United States District Court
District of Columbia

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

Plaintiffs' Motion for Summary Judgment

Plaintiffs move for summary judgment on all counts in their Verified Complaint for Declaratory and Injunctive Relief (Doc. 1) and request oral argument. In support, Plaintiffs file herewith

- Plaintiffs' Memorandum Supporting Their Motion for Summary Judgment,
- Plaintiffs' Statement of Undisputed Facts,
- Exhibit 1, and
- Plaintiffs' Proposed Order.

Respectfully submitted,

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Certificate of Service

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Introduction

Plaintiffs are state and local committees of a political party. The central focus of their case is their desire to use "nonfederal funds"[1] for independent communications qualifying as "federal election activity" ("FEA").[2] They cannot because of the Ban[3] on using nonfederal funds for FEA.

The Ban must be justified by the "only ... legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon v. FEC*, 134 S.Ct. 1434, 1450 (2014).[4] Only narrowly defined "'*quid pro quo*' corruption" is cognizable, *id.*, so FEC must prove a proper fit between the challenged provisions and preventing that corruption.

But FEC cannot meet its burden, first, because in *McConnell v. FEC*, 540 U.S. 93 (2003), FEC "identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds." *McConnell v. FEC*, 251 F. Supp. 2d 176, 395 (D.D.C. 2003) (op. Henderson, J.). *Accord McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (quoting and citing *Mconnell*, 251 F. Supp. 2d at 395) (op. Henderson, J.)).

And FEC cannot meets its burden, second, because central to the present challenge is *independ-*

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[1] "*Federal funds* ... comply with the limitations, prohibitions, and reporting requirements of the [Federal Election Campaign] Act [("FECA")]." 11 C.F.R. 300.2(g). "*Non-Federal funds* ... are not subject to" those requirements. 11 C.F.R. 300.2(k).

[2] FEA encompasses many traditional activities of state and local committees, including voter-registration activity (VR"), get-out-the-vote activity ("GOTV"), voter identification ("VID"), generic campaign activity ("GCA") (promoting political party), communications promoting, attacking, supporting, opposing federal candidates ("PASO"), and compensating workers with over 25% of time monthly on FEA ("25% Rule"). 52 U.S.C. 30101(20); 11 C.F.R. 100.24.

For the Court's convenience, Plaintiffs have included relevant FEA definitions in the Complaint (*see* Compl. ¶¶ 16-27), as well as legal and historical context (*see id.* ¶¶ 36-39 (federal-fund requirement), ¶¶ 40-44 (political-committee status), ¶¶ 45-51 (allocation rules), ¶ 52 (restrictions on candidates/officeholders), and ¶¶ 53-68 (rulemaking and litigation on FEA)).

[3] The texts of the challenged Ban (52 U.S.C. 30125(b)(1)), Fundraising Requirement (52 U.S.C. 30125(c)), and Reporting Requirement (52 U.S.C. 30104(e)) are set out in the Complaint at ¶¶ 32-35.

[4] This plurality opinion (Roberts, C.J., joined by Scalia, Kennedy & Alito, JJ.) states the holding, *Marks v. United States*, 430 U.S. 188, 193 (1977), so "plurality" indicators are omitted herein.

ent activity, especially *communications*, as set out in the Complaint (¶ 1 (emphasis added)):

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

Independence eliminates quid-pro-quo risk from communications. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976). "[I]ndependent expenditures ... do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). Thus, contributions for making independent expenditures may not be limited. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). And political committees that make contributions may establish a "Non-Contribution Account" ("NCA") to receive unlimited contributions to "financ[e] independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives." FEC, *FEC Statement on* Carey v. FEC (Oct. 5, 2011), www.fec.gov/press/press2011/20111006postcarey.shtml. The same analysis applies to political parties because (i) they are *capable* of making independent expenditures, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 619 (1996) ("*Colorado-I*") (rejecting "Government's conclusive presumption that all party expenditures are 'coordinated'"),[5] and (ii) their independent communications *also* pose no corruption risk, *id.* at 613-22.

Absent the anti-corruption interest, the Ban must fall (along with the derivative Fundraising Requirement and Reporting Requirement requiring the same anti-corruption justification) *as applied* to independent activity. The provisions fail *facially* because the access/gratitude "corruption" used to uphold them in *McConnell* 540 U.S. at 168 ("officeholders are grateful for contributions to state

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

and local parties"), was rejected in *Citizens United*, 558 U.S. at 360 ("Ingratiation and access ... are not corruption."), and *McCutcheon*, 134 S.Ct. at 1441 (same).

Facts

These facts are summarized from Plaintiffs' Statement of Material Facts Not in Genuine Dispute ("SMF"). The core of this case is that Plaintiffs want to *use nonfederal funds* for independent FEA.

