrictions on corporate independent expenditures had undermined *McConnell*'s holding concerning the governmental interests that apply to restricting soft money contributions to political parties. *Id.* at 158-60. The plaintiffs argued "that no viable theory of corruption justifies these limits on contributions to political parties." *Id.* at 158. The district court found, however, that *McConnell* had permissibly justified the soft money ban, even when viewed under the definition of corruption set out in *Citizens United*. "'[T]he close relationship between federal officeholders and . . . parties'" means that contributions to party committees "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 158-59 (quoting *McConnell*, 540 U.S. at 154).

Addressing the state and local committees' as-applied challenges to section 30125(b), the district court began by observing that the Supreme Court in *McConnell* had "squarely rejected those claims," *id.* at 161, under the applicable "closely drawn" level of scrutiny, *id.* at 156. It

explained that the Supreme Court had expressly considered and rejected "the argument that § [30125](b) was overbroad because it applied to expenditures by state and local parties that allegedly 'pose no conceivable risk of corrupting or appearing to corrupt federal officeholders.'" *Id.* at 161 (quoting *McConnell*, 540 U.S. at 166). In *McConnell*, the Supreme Court had "examined each of the categories of activity that § [30125](b) requires state and local parties to pay for with hard money, and it found that expenditures in each category had a significant potential to 'directly assist' federal candidates." *Id.* The court acknowledged that parties are permitted to bring as-applied challenges to section 30125(b) despite *McConnell's* facial holding, but it found that the arguments the plaintiffs raised were "essentially the same arguments considered and rejected in *McConnell*. There is nothing substantially new presented in plaintiffs' as-applied challenge to § [30125](b)." *Id.* Accordingly, the district court "reject[ed] plaintiffs' as-applied challenges to § [30125](b) as a matter of law." *Id.* at 162. Exercising its mandatory jurisdiction, the Supreme Court affirmed without opinion. 130 S. Ct. 3544 (2010).

C. *RNC v. FEC* and *Rufer v. FEC* (2014)

Last year LAGOP and the other plaintiffs in the current case, along with others including the Republican National Committee and Libertarian committees including the Libertarian Party of Indiana ("LPIN"), brought another round of challenges in this Court against various provisions of FECA. Specifically, they challenged 52 U.S.C. § 30116(a)(1)(B), "which limits the dollar amount individuals can contribute to national parties," 52 U.S.C. § 30116(a)(1)(D), "which limits the dollar amount individuals can contribute to state and local parties," and 52 U.S.C. § 30125(a)-(c), "which prohibits national, state, and local parties and their officers and agents from soliciting, receiving, or spending funds raised outside of section [30116]'s contribution limits." *Rufer*, 64 F. Supp. 3d at 200 n.2. The plaintiffs sought "to invalidate

Congress's longstanding party contribution limits as applied to *their* non-coordinated expenditures," seeking permission to create "segregated" accounts into which they could receive unlimited contributions for "non-coordinated federal campaign expenditures." *Id.* at 198, 200.

Included in the Republican plaintiffs' challenge was the Republican state and local committee plaintiffs' claim that "the non-federal-funds prohibition on [FEA, 52 U.S.C. § 30125(b)]," by state and local party committees was unconstitutional under the First Amendment "as applied to independent [FEA]" and "facially." Verified Compl. for Declaratory and Injunctive Relief ¶¶ 50-54 (Count 3), *RNC v. FEC*, No. 14-853 (D.D.C. May 23, 2014) (Docket No. 1) ("*RNC* 2014 Compl."). The Libertarian plaintiffs likewise challenged section 30125(b)(1)'s requirement that state committees like LPIN not "spend or disburse money in connection with a federal election, unless that money was raised in compliance" with the Act's "contribution limits." Verified Compl. for Injunctive and Declaratory Relief ¶¶ 105, 111 (Count III), *Rufer v. FEC*, No. 14-837 (May 21, 2014) (Docket No. 1) ("*Rufer* 2014 Compl."). Both sets of plaintiffs also challenged section 30125(c) as applied, and the Republican plaintiffs challenged it facially as well. *RNC* 2014 Compl. ¶¶ 53-54; *Rufer* 2014 Compl. ¶¶ 106-07, 111.

On the parties' motions, the Court ruled that the plaintiffs' challenges were substantial for the purpose of convening a BCRA three-judge court because the Supreme Court had not expressly considered "whether the threat of *quid pro quo* corruption or its appearance inherent in donations to political parties may be sufficiently reduced by segregating contributions to independent expenditure accounts so as to defeat the government's ability to cap such contributions consistent with the First Amendment." *Rufer*, 64 F. Supp. 3d at 203. It then held that, under *McConnell*, plaintiffs nevertheless lacked standing to bring their challenge in a BCRA three-judge court because, "regardless of what other statutory provisions Plaintiffs

challenge, no court can give them what they seek — redress their alleged injury in standing terms — without invalidating" FECA's base contribution limits. *Id.* Because the "lynchpin of Plaintiffs' challenge is the base limits," plaintiffs lacked "standing to challenge them through a three judge court" and "the constitutional questions raised" by the challenges of eligible plaintiffs were certified to the en banc D.C. Circuit pursuant to 52 U.S.C. § 30110. *Id.* at 204.

The Libertarian plaintiffs asked the Court to reconsider its decision and requested clarification of the Court's intended treatment of LPIN, the Libertarian state party committee plaintiff. Pls.' Mot. for Partial Reconsideration & Clarification of Denial of Mot. for Three-Judge Panel, *Rufer v. FEC*, No. 14-837 (D.D.C. Sept. 3, 2014) (Docket No. 23). These plaintiffs argued that, because the Court of Appeals would not have jurisdiction to hear LPIN's claims under 52 U.S.C. § 30110, LPIN's challenge to sections 30125(a)-(c) "indisputably falls within BCRA § 403's special judicial review provision," and thus "LPIN respectfully requests that, at a minimum, this Court convene a three-judge panel to consider LPIN's BCRA claims." *Id.* at 2. If the "Court [were] inclined to grant [this] relief," the Libertarian plaintiffs requested that the claims of their national party committee and individual plaintiff be stayed or dismissed so as to create jurisdiction before the three-judge court. *Id.* at 2 n.1; *id.* at 6-7. The FEC opposed the motion. It explained that "jettisoning everything but the claims of LPIN" would "leave them with no challenge to section [30116(a)(1)(D)] . . . in the first place." FEC's Opp. and Response to Pls.' Mot. for Partial Recons. & Clarification of Denial of Mot. for Three-Judge Panel at 6, *Rufer v. FEC*, No. 14-837 (D.D.C. Sept. 22, 2014) (Docket No. 24).

The Court denied reconsideration. Order on Pls.' Mot. for Partial Recons. & Clarification of Denial of Motion for Three-Judge Panel, *Rufer v. FEC*, No. 14-827 (D.D.C. Sept. 22, 2014) (Docket No. 25) ("Reconsideration Order"). It reiterated that "redressing

Plaintiffs' alleged injuries would require overturning portions of [FECA]," which a BCRA three-judge court would lack the power to do, and it rejected the Libertarian plaintiffs' request to "ignore the standing defects and convene a three-judge district court." *Id.* at 1. It further explained that LPIN's claims would not proceed before either a BCRA three-judge court or the en banc Court of Appeals, and would instead remain before the Court as a single-judge district court pursuant to its "jurisdiction to adjudicate claims under the Constitution and federal laws generally." *Id.* at 2 (citing *In re Cao*, 619 F.3d 410, 435 (5th Cir. 2010) (en banc)). Consistent with that ruling regarding LPIN, the Court's certification order stated that the claims of the Republican "state and local party committee plaintiffs — the Republican Party of Louisiana, the Jefferson Parish Republican Parish Executive Committee, and the Orleans Parish Republican Executive Committee" would similarly remain in the district court and be stayed "pending the decision of the circuit on the certified questions." Certification Order at 1-2, *RNC v. FEC*, No. 14-853 (D.D.C. Sept. 22, 2014) (Docket No. 36); Certification Order at 1-2, *Rufer v. FEC*, No. 14-837 (D.D.C. Sept. 22, 2014) (Docket No. 26).