• ***Parties*** (SMF ¶¶ 1-4). Republican Party of Louisiana ("LAGOP") is a "[s]tate committee," 52 U.S.C. 30101(15), and a "state party committee" (as a "political committee"), 11 C.F.R. 100.5(e)(4).[6] Its purposes are electing Republicans and supporting issues reflecting its principles. (SMF ¶ 1). Jefferson Parish Republican Parish Executive Committee ("JPGOP") is a "local committee," i.e., "part of the official party structure[] ... at the [local] level." 11 C.F.R. 100.14(b). It is not a federal "political committee," so not a "party committee." 11 C.F.R. 100.5(e)(4). (SMF ¶ 2.) Orleans Parish Republican Executive Committee ("OPGOP") is also a parish executive committee and local committee. (SMF ¶ 3.) FEC has enforcement authority over challenged provisions. (SMF ¶ 4.)

• ***Historical Context*** (SMF ¶¶ 11-14). Political parties could once use nonfederal funds for activity now called FEA under rules allowing allocation between federal and nonfederal accounts. (SMF ¶¶ 5-9; Compl. ¶¶ 45-51 (allocation rules).) BCRA altered this by (**a**) banning use of nonfederal funds (except "Levin funds," not at issue here[7]) for FEA ("Ban") (Compl. ¶¶ 32-33); (**b**)

[6] "State committees" or "local committees" (a.k.a. "party organizations," 11 C.F.R. 300.30(c)) are committees not necessarily registered as *political* committees so as to be "*party* committees."

[7] *Levin* funds may be used for some allocation but are restricted in raising and use. 11 C.F.R. 300. 31, .32, and .33(c). Plaintiffs cannot use them for some planned FEA because they may not be used for any broadcast (or cable/satellite) communication (unless it solely references a state/local candidate), for paying employees devoting over 25% of their time per month on activity in connection with federal elections, and for communications referencing federal candidates. 11 C.F.R. 300.32(c). Moreover, Plaintiffs do not use Levin funds due to the complexity, burdens, and restrictions associated with them. (SMF ¶ 10 n.6.) *Joint* fundraising costs may be allocated under 11 C.F.R. 300.33, but are not involved here and don't allow state/local committees to use nonfederal funds for FEA.

requiring federal funds for fundraising for FEA ("Fundraising Requirement") (Compl. ¶ 34); and (**c**) requiring monthly FEA reporting ("Reporting Requirement") (Compl. ¶ 35). (SMF ¶ 10.)

• ***FEA Periods*** (SMF ¶¶ 11-14). Some FEA is only such at certain times. FEC publishes periods for (**a**) VR[8] (120 days before regular election, 52 U.S.C. 30101(20)(A)(i)) and (**b**) VID, GCA, and GOTV (all three run from earliest primary filing date to the general election, 11 C.F.R. 100.24(a)(1)). (SMF ¶¶ 11-13.) Louisiana FEA periods related to 2016 elections are VID/ GCA/GOTV = 12/02/15 –11/08/16; VR = 11/06/15–03/05/16 and 07/11/16 –11/08/16. (SMF ¶ 14.)

• ***FEC Rulemaking & Litigation on FEA Definitions*** (*see* SMF ¶¶ 15-30). FEC's original definitions of VR and GOTV required "individualized" assistance and did not include merely "encouraging or urging" registration or voting, but FEC changed its definitions to include "encouraging or urging" and to drop the "individualized" requirement due to *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays-III*"). (SMF ¶¶ 15-21.) Though FEC does not include Internet communications in the definitions of other FEA ("except for communications placed for a fee on another person's website," 11 C.F.R. 100.26 ("public communication" definition incorporated into some FEA definitions)), and originally did not include online communications in its VR and GOTV definitions, after *Shays-III* it included online communications in its VR and GOTV definitions. (SMF ¶¶ 19-25.) In past rulemaking, FEC has indicated that where activity on a committee's website is defined as FEA, the committee might have to pay all costs for the website, including costs swept in by a "ripple effect," because "the Commission is not convinced that the statute permits time/space allocation ...." FEC nowhere states that a time/space allocation is permissible for any online FEA, though it later excluded de minimis FEA on a website. (SMF ¶¶ 23-25.) That de minimis exception requires that the communication be "both brief *and* incidental." (SMF ¶¶ 26.) FEC regulations do not define

[8] *See supra* note 2 (abbreviations).

"encouraging or urging" in the VR and GOTV definitions, but FEC uses those terms synonymously with "exhorting." (SMF ¶¶ 27-28.) At the 2009 rulemaking hearing, commenters argued against an "encouraging" definition and for a voter-mobilization definition for VR and GOTV. (SMF ¶ 29.) And at that hearing, one "reform"-community speaker asserted that "get out to vote for O'Malley" or "go vote for O'Malley" would be GOTV while "vote for O'Malley" (even if accompanied by the election date) would not be GOTV, though he did not dispute that the latter would encourage voting. (SMF ¶ 30.) But FEC has provided no such clarification.

• ***FEC Political Party Forum on FEA Problems*** (*see* SMF ¶¶ 31-35). On June 4, 2014, FEC "Chairman Lee Goodman and Vice Chair Ann M. Ravel ... hosted a public forum on the challenges faced by political parties ....." *See* FEC, News Release (June 4, 2014) (available at www.fec.gov/press/press2014/news_releases/20140604release.shtml). The audio recording is at www.fec.gov/audio/2014/20140604_FORUM.mp3 ("Audio"). (SMF ¶ 31.) Representatives of state committees explained problems created by provisions challenged here and the need for changes, but no regulatory changes resulted. (SMF ¶ 32.) For example, Minnesota Democrat Ken Martin noted that though political parties are good and accountable, they are increasingly unable to assist their candidates vis-a-vis independent-expenditure groups due to BCRA, and "[c]andidates and state parties are losing control over their voice." In December 2012, he asked the Association of State Democratic Chairs ("ASDC") to establish a committee to help level the playing field and help build up parties to be able to help their candidates. ASDC established the Committee on Campaign Finance Reform ("CCFR") which issued "Legislative Recommendations for Campaign Finance Reform" ("*Recommendations*"),[9] which was distributed at the forum. *Recommendations* was approved and its proposals are the subject of supportive resolutions by many Democratic state parties, as part of the campaign to

[9] *Available at* http://images.politico.com/global/2014/02/14/asdc_recs_081213.pdf.

improve their ability to do FEA. Martin declared, "It's my sincere belief that if we do not address the growing imbalance of political money flowing towards unregulated shadow organizations, we may very well see the end of political parties at the state and local level." Audio at 7:49. (SMF ¶ 33.)

The next presenter was Florida Democrat Scott Arceneaux, who explained that the vast majority of a state party's efforts are nonfederal, "[y]et you're seeing this slow federalization of all the activities that we do, for no ... solid, good policy reason." Audio at 10:55. He added, Audio at 13:36: "We are basically becoming fifty mini federal committees because the ever-expanding definition of federal election activity is ... slowly ... encompassing everything we do .... And what that means in reality is that nonfederal candidates don't want to work with us." (SMF ¶ 34.)

In *Recommendations*, described above, ASDC's CFFR recommends the following:

> **Repeal Levin Amendment or create reasonable definitions for "Federal election activity"**
>
> Under McCain-Feingold, how state parties pay for their activities is determined, in large part, by the extent to which such activities are classified as "Federal election activity" under that law. After extensive hearings and careful consideration, the FEC in 2002 issued thoughtful, practical yet rigorous regulations defining these activities. These definitions have been challenged by so-called "reform" organizations in a series of court cases which have forced the FEC in some cases to modify its definitions and in other cases have left the definitions in a state of confusion and uncertainty. Under the most recent iteration of the definition of "get-out-the-vote" almost all campaign activity is subsumed within the definition pulling most campaign activity within the definition even if no federal candidates are referenced in the communications. The Levin Amendment is too complicated to administer and several state parties have decided to just federalize their get-out-the-vote programs due to the complexity of administering and complying with the Levin Amendment. In addition, due to the continual expansion of the definitions of "get-out-the-vote" as well as the additional problems created by the concept of "federal election activity," **Congress should consider repealing these provisions and allow party committees to undertake activities in accordance with rules in place prior to ... McCain-Feingold**.

Recommendations at 1-2 (underline and bold in original). CFFR adds that "House-added restrictions have rendered the so-called 'Levin amendment' completely useless. The restrictions serve no discernible policy purposes and should be eliminated." *Id.* at 2-3 (bold removed). CFFR recommends thus about the 25% rule and mandatory monthly reporting:

> **Payment of Staff Payroll and Benefits**
>
> Under McCain-Feingold, employees who work more than 25% of their time in connection with federal elections must be paid for exclusively with federal funds. However, the FEC has interpreted this statute to not only include federal activity but also "federal election activities." Therefore, merely working on generic or non-federal activity has triggered federal payroll requirements. For example, if a state party hires employees to go door-to-door to do a voter identification project for a state or local candidate, those employees must be paid exclusively with federal funds. This has created a disincentive for party committees to engage in non-federal voter id or non-federal get-out-the-vote projects, even if there are no competitive federal races on the ballot. **Congress should either repeal this provision or clarify that it did not intend for the provision to include "federal election activities."**
>
> **Repeal mandatory monthly filing for state party committees**
>
> Under current law, state party committees must file FEC reports monthly if they spend funds on "federal election activity." This has imposed a huge burden on state parties. **State parties should be allowed to file quarterly; alternatively the thresholds for triggering monthly filing should be narrowed.**

Id. at 3 (underline and bold in original). (SMF ¶ 35.)

• ***Plaintiffs' Intended FEA Using Nonfederal Funds***[10] (*see* SMF ¶¶ 36-76). Plaintiffs intended to do independent FEA in 2014 without complying with challenged provisions, had it been legal to do so, and they intend to do so in 2015 and future years, when legal to do so. (SMF ¶ 36.)

LAGOP now complies with challenged provisions by using federal funds from a federal account for FEA. But its ability to do desired FEA is burdened by its inability to use nonfederal funds. It will not do some or all of the examples described below absent requested relief. (SMF ¶ 37.)

JPGOP and OPGOP do not currently intentionally[11] do FEA because of the complexity and burden of compliance, but they want to do independent FEA without complying with the challenged provisions, and they will not do their intended activities absent requested relief. (SMF ¶ 38.)