All of the plaintiffs then voluntarily dismissed. The dismissals occurred both as to the state and local party plaintiff committees proceeding before this Court and as to the national party committee and individual plaintiffs proceeding before the Court of Appeals. Stipulation Dismissing Pls. and Action, *RNC v. FEC*, No. 14-853 (D.D.C. Dec. 3, 2014) (Docket No. 38); Stipulation of Dismissal, *Rufer v. FEC*, No. 14-837 (D.D.C. Dec. 2, 2014) (Docket No. 28); Order, *Rufer v. FEC*, No. 14-5240 (D.C. Cir. Dec. 10, 2014) (en banc) (dismissing actions) (Document #1526566). The Republican plaintiffs explained that they were dismissing primarily because of the Court's procedural ruling. They "brought their claims as BCRA claims in the DC District Court and believe that is still the proper forum, but they were denied that forum, and as a

corollary, [mandatory] appellate review by the United States Supreme Court." (Exh. 1, Email from Rich Coleson to Charles Kitcher, Nov. 18, 2014.) "[T]he Republican plaintiffs should not be compelled to litigate in a court not of their choosing." (*Id.*) The plaintiffs also noted another reason for the dismissal: "[I]f the case were remanded for discovery, there would be further cost and delay which, together with the lack of [mandatory] Supreme Court appellate review, would make pursuing the claims unduly burdensome in the short term." (*Id.*)

III. PLAINTIFFS' CLAIMS

Eight months after these dismissals, a subset of the Republican plaintiffs in the 2014 *RNC* case (specifically, the state and local parties who are not eligible to proceed under 52 U.S.C. § 30110) have brought another case raising some identical issues. These plaintiffs once more seek declaratory and injunctive relief against three provisions: (1) the requirement that state and local parties must generally fund FEA with money raised subject to FECA's source and amount restrictions, 52 U.S.C. § 30125(b)(1); (2) the requirement that costs for raising funds for FEA be paid for with funds subject to FECA's source and amount restrictions, *id.* § 30125(c); and (3) the requirement that state and local committees report their FEA, *id.* § 30104(e)(2). (Verified Compl. for Declaratory and Injunctive Relief (Docket No. 1) ("Compl.") Prayer for Relief ¶¶ 3-10.)[4]

Plaintiffs' causes of action each seek varying amounts of relief, but all contain certain qualifications. Count I asks that the three challenged provisions be invalidated as applied to

[4] Although the local committee plaintiffs were alleged to be local committees "of a political party" in the 2014 challenge, they are no longer. *Compare* 2014 *RNC* Compl. ¶¶ 15-16 (local committee plaintiffs were "local committee[s] of LAGOP"), *with* Compl. ¶¶ 7-8. But plaintiffs must believe these are still "local committee[s] of a political party," 52 U.S.C. § 30125(b)(1), as alleged in 2014, because otherwise these plaintiffs could not challenge that provision on basic standing and ripeness grounds. To the extent plaintiffs alternatively seek confirmation that the various planned activities of the local committee plaintiffs are exempt party activities or non-FEA, so as not to count towards their political-committee-status registration thresholds (Compl. ¶¶ 41-44), what they seek is an advisory opinion that should be directed to the FEC, 52 U.S.C. § 30108, not an Article III federal court.

"independent, non-individualized communications that exhort registering/voting" and to such communications made "by Internet." (Compl. ¶¶ 117-29 (emphases removed).) Count III asks that the provisions be invalidated as applied to all "independent" FEA. (*Id.* ¶¶ 139-49 (emphasis removed).) Count IV asks that they be invalidated facially. (*Id.* ¶¶ 150-52.) Counts I, III, and IV are brought on behalf of all plaintiffs. Count II is brought on behalf of LAGOP only. It challenges the three provisions as applied to certain proposed FEA by LAGOP. (*Id.* ¶ 131.) It alternatively challenges only 30125(b)(1) and 30125(c) as applied to the proposed creation of an "independent-communications-only account," which allegedly would "contain only contributions from individuals" to LAGOP "that are legal under state law and applicable federal law (other than the challenged provisions)." (*Id.* ¶ 132 (emphasis removed).) This account would allegedly be similar to "the non-contribution accounts . . . of nonconnected committees," which such committees have used to finance independent expenditures following *Citizens United* and other decisions. (*Id.* ¶ 137.) Count II's alternative request does not challenge section 30104(e)(2)'s reporting requirement. All four counts are based on plaintiffs' claim that their planned activities raise no "cognizable" quid-pro-quo corruption risk. (*Id.* ¶¶ 121, 123, 134-35, 145, 151.)

Notwithstanding the phrasing of their claims, all of the funds plaintiffs intend to raise will be "compliant with state law," including Louisiana's $100,000 four-year state limit on individual contributions. (Compl. ¶ 108; *see also id.* ¶ 109 (describing limit).) Plaintiffs seek only to "be able to use nonfederal funds to pay for an *allocated* amount of their activities under the existing allocation rules" applicable to state and local party activity that is not FEA. (*Id.* ¶ 137.)

Plaintiffs acknowledge that use of Levin funds would permit them to allocate the costs of some of their desired activities to a nonfederal account. But plaintiffs assert that they "do not use [Levin funds] due to complexity, burdens, and restrictions." (*Id.* ¶ 15 n.4.) In describing their

proposed activities in detail (*id.* ¶¶ 74-111), plaintiffs appear ultimately to concede that these activities mostly meet the definition of FEA, despite some equivocation (*e.g.*, *id.* ¶ 104 (asserting that advertisement mentioning Hillary Clinton "might be deemed PASO")). Finally, although plaintiffs allege that they intend to comply with just about every other applicable federal and state contribution restriction (*id.* ¶¶ 107-09), absent from the list is FECA's annual $10,000 limit for individual contributions to state and local committees, 52 U.S.C. § 30116(a)(1)(D).

IV. BCRA'S SPECIAL JUDICIAL REVIEW PROCEDURE

Section 403 of BCRA makes available special procedures for actions brought on constitutional grounds challenging "any provision" of BCRA or "any amendment made by" it. BCRA § 403(a). Section 403 provides that all such actions initiated before December 31, 2006 were to be filed in this Court and heard by a three-judge district court convened pursuant to 28 U.S.C. § 2284. *Id.* § 403(d)(1). It also provides for expedition and that final decisions of such three-judge courts are reviewable only by direct appeal to the Supreme Court. *Id.* §§ 403(a)(3)-(4). The special procedural rules do not apply to actions filed after December 31, 2006 unless they are elected. *Id.* § 403(d)(2).

ARGUMENT

Plaintiffs' renewed request for a three-judge court should be denied.

Their challenge is not justiciable by a three-judge court. The Court's previous ruling on this issue precludes them from relitigating whether a three-judge court would have the power to grant them relief from FECA's contribution limit, and, in any event, the same redressability problem that prompted the Court to deny their request in 2014 remains fatal. Plaintiffs also lack standing because their claimed injuries are to a significant extent illusory in that they are not being harmed by the federal contribution limit; these injuries are also self-inflicted because plaintiffs can do at least some of their desired activities using an allocation of federal and

nonfederal funds pursuant to the Levin amendment. And because some of plaintiffs' claims are actually challenges to FEC regulations, not the Act's provisions, they must be heard by a single-judge court under the Administrative Procedure Act instead of a BCRA three-judge court.

Additionally, plaintiffs' claims cannot be heard by a three-judge court, even setting aside the jurisdictional barriers, because they are insubstantial. Plaintiffs have revised their challenge to focus on the constitutionality of BCRA's regulation of FEA (*i.e.*, soft money), making it wholly foreclosed by the controlling Supreme Court decisions that resolved the same issues and that remain good law. By no longer including any claims seeking permission to establish independent-expenditure-only accounts for unlimited contributions, plaintiffs have cut themselves off from their former reliance on independent-expenditure precedents. In contrast to independent expenditures, Congress's regulation of FEA is finely-tailored, focuses exclusively on the activities of a comparatively small group of entities that includes plaintiffs, and already establishes a constitutional framework in which such committees may operate independently of their otherwise-affiliated party committees. Also, plaintiffs' reprised argument that the government has no cognizable interest in regulating political parties' use of soft money for FEA, on the basis that plaintiffs' proposed activities pose no risk or appearance of quid-pro-quo corruption, has been repeatedly rejected in binding court opinions. And the availability of Levin funds separately establishes that plaintiffs' claims are insubstantial. Finally, plaintiffs' undeveloped challenge to the Act's requirement that they report their FEA is foreclosed by the Supreme Court's overwhelming approval of such reporting requirements.

I. STANDARD OF SCRUTINY

The Supreme Court has no discretion to refuse adjudication on the merits in direct appeal cases. *McCutcheon*, 134 S. Ct. at 1444. "[D]ue to an 'overriding policy . . . of minimizing the

mandatory docket of [the Supreme] Court in the interests of sound judicial administration,' district courts are to narrowly construe statutory provisions providing for three-judge courts." *Rufer*, 64 F. Supp. 3d at 202 (quoting *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 98 (1974)); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket." (internal quotation marks omitted)); *accord MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (per curiam).

Consistent with that narrow construction mandate, applications for three-judge courts made pursuant to BCRA § 403 and 28 U.S.C. § 2284 should not be granted unless the case presents "a 'substantial claim' and 'justiciable controversy.'" *Rufer*, 64 F. Supp. 3d at 202 (quoting *Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011) (per curiam) (quoting *Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1335, 1338 (D.C. Cir. 1975))); *Independence Inst. v. FEC*, 70 F. Supp. 3d 502, 506 (D.D.C. 2014) (denying application for BCRA three-judge court and dismissing because plaintiffs' challenge was "'clearly foreclosed by Supreme Court precedent'" (quoting *Rufer*, 64 F. Supp. 3d at 198)), *appeal docketed*, No. 14-5249 (D.C. Cir. Oct. 22, 2014); *Hassan v. FEC*, 893 F. Supp. 2d 248, 257-58 (D.D.C. 2012) ("A three-judge court is not required . . . when the Court lacks jurisdiction over a plaintiff's claims. As the D.C. Circuit has stated, an individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel." (internal quotation marks omitted)), *aff'd*, No. 12-5335, 2013 WL 1164506 (D.C. Cir. Mar. 11, 2013).

Review of a district court's refusal to convene "a three-judge court ab initio . . . is available only in the court of appeals." *Gonzalez*, 419 U.S. at 101.

II. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE BEFORE A BCRA THREE-JUDGE COURT

The irreducible constitutional minimum of standing requires (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "A three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez*, 419 U.S. at 100; *Wertheimer v. FEC*, 268 F.3d 1070, 1072 (D.C. Cir. 2001) ("[A]n individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel.") (construing the Presidential Election Campaign Fund Act's judicial review provision, 26 U.S.C. § 9011(b)).

Here, plaintiffs lack standing. Not only are they collaterally estopped from relitigating whether a BCRA three-judge court possesses the power to invalidate FECA's $10,000 limit on individual contributions to state and local committees, but, as before, they remain utterly unable to demonstrate redressability otherwise. Plaintiffs also fail to show injury and causation. Plaintiffs have not shown that their planned activities require receiving, or that any individual contributor actually intends to give them, the five- or six-figure excess contributions they contemplate. Their disinclination to use Levin funds is a self-inflicted injury that was not caused by the FECA provisions they challenge. And a three-judge court also lacks the power to invalidate the FEC regulations the plaintiffs are actually challenging in Counts I and II.

A. A Three-Judge Court Could Not Redress Plaintiffs' Alleged Injury

Last year, the Court resolved the issue of whether plaintiffs can pursue their claim before a three-judge court. It ruled that the plaintiffs in the 2014 edition of these soft money challenges could not pursue their claims before a three-judge court because they lacked standing to bring

their challenge in that forum. *Rufer*, 64 F. Supp. 3d at 203-04. That challenge, like this one, included claims by the same state and local committee plaintiffs that "the non-federal-funds prohibition on [FEA]" in sections 30125(b) and (c) is unconstitutional "as applied to independent [FEA]" and "facially." *RNC* 2014 Compl. ¶¶ 52-54; Compl., Prayer for Relief ¶¶ 3-10.

The Court observed that "regardless of what other statutory provisions" were challenged in that case — including the restrictions in subsections 30125(b) and (c) — "no court can give them what they seek" without invalidating FECA's base contribution limits. *Rufer*, 64 F. Supp. 3d at 203. The "pivotal question" the Court confronted, "then, is whether a three-judge district convened under BCRA § 403 would have that power. If the answer is 'no,' then Plaintiffs lack standing to present their challenges to a three-judge court." *Rufer*, 64 F. Supp. 3d at 203. Applying the Supreme Court's analysis in *McConnell*, the Court held that the answer indeed was no. *Id.* at 203-04. The Court reiterated that holding in denying the Libertarian plaintiffs' reconsideration request. Reconsideration Order at 1-2. Those plaintiffs sought to abandon all claims other than the state party committee's (LPIN) challenge to subsections 30125(b) and (c), as plaintiffs here have now done. *See supra* p. 14. The Court explained, however, that although the jurisdiction of a BCRA three-judge court is limited, mixed BCRA and FECA claims may be heard either by a single-judge district court under regular federal question jurisdiction, 28 U.S.C. § 1331, or before the en banc Court of Appeals under 52 U.S.C. § 30110 if the plaintiffs are among those enumerated in that provision. Reconsideration Order at 2.

That answer has not changed. As an initial matter, plaintiffs are estopped from relitigating this question. The issue of whether a three-judge court can hear plaintiffs' challenge, including their challenges to section 30125, was (1) "'contested by the parties and submitted for judicial determination in the prior case'"; and (2) "'determined by a court of competent

jurisdiction'"; in addition, (3) no "'basic unfairness'" would result from plaintiffs being precluded by their (and the Libertarian plaintiffs') previous but unsuccessful to obtain review before a three-judge court. *Martin v. Dep't of Justice*, 488 F.3d 446, 454-55 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)).

Plaintiffs have had their bite at the apple. The jurisdictional question was extensively briefed both in *RNC v. FEC*, No. 14-853, and *Rufer v. FEC*, No. 14-837, the Court heard oral argument on the question, including argument addressing questions that the Court itself crafted after reviewing the parties' briefs, Notice Regarding July 16, 2014 Hearing at 1-2, *RNC v. FEC*, No. 14-853 (D.D.C. July 10, 2014) (Docket No. 24) (articulating five "specific questions"), and the Libertarian plaintiffs and the FEC also filed briefs concerning reconsideration. The Court's ruling addressed plaintiffs' arguments and fully resolved the jurisdictional issue in a published opinion that all plaintiffs chose not to appeal when they dismissed their cases. That ruling is "sufficiently firm to be accorded conclusive effect." Restatement (Second) of Judgments § 13 (1982); *Martin*, 488 F.3d at 454-55 (citing Restatement and affirming district court's decision applying collateral estoppel)); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (noting that the Supreme Court "regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion"). And no unfairness would result from applying issue preclusion here. Plaintiffs' previous incentives "to litigate the point . . . were no less present in the prior case, nor are the stakes of the present case of 'vastly greater magnitude.'" *Martin*, 488 F.3d at 455 (quoting *Yamaha Corp. of Am.*, 961 F.2d at 254).