The examples of FEA Plaintiffs desire will be independent. All that is required for FEA independence is compliance with statutes and regulations governing independence extant when FEA is

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[10] "[*U]sing nonfederal funds*" is central to each intended activity because Plaintiffs' want to *use nonfederal funds for FEA*, not just do *specific acts* of FEA described.

[11] JPGOP *inadvertently* engaged in online FEA. (*See* SMF ¶ 76.)

done. *See, e.g.*, 11 C.F.R. §§ 109.30, 109.37. (SMF ¶ 40.)[12]

a. Communications Exhorting Registration ("VR") and Voting ("GOTV") (SMF ¶¶ 41-51). Plaintiffs want to make non-individualized communications exhorting registration and voting that will be VR and GOTV under the "encouraging or urging" standard of 11 C.F.R. 100.24(a)(2)(i)(A) and (3)(i)(A). Non-individualized communications would not have been VR or GOTV under FEC's 2002 regulations because they will be in substantially similar form to multiple persons without "individualized contact for the specific purpose of assisting individuals with the process of registering to vote [or voting]." FEC, 2002 E&J, 67 Fed. Reg. at 49067. (*See* Compl. ¶ 16 (quotes from 2002 E&J).) Plaintiffs provide nine examples. (SMF ¶¶ 42, 44-51.)

First, when the Complaint was filed, LAGOP had on its *website* (www.lagop.com) an outline of Louisiana, across which was "click here to REGISTER TO VOTE" (linking to www.lagop.com/get-registered) and below which was "Get Registered." *See* www.lagop.com. The imperative "Get Registered" was "[e]ncouraging or urging potential voters to register to vote," so this communication would have to be paid for with all federal funds starting November 6, 2015. Also on the website was an Instagram image saying "Geaux Vote Today," which referred to the last general election but would become GOTV(for exhorting voting) and require all federal funds for the communication on December 2, 2015. LAGOP had also posted on its website a nonpartisan article merely exhorting registration and voting as follows, www.lagop.com/get-registered ("Get Registered"):

> Your right to vote for public officials and representatives is valuable. It is rare in human history. It was hard-won by America's founders.
>
> Before America gained independence, the colonies were ruled by Great Britain. In the Decla-

[12] Because LAGOP is a political "party committee," *see supra* at 3 & n.6, whether its communications are coordinated should be governed by 11 C.F.R. 109.37 ("What is a 'party coordinated communication'?"), which governs when "[a] political party communication is coordinated with a candidate," *id.* at 109.37(a). But Plaintiffs' intended independent FEA will be independent under all laws and regulations applicable when they are able to do FEA with nonfederal funds.

> ration of Independence, the founders listed many grievances against British rule, especially the lack of representation. The Declaration said King George would not enact needed laws "unless ... people ... relinquish[ed] the right of Representation in the Legislature." It said the British were "suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."
>
> The Revolutionary War rejected British rule. America established a republic where citizens select their representatives in government. Yet astonishingly, many people don't register and vote.
>
> As Americans who enjoy the benefits that a democratic society offers, it is our civil duty to actively participate in government by voting. But more importantly, voting allows citizens the opportunity to make direct decisions that better our communities and allows us to build a free and prosperous society. Many people in the world live in places where their voices will not be heard because they are unable to vote. So take a stand to let your voice be heard, and help build a stronger America by registering to vote today!
>
> The Louisiana Secretary of State's website provides valuable information to help you register and vote. For registration information and to register online, see
>
> - www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx and
> - www.sos.la.gov/ElectionsAndVoting/Pages/OnlineVoterRegistration.aspx.
>
> For voting information, see
>
> - www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx.
>
> The calendar of elections and deadlines for registration and voting by mail, see
>
> - www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2016.pdf.
>
> Check out those websites today, and let your voice be heard in 2016!

"Get Registered" provided hyperlinks to *state* election materials, which are not FEA. 11 C.F.R. 100.24(c)(7).[13] Because "Get Registered" would become VR on November 6, 2015 and GOTV on December 2, 2015, LAGOP said it would take it down absent requested relief. (SMF ¶ 42.)

On November 20, 2015, Plaintiffs filed the verified Plaintiffs' Notice Regarding Changed Facts (Dkt. 22), notifying the Court of changed facts as follows (SMF ¶ 43):

> Plaintiffs notify the court of the following changed facts regarding
>
> (A) the removal of voter-registration activity ("VR") and get-out-the-vote activity ("GOTV") from LAGOP's website .... This notice is verified.
>
> ***A. LAGOP Removed VR and GOTV Items from Its Website.***
>
> 1. Plaintiff LAGOP recently removed VR and GOTV from its website, *see* www.lagop.com, because of the impending federal-election-activity periods for VR and GOTV and because it does not want to fund such non-individualized communications exhorting registration and voting with federal funds, *see* Compl. ¶¶ 74, 84-85.

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[13] The federal-election-activity definition excludes "*[d]e minimis* costs associated with" a party committee providing, on its website, hyperlinks to an election-board's site, downloadable registration and absentee-ballot forms, and voting dates, hours, and locations. *Id.* "Get Registered" did more.