Importantly, for purposes of issue preclusion, "once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case," and "[p]reclusion cannot be avoided simply by offering evidence in the second

proceeding that could have been admitted, but was not, in the first." *Yamaha Corp. of Am.*, 961 F.2d at 254-55. As the Court analogously explained in its Reconsideration Order, reconsideration "is not 'a second opportunity to present argument upon which the Court has already ruled.'" Reconsideration Order at 2 (quoting *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001)). The Court accordingly should find plaintiffs precluded from relitigating whether they may proceed before a three-judge court, consistent with the goals of relieving "the parties of the expense, vexation, and burdens attending multiple lawsuits," conserving judicial resources, and minimizing the "risk of forum shopping, piecemeal litigation, and inconsistent decisions." *Bailey v. DiMario*, 925 F. Supp. 801, 810 (D.D.C. 1995).[5]

Furthermore, even if plaintiffs were not formally precluded, they would remain unable to satisfy the requirement of redressability. A BCRA three-judge court still lacks the power to invalidate FECA's base limit on individual contributions to state and local party committees. 52 U.S.C. § 30116(a)(1)(D). Plaintiffs attempt to avoid that conclusion by reframing their challenge as one that does not seek to have FECA's contribution limits be invalidated. But this move only underscores plaintiffs' redressability problem, especially in light of their express concession that state contribution limits still apply (*e.g.*, Compl. ¶¶ 107, 109, 132). Plaintiffs fail to explain why, if they were to prevail here, their proposed activities would remain subject to general state and federal contribution restrictions, including state law limits on the amount of those contributions, but not the federal limits on the amount of those contributions. Although those last limits are intentionally not cited, plaintiffs' case is in essence a challenge to the federal contribution limits. Because plaintiffs are still seeking to pay for FEA using funds raised outside of FECA's amount

[5] The Commission stipulated to the Republican plaintiffs' voluntary dismissal but explicitly reserved "any rights or arguments that may apply in future cases," which include the ability to assert issue preclusion here. Stipulation Dismissing Pls. and Action at 1, *RNC v. FEC*, No. 14-853 (D.D.C. Dec. 3, 2014) (Docket No. 38).

restrictions, *i.e.*, the limit of $10,000 that applies to individual contributions to state and local committees, "no court can give them what they seek" without invalidating that base limit. *Rufer*, 64 F. Supp. 3d at 203. Indeed, that is why the plaintiffs found themselves before this Court, and not a BCRA three-judge court, when they dismissed the same claims last year.

Undaunted, plaintiffs once again contend that this case is "like" other BCRA three-judge court cases, including *McConnell* and *McCutcheon*, which invalidated BCRA's revision of FECA's aggregate contribution limit. (Pls.' Mem. Supporting Appl. for Three-Judge Court at 1, 3-4 (Docket No. 3) ("Pls.' Mem.").) But *McCutcheon* was appropriately before a three-judge court because that revision created a "different statutory regime" from the one that had been considered in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *McCutcheon*, 134 S. Ct. at 1446. *McConnell* (and *RNC*) were likewise appropriately before three-judge courts because those challenges directly targeted BCRA's soft money provisions as improperly regulating nonfederal activities. This case, by contrast, seeks to avoid FECA's contribution limits due to the claimed "independence" of the plaintiffs' concededly federal activities. (*E.g.*, Pls.' Mem. at 36 ("There is no quid-pro-quo risk due to the *independence* of the activities." (emphasis added)).) This was the same basis plaintiffs claimed for avoiding FECA's contribution limits in the previous case. But the Court correctly rejected that basis for a BCRA three-judge court, explaining that the challenged FECA contribution limits restricting contributions for independent expenditures predated BCRA. *Rufer*, 64 F. Supp. 3d at 203-04. Here, plaintiffs' claim similarly does not ultimately hinge on any alterations made by BCRA, but on the purported "absence of prearrangement and coordination" (Pls.' Mem. at 35 (internal quotation marks omitted) — the independence justification upon which *Buckley* invalidated FECA's *expenditure* limits.

Even assuming subsections 30125(b) and (c) were wiped away, plaintiffs still could not accept the $100,000 individual contributions (per four years) they say they would like to use to fund their contemplated activities. As explained further below, LAGOP is the only committee with planned or historical party activity above de minimis levels, *see infra* pp. 27-28, and it is a federal political committee. (Compl. ¶ 6.) FECA provides that "no person shall make contributions . . . to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000." 52 U.S.C. § 30116(a)(1)(D). That means that plaintiffs remain subject to the $10,000 limit.

Plaintiffs are wrong in assuming that the campaign finance regime created by FEC's pre-BCRA interpretations of FECA permitting soft money to be used for "mixed" activities springs back into existence upon the invalidation of subsections 30125(b) and (c). (*E.g.*, Compl. ¶ 75 (LAGOP is "burdened by the inability to allocate costs to nonfederal funds as allowed before BCRA").) That assumption cannot be squared with Congress's clear intent to reject the pre-BCRA regime by prohibiting the use of soft money to fund FEA. *See McConnell*, 540 U.S. at 123 (noting that "a literal reading of FECA's definition of 'contribution' would have required [activities influencing both federal and state elections] to be funded with hard money"). As part of that legislative choice, Congress doubled the hard money limit on contributions to state and local committees in order to offset partially the loss of soft money funds. 148 Cong. Rec. S2153 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein). Congress has thus "spoken" to the "precise question" of whether FECA should be interpreted to permit the use of soft money to fund FEA. *Chevron*, 467 U.S. at 842; *accord Shays*, 528 F.3d at 932 (invalidating FEC's interpretations unduly narrowing statutory provisions). That was why the plaintiffs in 2014 challenged "whatever provisions [stood] in the way" of their ability to receive unlimited

contributions, "whether they are a soft-money ban or a BCRA-amended contribution limit." Pls.' Reply Supporting Their Amended Appl. for Three-Judge Court at 18, *RNC v. FEC*, No. 14-853 (D.D.C. June 23, 2014) (Docket No. 21). Without challenging section 30116(a)(1)(D) here, plaintiffs only challenge some of the provisions standing in the way of their desired relief. Their claims remain unredressable by a three-judge court.

B. Plaintiffs Also Fail to Establish Injury and Causation

The new detail in plaintiffs' complaint shows that their challenge also runs afoul of the injury and causation elements of standing.

First, plaintiffs have offered no evidence that, even absent the limit, there is anyone who wants to give them such significant sums. Plaintiffs have thus failed to establish any injury. *Hassan*, 893 F. Supp. 2d at 257. In 2014, when LAGOP purportedly did not undertake activities but for FECA, the committee's state account appears to have had only one contributor who gave a contribution of more than $10,000.[6] The local committee plaintiffs raise virtually no contributions. JPGOP has filed reports of its receipts and disbursements with the state of Louisiana for all but one year dating back to 2005, and its receipts of a couple thousand dollars each year consist almost entirely of candidate filing fees forwarded by local clerk's offices.[7] It has not reported a single "contribution" under state law during that time.[8] The Orleans Parish

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[6] Louisiana Ethics Administration Program, http://ethics.la.gov/CampaignFinanceSearch/SearchEFilingContributors.aspx (permitting search by date, filer, amount, and name of contributor).

[7] Louisiana Ethics Administration Program, http://ethics.la.gov/CampaignFinanceSearch/ViewScannedFiler.aspx?FilerID=300306.

[8] Louisiana Ethics Administration Program, http://ethics.la.gov/CampaignFinanceSearch/SearchResultsByContributions.aspx (permitting search under committee name, which for JPGOP yields only a $150 "other" receipt of a candidate qualifying fee from a clerk).

Republican Executive Committee has apparently never filed a report with the state of Louisiana, indicating that it never had financial activity in excess of $500 within a calendar year dating back to at least 1998.[9] Any failure of the two committees to raise contributions in excess of federal limits is hardly traceable to BCRA.

Second, plaintiffs also have not shown that they need the excess individual contributions they seek in order to fund their intended activities. In addition to FECA's $10,000 limit, state and local committees each may receive Levin funds up to a separate $10,000 limit (unless the state limit is lower, which is not the case in Louisiana, La. Rev. Stat. 18:1505.2(K)(1)). 52 U.S.C. § 30125(b)(2)(B)(iii); 11 C.F.R. § 300.31. LAGOP alleges that in 2014 it "wanted to use approximately $100,000 in nonfederal funds for [FEA], but could not because it did not want to do so under the challenged provisions" and that it intends "materially similar" FEA activities in the future. (Compl. ¶¶ 111, 114.) Raising these amounts using federal funds or Levin accounts (which each plaintiff could have separately) would require only a handful of contributors to give the maximum $10,000 in contributions. Plaintiffs have failed to establish that LAGOP is hampered by abiding by this restriction. The local committee plaintiffs say they want to "spend *under $5,000* in 2015 and 2016 on [FEA]," (Compl. ¶ 110 (emphasis added)), and thus they would need only a single contributor to give half the legal limit. That is no injury.

Third, the D.C. Circuit has also "consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). Self-inflicted injuries are not "cognizable under Article III," nor would they be "fairly traceable to the defendant's challenged conduct." *Id.*

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[9] Louisiana Ethics Administration Program, http://ethics.la.gov/CampaignFinanceSearch/SearchScanned.aspx (permitting search by name of committee); Louisiana Board of Ethics, Ethics Administration Program, http://ethics.la.gov/Pub/Laws/pacsum.pdf (summarizing Louisiana law).

Here, it appears that plaintiffs could use Levin funds to pay for certain of their contemplated FEA, such as voter registration activity, voter identification, get-out-the-vote, and certain generic campaign activity. For example, plaintiffs' complaint alleges that they wish to email a "nonpartisan article" that LAGOP has posted on its website to potential voters, and that this email will qualify as voter registration and get-out-the-vote activity in the coming months. (Compl. ¶ 86.) Plaintiffs contend that they should be able to fund this activity using an allocation of federal and non-federal money (*e.g.*, *id.* ¶¶ 118, 131), but plaintiffs already *can* use an allocation of federal and non-federal money to do this kind of activity, so long as they comply with the provisions governing how Levin funds are raised. *See* 52 U.S.C. § 30125(b)(2); 11 C.F.R. § 300.31. The same is true of other FEA falling into the first two categories of FECA's definition and which do not refer to a clearly-identified candidate for Federal office. (Compl. ¶¶ 87, 88, 91-93 (voter registration, get-out-the-vote, and generic campaign activities); *id.* ¶ 96 (voter identification related to state legislative and gubernatorial candidates for use in federal election).) To the extent plaintiffs' claim that they must pay for their proposed FEA solely with federal funds derives from their choice to do so rather than through the already permissible allocation method, they have failed to establish injury caused by FECA.

C. A Three-Judge Court Could Not Invalidate FEC Regulations

Plaintiffs' revised case also raises a new redressability problem. The extensive discussions of FEC regulations in plaintiffs' complaint and the brief supporting their three-judge court application, together with the descriptions of plaintiffs' desired activities, demonstrate that at least as to Counts I and II, plaintiffs' grievances are actually with FEC regulations, not the statutory provisions they purport to challenge. (Compl. ¶ 127 (citing portions of 11 C.F.R. § 100.24 (FEC's regulation implementing FECA's definition of FEA); *id.* ¶ 131 (citing portions

of 11 C.F.R. § 100.24 and the FEC's regulation defining "public communication," 11 C.F.R. § 100.26, and "PASO" communications, 11 C.F.R. § 100.24(b)(3)).)

In pressing these counts, plaintiffs seek to resurrect the FEC's "original" post-BCRA regulatory definitions of "voter registration activity" and "get-out-the-vote activity." (Compl. ¶¶ 118 & n.16, 131 & n.18; Pls.' Mem. at 31-32 (explaining that plaintiffs' proposed activities are intended to conform with "what [the] FEC meant in its original *rule*" (emphasis added)).) If the plaintiffs obtained that relief, then the FEC's current and supposedly unduly "broad" (Compl. ¶ 53) regulatory definitions of "voter-registration activity and get-out-the-vote-activity definitions" would be invalidated and the agency's new definitions could no longer reach plaintiffs' contemplated email blasts and website "Internet communications" (*see* Pls.' Mem. at 32-34 (arguing that Internet communications should be carved out of the "voter registration activity" and "get-out-the-vote activity" definitions, as plaintiffs contend they are with the definition of "public communication")). In that event, plaintiffs' activities would no longer be FEA, and Counts I and II would be resolved without invalidating any statutory provisions.

Because these "alleged constitutional infirmities are found in the implementing regulations rather than the statute itself," *McConnell*, 540 U.S. at 223, these claims cannot be heard by a three-judge court. BCRA provides for three-judge court jurisdiction for actions challenging "the constitutionality of *any provision* of this Act or *any amendment* made by this Act." BCRA § 403(a) (emphases added). The district court in *McConnell* held that the plaintiffs' challenges to FEC regulations were unripe and that the proper venue to challenge them was a single-judge court under the Administrative Procedure Act, rather than in a three-judge court. 251 F. Supp. 2d at 264. The Supreme Court affirmed this point: "As the District Court explained, issues concerning the regulations are not appropriately raised in this facial challenge

to BCRA, but must be pursued in a separate proceeding." 540 U.S. at 223. Because a three-judge court would "lack[] the jurisdiction to rule on the regulations," *McConnell*, 251 F. Supp. 2d at 264, this Court should deny plaintiffs' request for a three-judge court "insofar as it requests that a three-judge court hear its claim[s] that [the regulations are] unconstitutional," *Bluman v. FEC*, 766 F. Supp. 2d 1, 4 (D.D.C. 2011).

Plaintiffs acknowledge (Pls.' Mem. at 31) that the D.C. Circuit has already ruled that their preferred regulatory interpretation is impermissible because it "conflict[s] with BCRA's purpose of prohibiting soft money from being used in connection with federal elections." *Shays*, 528 F.3d at 932 (internal quotation marks omitted) (invalidating the FEC's original regulatory definitions of "voter registration activity" and "get-out-the-vote activity" that plaintiffs now seek to have resurrected). But that does not transform their challenge from a regulatory one to a statutory one. It merely establishes that, in addition to the redressability problem, plaintiffs' regulatory claims are frivolous and foreclosed by binding precedent.

III. PLAINTIFFS' CLAIMS ARE INSUBSTANTIAL

Even if plaintiffs' reprised challenges to subsections 30125(b)(1) and (c) were justiciable before a three-judge court, they are insubstantial. Plaintiffs have attempted an end run around the Court's previous jurisdictional ruling by altering the scope of relief they seek in order to create the appearance of a BCRA, rather than FECA, case. This effort is too clever by half. Plaintiffs have navigated away from the "confluence" of precedents that led the Court to find their previous challenge substantial. *Rufer*, 64 F. Supp. 3d at 200-03. By no longer seeking to raise unlimited funds for their proposed independent-expenditure-only accounts, they have also abandoned the basis on which they can plausibly rely on "independent expenditure" precedents. This time, plaintiffs seek to raise funds without regard to FECA's base limits solely in order to

engage in FEA and concede that state law limits are applicable. Although the "determination of substantiality is rarely mechanical and often demands of the district judge an exceedingly close analysis of petitioner's constitutional claims vis-a-vis prior case law," this reframed case falls squarely under *McConnell* and its progeny, making it "obviously without merit" and clearly foreclosed by "the previous decisions of [the Supreme Court]." *Feinberg*, 522 F.2d at 1339 (internal quotation marks omitted); *Rufer*, 64 F. Supp. 3d at 202.

A. Plaintiffs' Challenges to Subsections 30125(b) and (c) Are Insubstantial

1. *McConnell* and *RNC* Upheld Section 30125

Plaintiffs' case is foreclosed by *McConnell* and *RNC*. In *McConnell*, the plaintiffs challenged section 30125 facially and argued that the soft money ban failed to serve the government interest in deterring actual and apparent corruption because the funds at issue were ostensibly given for nonfederal purposes and in some cases spent on purely state and local elections. *McConnell*, 540 U.S. at 145, 154. The Supreme Court disagreed. It found 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 likewise rejected the state and local committees' argument that section 30125(b), the provision primarily challenged here, represented "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. The Court found that section 30125(b) was "premised on Congress' judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption." *Id.* at 167.

In upholding section 30125(b)(1), the Court found that the provision, like the other "remaining provisions of new FECA § 323 [section 30125]," "largely reinforce[s]" the

restrictions of section 30125(a), *id.* at 133; it "foreclose[s] wholesale evasion of § [30125](a)'s anticorruption measures by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections," *id.* at 161. Having been taught the "hard lesson of circumvention," Congress had reasonably concluded that "political parties would react to § [30125](a) by directing soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties." *Id.* at 165. Applying closely drawn scrutiny, the Court held 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 upheld the restrictions on all four categories FEA as "reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anticorruption interests to be served." *Id.* at 167. Section 30125(b), it concluded, "is a closely drawn means of countering both corruption and the appearance of corruption." *Id.* at 167, 173.