2. The initial dates for those periods are November 6, 2015, for VR, and December 2, 2015, for GOTV. *Compare* Compl. (Doc. 1) ¶ 31 (periods) *with* Answer (Doc. 19) ¶ 31 (admit).

3. LAGOP currently uses federal funds to pay for its website costs in federal-election years, such as 2016, but uses nonfederal funds to pay for its website costs in non-federal-election years, such as 2015.

4. In ¶ 85 of the Complaint, LAGOP noted that at www.lagop.com the words "Get Registered" are in the imperative and so exhort VR. Those words have now been changed to "To Register."

5. In ¶ 85 of the Complaint, LAGOP noted that the website included Instagram images such as "Geaux Vote Today," which is GOTV. That and similar images have been removed from www.lagop.com.

6. In ¶ 85 of the Complaint, LAGOP noted that at www.lagop.com/get-registered the following nonpartisan article appeared:

[*text of "Get Registered" presently omitted*]

That nonpartisan article has been stripped of all exhortation to register and vote, leaving only the following, *see* www.lagop.com/get-registered:

> The Louisiana Secretary of State's website provides valuable information to help you register and vote. For registration information and to register online, *see*
>
> - www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx and
> - www.sos.la.gov/ElectionsAndVoting/Pages/OnlineVoterRegistration.aspx.
>
> For voting information, see
>
> - www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx.
>
> The calendar of elections and deadlines for registration and voting by mail, *see*
>
> - www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2016.pdf.

Second, LAGOP wants to *email* the (original) "Get Registered" to potential voters, with the same election-information links as on the website (those excluded from FEA if done on its *website*, 11 C.F.R. 100.24(c)(7)), if it may do so without complying with challenged provisions. Such an email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015. (SMF ¶ 44.)

Third, JPGOP and OPGOP want to *email* an article substantially similar to the (original) "Get Registered" article, with links of the sort excluded from FEA if done on a *party committee's website*, 11 C.F.R. 100.24(c)(7), if they may do so without complying with challenged provisions. The email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015. (SMF ¶ 45.)

LAGOP verifies six more examples of VR/GOTV activities it wants to do with nonfederal funds. (SMF ¶¶ 46-51 (with scripts "Democrat Outreach" and "Voter Drive for Presidential Primary").)

b. Voter-Identification ("VID") Communications. LAGOP wants to make communications that will be VID, 11 C.F.R. 100.24(a)(4), because they will be designed to "acquire[] information about potential voters," including "verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates," *id.*, absent challenged provisions. (SMF ¶ 52.) LAGOP describes desired activity. (SMF ¶¶ 53-54.)

c. Generic-Campaign-Activity ("GCA") Communications. LAGOP wants to make communications that will be GCA, i.e., "public communication[s] ... promot[ing] ... a political party and ... not promot[ing] or oppos[ing] a clearly identified ... candidate," 11 C.F.R. 100.25, if it may do so without complying with challenged provisions. Examples follow. (SMF ¶ 55.)

LAGOP wants to make audio recordings explaining what it stands for, to be posted on its website, where they will *not* be GCA because not "public communications," 11 C.F.R. 100.26. But LAGOP also wants to air radio ads from these recordings during FEA periods, the next starting December 2, 2015, when they *will* be public communications and so GCA. An example is "Democrat Outreach" (Compl. ¶ 89), which fits both VR and GCA definitions. (SMF ¶ 56.) Another example of a recording to be placed online, then broadcast in 2016, follows:

> **AFRICAN-AMERICAN OUTREACH**
> **Republican Party of Louisiana**
> **:60 Script**
> February is Black History Month.
> It is a time to honor those who have fought to secure freedom and prosperity for our people.
> A great distinction must be attributed to the Republican Party, which was FOUNDED in 1854 with one simple creed: that "Slavery is a violation of the rights of man."
> You see, the movement to end slavery and the creation of the Republican Party were one and the same.
> Abolitionist leaders like Harriet Tubman and Sojourner Truth were committed Republicans. Frederick Douglass was one of the party's early champions.
> The first Republican President was Abraham Lincoln—author of the Emancipation Proclamation.
> Republicans voted unanimously for the 13th Amendment, which abolished slavery.
> The Republican Party has never been the party of white Americans. Or Black Americans. It is

> the party for all Americans ... promoting freedom, justice and equal opportunity for all.
> FEMALE VO: This moment in black history has been brought to you by the Republican Party of Louisiana.

(SMF ¶ 57.) Another example is "The R Word." (SMF ¶ 58 (script).)

d. PASO Communications. LAGOP wants to make PASO communications ("public communications" that will be deemed to promote, attack, support, or oppose a federal candidate, 11 C.F.R. 100.24(b)(3)), without express advocacy, when legal to do so without complying with challenged provisions. (SMF ¶ 59.) LAGOP provides examples. (SMF ¶¶ 60-62.) LAGOP wants to post on its website, then broadcast on radio, in 2015 and/or 2016, "Celebrating Jindal":

> **CELEBRATING JINDAL**
> **Repubican Party of Louisiana**
> **:30 Commercial**
> In 2008, Louisiana's state government was out of control, having tripled in size in just 12 years. Then came Bobby Jindal.
> And since becoming governor, Jindal has cut the state budget by more than 26%. Louisiana now has 30,000 fewer public employees and our reputation across the country has never been better.
> Governor Jindal was one of the first governors in the United States to create a School Choice program to help children escape failing schools.
> Let's face the facts. Bobby Jindal has been the nation's finest example of a Republican leader, refusing to compromise on all of the major conservative issues: taxes, spending, abortion, guns, school choice, religious liberty, you name it.
> As his tenure ends here, Louisiana's loss is America's gain, as Governor Jindal travels across America spreading his message of freedom and traditional values.
> Bobby Jindal. Proven leadership for America.