With respect to the third category of FEA (public communications that refer to a clearly-identified public candidate and that PASO a candidate), the Court observed that such "ads were a prime motivating force behind BCRA's passage": the Senate's hearings had "'provided overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble.'" *Id.* at 169-70 (quoting S. Rep. 105-167 at 4535 (additional views of Sen. Collins)). As an example, the Court quoted the script of a television advertisement attacking Bill Yellowtail, a 1996 federal candidate, through non-express advocacy that criticized his family values and described him as "'a convicted felon.'" *Id.* at 193 & n.78 (quoting S. Rep. 105-167 at 6305 (minority views)). Here, plaintiffs' proposed advertisement supporting Louisiana Governor

Bobby Jindal (Compl. ¶ 105 ("'Let's face the Facts. Bobby Jindal has been the nation's finest example of a Republican leader . . . .'")) is precisely the same kind of PASO communication that BCRA was passed to regulate. *McConnell*, 540 U.S. at 193 ("[T]he unmistakable lesson from the record in this litigation . . . is that *Buckley*'s magic-words [of express advocacy] requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted." (citations omitted)). Yet here plaintiffs are again requesting that a three-judge court grant them an exemption in order to do the very thing BCRA was passed to prevent. The request is frivolous. *See Independence Institute*, 70 F. Supp. 3d at 511-12 (rejecting request for BCRA three-judge court and dismissing as-applied challenge to BCRA's regulation of broadcast communications made in the run up to an election based on plaintiff's claim that its proposed advertisement was less "pejorative" than those considered in the facial challenge).

Moreover, seven years after *McConnell* was decided, this court reaffirmed its holding in rejecting another as applied challenge to section 30125(b). *RNC*, 698 F. Supp. 2d 150, *aff'd*, 130 S. Ct. 3544. The court found that "'the close relationship between federal officeholders and . . . parties'" means that soft money contributions to party committees "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 158-59 (quoting *McConnell*, 540 U.S. at 154). It thus "reject[ed] plaintiffs' as-applied challenges to § [30125](b) as a matter of law." *Id.* at 162.

2. Plaintiffs' Challenge Is Foreclosed Because This Case Is About FEA, Not Independent Expenditures

Despite the Supreme Court's upholding of section 30125, plaintiffs now again challenge subsections 30125(b) and (c) facially and on various as-applied grounds, including as applied to all "independent" FEA. (Compl. ¶¶ 117-52.) Plaintiffs go on at great length in their brief

attempting to explain why this challenge is not foreclosed. (Pls.' Mem. at 4-39.) To the extent it can be followed, plaintiffs' argument deconstructs authorities by stripping away context until those precedents supposedly end up meaning the opposite of what they say. Plaintiffs thus contend, for example, that "[w]hat . . . *McConnell* [r]eally [s]aid [s]upports [p]laintiffs." (*Id.* at 23.)[10] But "not every sophistic twist that arguably presents a 'new' question" warrants using special judicial review procedures. *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990) (denying section 30110 certification). And in reality, as plaintiffs eventually seem to acknowledge, their case is simply "a request for overturning *McConnell*." (Pls.' Mem. at 43.) Plaintiffs nevertheless argue that this "request for overturning a facial holding is neither insubstantial nor foreclosed in light of the developments in the independent-expenditure case line and *McCutcheon*'s holding in the contribution-restriction case line." (*Id.*)

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[10] While cataloguing all of plaintiffs' errors is unnecessary, the FEC notes that plaintiffs incorrectly identify "seven controlling holdings" from *McCutcheon* that strain credulity, including the notion that *McCutcheon* altered the "closely drawn" standard of scrutiny that has applied since *Buckley*. (Pls.' Mem. at 10-11 & n.16.) Plaintiffs bizarrely assert that the FEC should not be able to rely on "some prior *language*" from cases like *McConnell* (*id.* at 14-17), or others such as *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) that "distinguished [independent-expenditure-only]-PACs from party-committees" (*id.* at 18-22), as if those decisions should be treated differently from "language" in court decisions generally. They assert fictional holdings that have never been rendered by any court, including that there is "no constitutional justification for any limit even on [parties'] *coordinated* expenditures" (*id.* at 21), the abandoned claim from their 2014 challenge that party committees "may . . . do independent expenditures . . . including through an ['independent-communications-only account']" (*id.* at 24), and that "facial challenges . . . may even be raised" for the first time "on appeal" (*id.* at 39). And they contend, relying exclusively on quotations from dissenting opinions, that the record in *McConnell* reflected no quid-pro-quo corruption (*e.g.*, *id.* at 39), when in fact that record was "to the contrary": the "evidence connect[ed] soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation," *McConnell*, 540 U.S. at 150 (citing evidence of how, *e.g.*, "[d]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform"). Though the evidence may not have been sufficient to support criminal bribery prosecutions, these were apparent quid-pro-quos on a massive scale. *Id.* The "meltdown of the campaign finance system" caused by "the soft-money loophole," which spurred BCRA's passage, *id.* at 94, was not the result of corruption-free activity, as plaintiffs contend.

Plaintiffs are wrong. A three-judge court cannot be convened to hear a request to overturn Supreme Court precedent because no lower court can grant that relief, so such a request cannot be substantial. And because plaintiffs do not make the same request to raise unlimited funds for independent expenditures by the national committees (as in the last case), they have severed the connection that formerly existed between the independent-expenditure cases on which they rely and the relief they now seek. This action involving state-compliant funds is thus squarely within the "current" of limited contributions to political parties, and plaintiffs' arguments are "so clearly foreclosed as to be insubstantial for purposes of three-judge court jurisdiction." *Rufer*, 64 F. Supp. 3d at 200, 203.

As this Court has explained, *McConnell* "upheld the portions of BCRA that cabined contributions to political parties in connection with federal elections, 'regardless of how th[e] funds are ultimately used.'" *Rufer*, 64 F. Supp. 3d at 202-03 (quoting *McConnell*, 540 U.S. at 155). "This portion of *McConnell*" — "upholding [52 U.S.C. §§ 30125](a) & (b)" — "was *untouched* by the Court's later ruling in *Citizens United*, which overturned the ban on unlimited expenditures by private and public corporate entities." *Id.* at 203 (emphasis added). Limits on contributions to other entities were held unconstitutional precisely because they did not intend to involve candidates *or political party committees* in their activity. *See SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc); *Carey v. FEC*, 791 F. Supp. 2d 121, 125-26 (D.D.C. 2011). Indeed, the D.C. Circuit in *SpeechNow.org* specifically distinguished *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996), by observing that that case concerned expenditures by political parties. 599 F.3d at 695.

Citizens United in no way supports plaintiffs' legislative suggestion that state, but not federal, contribution limits and reporting requirements should apply to their proposed FEA.

Citizens United applied strict scrutiny to expenditure limits, and as the opinion itself said, distinguishing *McConnell*, *Citizens United* was "about independent expenditures, not soft money." 558 U.S. at 361. This case is about soft money, not independent expenditures, and nothing about *McConnell*'s upholding of section 30125 — as a contribution restriction subject to closely-drawn scrutiny — has been called into question. *Rufer*, 64 F. Supp. 3d at 202-03.[11]

Furthermore, in contrast to independent expenditures, which are no longer at issue in this challenge, FECA's regulation of FEA is targeted particularly to "[s]tate, district, or local committee[s] of a political party" like plaintiffs. 52 U.S.C. § 30125(b)(1). Based on an overwhelming record of abuse by such committees, Congress specifically cabined their use of soft money for FEA, and did so in a "reasonably tailored" manner (*McConnell*, 540 U.S. at 167) that was designed to curb the risk and appearance of quid-pro-quo corruption. Notwithstanding plaintiffs' claims that certain planned communications will be "non-coordinated" under FEC regulations (Compl. ¶¶ 78-83; Pls.' Mem. at 20-22), section 30125 was premised on the tight "nexus between national parties and federal officeholders" that "prompted one of [BCRA] Title I's framers to conclude" that the parties "'are *inextricably intertwined* with federal officeholders and candidates,'" *McConnell*, 540 U.S. at 155 (emphasis added) (quoting 148 Cong. Rec. H409 (Feb. 13, 2002) (statement of Rep. Shays)). Political party committees do not need to coordinate on specific communications in order to return to a system in which vast sums of soft money raised and spent by "state and local political parties for 'generic voter activities' that in fact

[11] By seeking to have state rather than federal contribution limits govern plaintiffs' conduct, plaintiffs are in actuality making a federalism challenge. (Compl. ¶¶ 107-09, 137.) This is another claim that *McConnell* directly rejected. 540 U.S. at 186-87 ("Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen. Indeed, our above analysis turns on our finding that those interests are sufficient to satisfy First Amendment scrutiny. Given that finding, we cannot conclude that those interests are insufficient to ground Congress' exercise of its Elections Clause power."). No intervening decision calls this holding into question.

ultimately benefit[] federal candidates,'" *id.* at 131 (some internal quotation marks omitted), present the same actual and apparent abuses as before BCRA. (*Contra* Pls.' Mem. at 37 (suggesting that plaintiffs' "independent" activities "may actually be counterproductive").)

Plaintiffs' argument also ignores that Congress *already* tailored section 30125(b) to accommodate independent FEA activity by state and local committees in the Levin amendment. State and local committees presumptively are treated as "affiliated committees" and, unless the presumption is rebutted, share the federal limit of $10,000 due to their close relationship, 52 U.S.C. § 30116(a)(1)(D); *see* 2014 *RNC* Compl. ¶¶ 15-16 (local committee plaintiffs are "local committee[s] of LAGOP"). However, in the Levin context, "State, district, and local committees of the same political party shall not be considered affiliated." 11 C.F.R. § 300.31(d)(3); 52 U.S.C. § 31025(b)(2)(B)(iii). Accordingly, state and local committees are permitted to raise funds using a separate limit of up to $10,000 in their Levin accounts for the FEA that they wish to do with that independently-raised "homegrown" money. 52 U.S.C. § 30125(b)(2)(B)(iii)-(iv). Plaintiffs' claim to a right to do "independent" FEA without regard to federal contribution limits is thus expressly belied by the fact that Congress has already established a more tailored framework for such activity. And the Supreme Court has held that that framework is constitutional "regardless of how th[e] funds are ultimately used." *McConnell*, 540 U.S. at 155.

3. Congress's Regulation of FEA Remains Constitutional Because it Is Based on Limiting the Risk and Appearance of Quid-Pro-Quo Corruption

Equally flawed is plaintiffs' claim that "the facial upholding of the challenged provisions in *McConnell* was built on a now-rejected, broadly defined 'corruption,'" and so "it is without a foundation and therefore the superstructure must collapse." (Pls.' Mem. at 38; *see id.* at 15.) Quoting the dissenting opinion in *McCutcheon*, plaintiffs repeatedly contend that the Supreme

Court has now limited the notion of corruption to "'an act akin to bribery.'" (*See, e.g.*, *id.* at 11 (quoting *McCutcheon*, 134 S. Ct. at 1466 (Breyer, J., dissenting)), 15, 35, 36, 38.) But the controlling opinion categorically rejected this idea: "Our holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about 'soft money.'" 134 S. Ct. at 1451 n.6. On the contrary, the controlling opinion relied upon the notion of corruption that the Court had used in *Citizens United*, which in turn had relied upon *Buckley*. *See id.* at 1450 (quoting *Citizens United*, 558 U.S. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.")). *Buckley* itself rejected an overbreadth argument based upon existing bribery laws, explaining that such laws "deal with only the most blatant and specific attempts of those with money to influence governmental action." 424 U.S. at 27-28. Quid-pro-quo corruption (and its appearance) is not limited to bribery.

Plaintiffs' argument that post-*McConnell* limitations on the government's anticorruption interests have undermined *McConnell*'s soft money holding was also considered and rejected in *RNC*. In challenging section 30125(b) and other provisions, Republican state and local party committees argued that after *Citizens United* "no viable theory of corruption justifies" the law. 698 F. Supp. 2d at 158. The court disagreed, holding that *McConnell* had already determined that unlimited funds posed a danger of corruption however the recipient party committee may use those funds. *Id.* at 157. Further, it held that *McConnell* had upheld the soft money ban not just on the basis of an interest in deterring preferential access, a theory later rejected by *Citizens United*, but also due to the danger of quid pro quo corruption and its appearance inherent in the close relationship between federal candidates and officeholders and political party committees. *Id.* at 158-59. The Supreme Court affirmed. 130 S. Ct. 3544.

In making the same argument here, plaintiffs' simply substitute "*McCutcheon*" for "*Citizens United*" and invent holdings from *McCutcheon*, such as the plurality's supposed rejections of "indebtedness" as an element of quid-pro-quo corruption and the "notion that large federal-funds contributions pose any corruption [risk] absent quid-pro-quo exchanges with candidates." (Pls.' Mem. at 16 n.18.) These alleged holdings do not appear anywhere in the *McCutcheon* opinion and would contradict the plurality's express holding that it was not overruling *McConnell*. What the plurality actually said was that it was "leav[ing] the base limits undisturbed. Those base limits," which apply to plaintiffs, "remain the primary means of regulating campaign contributions." *McCutcheon*, 134 S. Ct. at 1451.

Critically, the *RNC* court determined that the challenge in that case was "'based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision.'" *Rufer*, 64 F. Supp. 3d at 203 (quoting *RNC*, 698 F. Supp. 2d at 157). The plaintiffs had alleged that they planned "to use state funds and non-federal funds to engage in First Amendment activities that are not unambiguously related to the campaign of a particular federal candidate, but they are prohibited by" section 30125; that the state and local party committee plaintiffs planned "public communications" they believed would "'attack' or 'oppose' federal candidates, as these terms are used in the definition of [FEA]"; and that they intended "to use state funds for voter registration, voter identification, and get-out-the-vote activities, as well as 'generic campaign activity,' [52 U.S.C. § 30101(21)], in future elections where both state and federal candidates appear on the ballot." Compl. for Declaratory and Injunctive Relief ¶¶ 8, 23-25, *RNC v. FEC*, No. 08-1953 (D.D.C. Nov. 13, 2008) (Docket No. 1). That challenge, the court said, was "'not so much an as-applied challenge as it is an argument for overruling a precedent.'" *Rufer*, 64 F. Supp. 3d at 203 (quoting *RNC*, 698 F. Supp. 2d at 157).

Here, plaintiffs claim a First Amendment right to use non-federal money to fund planned FEA, including "PASO communications . . . without express advocacy" and "communications exhorting registration and voting," "voter identification," and generic campaign activity. (Compl. ¶¶ 84, 94, 97, 101.) Just as there was nothing "substantially new presented in plaintiffs' as-applied challenge to § [30125](b)" in *RNC*, 698 F. Supp. 2d at 161, there is nothing new or substantial here either. As in *McConnell* and *RNC*, plaintiffs simply seek the same relief of avoiding FECA's $10,000 contribution limit for FEA on the same false premise that no "cognizable" quid-pro-quo corruption interest justifies the Act's restriction of their proposed activities. (Compl. ¶¶ 121, 123, 134-35, 145, 151; Pls.' Mem. at 12, 13, 14-17, 21, 29, 34, 36, 37, 42, 43.) Plaintiffs' challenge is wholly foreclosed and obviously without merit because *McConnell* has "'expressly considered'" and rejected "the specific factual and legal arguments advanced by Plaintiffs." *Rufer*, 64 F. Supp. 3d at 203 (quoting *RNC*, 698 F. Supp. 2d at 157). The Supreme Court has reaffirmed that ruling three times. *Citizens United*, 558 U.S. at 361; *RNC*, 698 F. Supp. 2d at 158-59, *aff'd*, 130 S. Ct. 3544; *McCutcheon*, 134 S. Ct. at 1451 n.6.[12]