On LAGOP's *website*, this would not be FEA because it is not a "public communication," so it could not be a PASO communication. When *broadcast*, it would be a "public communication" and the candidate support makes it a PASO communication. (SMF ¶ 63.) On November 20, 2015, Plaintiffs filed Plaintiffs' Notice Regarding Changed Facts (Doc. 22), notifying the Court that Governor Jindal had suspended his presidential campaign and so was "unlikely to become President." (SMF ¶ 64.)

b. Employee Services (SMF ¶ 65). LAGOP wants to reimburse employees without regard to the

FEA 25% Rule. (SMF ¶ 65)

f. Independent Federal-Election-Activity Funding. In paying for independent FEA, Plaintiffs want to use nonfederal funds, on hand or to be raised, compliant with state law and the federal law provisions listed in SMF ¶ 66 (Compl. ¶ 107). (SMF ¶ 66.) Federal funds were not, and will not be, used to *raise* nonfederal funds for intended activities, but the nonfederal funds used were (and will be) compliant with state law and listed provisions of federal law. (SMF ¶ 67.)

In Count II, LAGOP challenges the Ban and Fundraising Requirement as applied to independent communications from an independent-communications-only account ("ICA"). The ICA would receive only funds (**a**) from *individuals*, (**b**) compliant with applicable state and listed federal restrictions, and (**c**) either (**i**) transferred from LAGOP (under reasonable accounting methods assuring that subparagraph (b) is met) or (**ii**) fundraised in compliance with provisions governing such fundraising when LAGOP is able to operate an ICA for such independent communications. The ICA's receipts would be limited to Louisiana's contribution limit, currently $100,000 over a 4-calendar-year period (which LAGOP and its ICA must share). (SMF ¶ 68.)

LAGOP wants to make disbursements of over $5,000 per calendar year for FEA in 2015 and 2016, which would require it to report receipts and disbursements for FEA, but LAGOP wants to report its nonfederal funds used for such activity as it reports other nonfederal funds absent BCRA's Reporting Requirement (with the exception of the alternative as-applied challenge involving an ICA in Count II, which would comply with the Reporting Requirement). The local-committee Plaintiffs want to spend under $5,000 in 2015 and 2016 on FEA. (SMF ¶ 69.) In 2014, LAGOP wanted to use approximately $100,000 in nonfederal funds for FEA absent challenged provisions. (SMF ¶ 70.)

• ***General.*** None of the FEA that Plaintiffs want to do herein would otherwise qualify as "contributions," or "expenditures," or "exempt activities" and so would not trigger political-committee

status for the local-committee Plaintiffs. (SMF ¶ 71.) In the future, Plaintiffs intend materially similar FEA. (SMF ¶ 73.) Plaintiffs face a credible threat of enforcement if they proceed without complying with challenged provisions, absent requested relief. (SMF ¶ 74.) Absent requested relief, Plaintiffs will be deprived of their First Amendment rights and suffer irreparable harm. There is no adequate remedy at law. (SMF ¶ 75.)

• ***Brennan Center Publication.*** A campaign-reform group seeks revised regulation to empower political parties. *See* Brennan Center for Justice, *Stronger Parties, Stronger Democracy: Rethinking Reform* (2015), https://www.brennancenter.org/publication/stronger-parties-stronger-democracy-rethinking-reforming#.Vfshsx74b-s.twitter. It seeks "to relax some of BCRA's federalization of state and local parties," *id.* at 15, "such as voter registration and GOTV," *id.* at 16. (SMF ¶ 77.)

Argument

Plaintiffs challenge (*i*) the *Ban*, 52 U.S.C. 30125(b)(1) (banning state and local committees from using nonfederal funds for FEA); (*ii*) the *Fundraising Requirement*, 52 U.S.C. 30125(c) (requiring federal funds to raise funds to be used for FEA); and (*iii*) the *Reporting Requirement*, 52 U.S.C. 30104(e)(2) (requiring monthly reporting of receipts and disbursements for FEA). (*See* Compl. ¶¶ 32-35(texts). Plaintiffs challenge these provisions (*I*) as applied to (*a*) non-individualized, independent communications exhorting registering/voting and (*b*) non-individualized, independent communications by Internet; (*II*) as applied to (*a*) non-individualized, independent communications and (*b*) such communications from an independent-communications-only account ("ICA"); (*III*) as applied to all independent FEA; and (*IV*) facially. (*See* Compl. ¶ 1.)