B. The Availability of Levin Funds Further Demonstrates that Plaintiffs' Claims Are Insubstantial

Plaintiffs' complaint repeatedly states that Levin funds "are not involved here." (Compl. ¶¶ 10 n.3, 15 n.4, 36 & n.8, 37.) It is obvious why plaintiffs wish that were true: by permitting

[12] Plaintiffs make no independent showing that their challenge to section 30125(c) is substantial. But after upholding section 30125(a) facially, the Supreme Court in *McConnell* explained that "[t]he remaining provisions of [section 30125] largely reinforce the restrictions in § [30125](a)." 540 U.S. at 133. The constitutionality of section 30125(c) thus follows from the constitutionality of sections 30125(a) and (b). Indeed, one of the district court opinions in *McConnell* also viewed the analysis of section 30125(c) as deriving from the analysis of section 30125(b)'s restrictions on FEA. *See* 251 F. Supp. 2d at 412 (explaining that section 30125(c) demanded "only passing attention" and should have been invalidated on the basis that the definition of FEA was unconstitutional and section 30125(c) was "inseverable") (Henderson, J., concurring in the judgment in part and dissenting in part). Of course, the Supreme Court's decision rejected that opinion's conclusion.

state and local committees to use some nonfederal funds for FEA, raised under a separate limit of up to $10,000, the Levin amendment softened the impact of section 30125(b)(1). The amendment was "[a] refinement on the pre-BCRA regime that permitted parties to pay for certain activities with a mix of federal and nonfederal funds." *McConnell*, 540 U.S. at 162. But here, plaintiffs do not want a refined pre-BCRA regime; they want the unrefined version. So plaintiffs pretend that Levin funds do not exist in order to support their fiction that the constitutional choice is between no allocation at all (section 30125(b)(1)) or pre-BCRA rules. Yet the availability of Levin funds demonstrates that the difference between what plaintiffs would like to do and what they can do right now is obviously not of constitutional dimension.

Consequently, their claims are insubstantial. Here, the local committee plaintiffs want to spend less than $5,000 on FEA (Compl. ¶ 110), and LAGOP wants to use an amount that is "materially similar" to the "approximately $100,000 in nonfederal funds for [FEA]" that it wanted to spend in 2014 (*id.* ¶¶ 111, 114). Given that LAGOP can right now raise a separate $10,000 in Levin funds from each individual contributor, it could satisfy its desired nonfederal budget goals with maximum contributions from just ten contributors.

Because these limits apply on an annual basis, and are separate from the limit for its federal account, LAGOP actually could receive up to $80,000 from a single contributor over the course of four years ($10,000 per year to each of its federal and Levin accounts). During that same period, if LAGOP were subject only to the higher Louisiana state limit of $100,000-per-four-years that plaintiffs prefer (and could not also accept four additional annual federal contributions of $10,000), it could raise a maximum of $100,000 from a single contributor. That is $20,000 more ($100,000 vs. $80,000) over a four-year period, or an average of $5,000 more annually. If plaintiffs are "satisfied that some limit on contributions is necessary, a court has no

scalpel to probe, whether, say, a [$25,000 annual] ceiling might not serve as well as [$20,000]." *Buckley*, 424 U.S. at 30 (internal quotation marks omitted) (discussing amounts with 2:1 ratio). LAGOP's claim is insubstantial if it can be solved by expanding its donor pool beyond a single individual (who is at this point hypothetical). *Cf. id.* at 21-22 (observing that an "overall effect of the Act's contribution ceilings is merely to require . . . political committees to raise funds from a greater number of persons").

Notwithstanding these relatively small contribution differences, plaintiffs also appear to base their objection to Levin funds on the types of FEA that are permitted to be paid for in part with those funds. (Compl. ¶ 15 n.4 (objecting to "restrictions" on Levin funds).) But the more plaintiffs allege that the kinds of FEA they wish to engage in are those not permitted by the Levin amendment, the more they acknowledge that the activity they would like to do is precisely the activity Congress passed BCRA to rein in. *Compare McConnell*, 251 F. Supp. 2d at 702-03 (Kollar-Kotelly, J.) (explaining that the activity that can be paid for with a portion of Levin funds in FEA categories (1) and (2) is more likely to concern "state and local elections"), *and* 147 Cong. Rec. S3124 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("[T]his amendment will allow the use of some non-Federal dollars by State parties for voter registration and get out the vote, where the contributions are allowed by State law, where there is no reference to Federal candidates, where limited to $10,000 of the contribution which is allowed by State law, and where the allocation between Federal and non-Federal dollars is set by the Federal Election Commission."), *with supra* p. 33 (advertisement attacking federal candidate Bill Yellowtail), Compl. ¶¶ 104-105 (scripts "[c]elebrating" federal candidate Bobby Jindal and describing Hillary Clinton as "more 'hope & change,'" which could not be paid for using Levin funds

because they clearly identify federal candidates, 52 U.S.C. § 30125(b)(2)(B)(i)), *and McConnell*, 540 U.S. at 169 ("Such [PASO] ads were a prime motivating force behind BCRA's passage.").

C. Plaintiffs' Challenge to Section 30104(e)(2) Is Also Insubstantial

As with their challenge to section 30125(c), plaintiffs assert no independent reason why the reporting provision they challenge, 52 U.S.C. § 30104(e)(2), is unconstitutional. *See supra* p. 41 n.12.[13] Plaintiffs declare that "[a]n informational interest is inadequate to support" this provision, "because the foundational justification for regulating [FEA]" was the "theory of corruption" plaintiffs say *Citizens United* and *McCutcheon* rejected. (Pls.' Mem. at 37.)

Once again, plaintiffs are wrong. Binding court decisions have repeatedly embraced the important interests that FECA's disclosure provisions support, including the Supreme Court in decisions from *Buckley* to *McCutcheon*, as well as the full D.C. Circuit as recently as 2010 in *SpeechNow.org*. In *McCutcheon*, for example, the plurality opinion generally explained that "[d]isclosure requirements are in part justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending." 134 S. Ct. at 1459 (internal quotation marks omitted). "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information." *Id.* at 1460. In *Citizens United*, eight Justices agreed that the challenged disclosure provisions were valid, observing that "the public has an interest in knowing who is speaking about a candidate shortly before an election," even when such speech occurs in communications lacking express candidate advocacy. 558 U.S. at 368-69; *cf. John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."). "Disclaimer and disclosure requirements," the Court

[13] Plaintiffs' Prayer for Relief and brief almost exclusively cite the supposedly challenged provision incorrectly, as section 30105(e)(2).

has said, "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201); *contra* Pls.' Mem. at 34 (complaining that challenged provisions "restrict[] . . . core political speech"). In *SpeechNow.org*, the en banc D.C. Circuit likewise unanimously held that political committee disclosure requirements further the public's "interest in knowing who is speaking about a candidate and who is funding that speech," and "deter[] and help[] expose violations of other campaign finance restrictions." 599 F.3d at 698. And in *Buckley*, the Supreme Court upheld the Act's disclosure requirements for political committees, which "directly serve substantial governmental interests." 424 U.S. at 68; *see id.* at 60-84.

Plaintiffs acknowledge that state reporting requirements still apply to them. (Compl. ¶ 107.) LAGOP presently files the reports at issue here with the FEC and analogous reports with the state of Louisiana, and JPGOP similarly complies with the state reporting regime. *See supra* pp. 27-28. Plaintiffs offer no reason to suggest that they cannot comply with such reporting resulting from their planned activity. Section 30104(e)(2) is constitutional in light of the courts' overwhelming support for such provisions, and plaintiffs' challenge is thus insubstantial.[14]

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' application and decline to convene a three-judge court.

Respectfully submitted,

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[14] Finally, plaintiffs once again ask the Court to expedite the case and to limit the FEC's ability to defend itself with evidence obtained through discovery, as argued in both their memorandum supporting their three-judge court application (Pls.' Mem. at 43-44), and in a separately filed motion (Pls.' Mot. to Expedite (Docket No. 9)). The Court should deny these requests, as the Commission will establish in its separate opposition to the expedition motion.

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