I. Standard of Review & Scrutiny: FEC Must Prove a "Fit" to Quid-Pro-Quo Corruption.

"The court shall grant summary judgment if," as here, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Regarding scrutiny level, as shown next, (**A**) *McConnell* neither applies nor controls; (**B**) *McCutcheon* controls the contribution-restriction context and requires a "fit" to preventing quid-pro-quo corruption, and (**C**) *Citizens United* controls the independent-communication context (at issue here) and requires strict scrutiny, so at a minimum FEC must prove a "fit" between the challenged provisions and preventing narrowly defined quid-pro-quo corruption.

A. *McConnell*'s Scrutiny Analysis Neither Applies Nor Controls.

McConnell's scrutiny analysis neither applies nor controls for several reasons. *McConnell* treated BCRA's nonfederal-funds provisions as contribution restrictions, 540 U.S. at 139, calling the Ban "a straightforward contribution regulation: It prevents donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'" *Id.* at 161-62. *McConnell* also said ads using nonfederal funds were *like express advocacy* and *coordinated*:

> [B]oth parties began to use ... soft money ... for issue advertising ... to influence federal elections. The [Senate] Committee found such ads highly problematic for two reasons. Since they accomplished the same purposes as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide. Moreover, though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns.

540 U.S. at 131 (footnote omitted). The reliance on coordination has no application to independent activity here. Not treating the Ban as an expenditure restriction is superseded by *McCutcheon*'s treatment of aggregate *contribution limits* as "speech." 134 S.Ct. at 1452. And Plaintiffs legally *have* nonfederal funds in state accounts (unlike national committees), so the Ban prohibits using *existing* funds in state accounts for independent communications, making it an *independent expenditure* restriction. *McConnell*'s equation of issue ads and "express advocacy," 540 U.S. at 131, also indicates that Plaintiffs' non-individualized, independent communications are constitutionally like

independent expenditures.[14] *McConnell* did not consider the Ban as applied to such communications (governed by the independent-expenditure case line), and it upheld the provisions challenged here based on a gratitude/access theory of corruption now rejected in both the independent-communications context (*Citizens United*, 558 U.S. at 360), and the contribution context (*McCutcheon*, 134 S.Ct. at 1441. So *McConnell*'s foregoing scrutiny and interest analyses do not control.

B. *McCutcheon* Controls the Contribution Context, Requiring a "Fit" to Narrow Corruption.

If contribution-restriction scrutiny is applied, *McCutcheon* now controls the nature of the right, interest, and scrutiny. *McCutcheon* held that aggregate limits on contributions violate the First Amendment for not being justified by an anti-quid-pro-quo-corruption interest, "while seriously restricting participation in the democratic process." 134 S.Ct. at 1442). *McCutcheon* made seven holdings that control here. (**i**) "The right to participate in democracy through political contributions is protected by the First Amendment." *Id.* at 1441. (**ii**) Under "strict scrutiny or *Buckley*'s 'closely drawn' test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective." *Id.* at 1445-46 (citations omitted).[15] (**iii**) The "Court has identified only one legitimate governmental interest for *restricting campaign finances*: preventing corruption or the appearance of corruption," *id.* at 1450 (emphasis added), which is "a direct exchange of an official act for money," *id.* at 1441, which entails "'large individual financial contributions' *to particular*

[14] *Buckley*'s constitutionally required restriction of "expenditure" to "express advocacy," 424 U.S. at 39-44, was incorporated in the "independent expenditure" definition, 2 U.S.C. 431(17). But the non-corrupting nature of independent expenditures turns on *independence*, not express advocacy. *See Colorado-I*, 518 U.S. at 613 (identifying non-express-advocacy communication as "independent expenditure"). *See also FEC v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1488, 1451 (D. Col. 1993) (applying express-advocacy construction and dismissing enforcement proceeding because the same communication lacked express advocacy).

[15] *McCutcheon* stated the "closely drawn test" thus: "[I]f a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, ...it cannot survive 'rigorous' review," *id.* at 1446 (citations omitted), and "fit matters," so tailoring must be "reasonable" with "'means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57 (citation omitted).

candidates," *id.* (citation omitted; emphasis added), i.e., "an act akin to bribery," *id.* at 1466 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting,). (**iv**)

> Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties.... And because the Government's interest in preventing the appearance of corruption is equally confined ..., the Government may not seek to limit the appearance of mere influence or access.

Id. at 1450-51 (plurality; citations omitted). (**v**) *Contribution* restrictions equate with "restrict[ing] *speech*" and the Government must prove a quid-pro-quo risk: "'When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption." *Id.* at 1452 (citation omitted).(**vi**) "*Buckley*'s fear that an individual might 'contribute massive amounts of money to a particular candidate through the use of unearmarked contributions' to entities likely to support the candidate ... is far too speculative." *Id.* at 1452 (quoting *Buckley*, 424 U.S. at 38). (**vii**) "And—importantly—we 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'" *Id.* (citation omitted).

So if this case is deemed a contribution-restriction case,[16] *McConnell*'s analysis is superseded by *McCutcheon*'s, which equates campaign-finance restrictions with restricting "*speech*" and recognizes *only* quid-pro-quo corruption, requiring the government to prove a fit between campaign-finance restrictions and narrow corruption. But as discussed next, this case differs from *McConnell* and *McCutcheon* because it *also* involves independent communications, which require strict scrutiny.

C. *Citizens United*'s Strict Scrutiny Controls the Independent-Communication Context.

Central to this case is Plaintiffs' desire to use state accounts to pay for non-individualized, inde-

[16] This action is like *McCutcheon* in that both involve BCRA provisions "restricting campaign finances," *id.* at 1450, i.e., an aggregate limit and the Ban.

pendent *communications*, (Compl. ¶ 1 (emphasis added)):

> Plaintiffs challenge provisions ... as unconstitutional ... (I) as applied to (a) non-individualized, independent *communications* exhorting registering/voting and (b) non-individualized, independent *communications* by Internet; (II) as applied to (a) non-individualized, independent *communications* and (b) such *communications* from an independent-*communications*-only account ("ICA"); (III) as applied to all independent federal election activity; and (IV) facially.

So strict scrutiny applies. *Citizens United*, 558 U.S. at 340 ("Laws that burden political speech are 'subject to strict scrutiny.'"). But under either scrutiny, the challenged provisions are unconstitutional because there is no "fit" between them and quid-pro-quo corruption.

II. Only Narrow "Corruption" Is Cognizable; Independent Communications Pose None.

(**A**) Challenged provisions burden rights; (**B**) *McConnell* upheld them with access/gratitude "corruption"; (**C**) *Citizens United* and *McCutcheon* recognize only quid-pro-quo corruption; (**D**) independence removes corruption; and (**E**) Plaintiffs' independent activity is non-corrupting.

A. Challenged Provisions Burden First Amendment Rights.

Before BCRA, political parties could use nonfederal funds from their state accounts for a wide range of traditional political-party activity under FEC's rules allowing allocation of activity between federal and nonfederal accounts. (*See* SMF ¶¶ 5-9). BCRA's Ban and Fundraising Requirement eliminated *all* ability *to use nonfederal funds* for activity captured by the FEA definition.[17]

As a matter of law, Plaintiffs' First Amendment rights are burdened by challenged provisions because they cannot speak and associate *using nonfederal funds* for FEA and *without* such regulation. *See, e.g.*, *McConnell*, 540 U.S. at 134 (recognizing "First Amendment challenge"); *Citizens United*, 558 U.S. at 337-40 (political-committee burdens restrict speech); *McCutcheon*, 134 S.Ct.

[17] Levin funds are nonfederal funds, but are not at issue because Plaintiffs cannot use them for planned broadcast communication, paying employees devoting over 25% of their time per month on activity in connection with federal elections, and communications referencing federal candidates. Plaintiffs also do not use them due to complexity, burdens, and restrictions. *See supra* note 7.

at 1441 (" right to participate in democracy through ... contributions is protected by the First Amendment"); *id.* at 1446 ("if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, *Buckley,* 424 U.S., at 25 it cannot survive 'rigorous' review.").

But based on FEC's burdensome discovery,[18] FEC is likely to argue no First Amendment burden because Plaintiffs could *just use federal funds* for what they "want to do," by which FEC means the *examples* of FEA that Plaintiffs want to do. However, what Plaintiffs "want to do" is not just those particular examples but rather to fund FEA (including those examples) *with nonfederal funds from their state accounts*. FEC made similar erroneous arguments in *WRTL-II*, 551 U.S. 449, saying WRTL should just do its issue ads at *other* times or by *other* means to avoid BCRA's "electioneering communication" definition, but *WRTL-II* said the First Amendment does not permit government to dictate different action, such as telling Cohen just to wear a less-offensive jacket. 551 U.S. at 477 n.9.[19] Second, FEC may argue that Plaintiffs have enough money for "effective advocacy" so they don't need to use state accounts for FEA. But that is an erroneous contribution-limit argument from *Buckley*, 424 U.S. at 21, inapplicable here because no contribution limit is challenged.[20]

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[18] *FEC v. Wisconsin Right to* Life, 551 U.S. 449 (2007) ("*WRTL-II*"), declared FEC's multiple depositions and discovery of WRTL's "documents related to its operations, plans, and finances ... a severe burden on political speech." 551 U.S. at 468 n.5.

[19] FEC also asked Plaintiffs here to put a dollar value on examples of desired FEA they recited, presumably so FEC could pursue the notion that Plaintiffs could just pay for that dollar value using federal funds. Plaintiffs cited *WRTL-II*, 551 U.S. at 462, for the matter-of-law proposition that groups cannot possibly know far in advance what their speech needs and plans will be, so it would be rank speculation to provide a dollar amount, especially because they verified a desire to do similar future activity, and Plaintiffs cannot possibly know what future needs and plans will be. *See, e.g.*, Plaintiff JPGOP's Responses to FEC's First Set of Discovery Requests at 25-26. (Exhibit 1.)

[20] *McConnell* also left open the possibility of an as-applied challenge based whether contribution restrictions are "'so radical'" as to drive a group's "'voice below the level of notice.'" 540 U.S. at 173 (citation omitted). But this was premised on *McConnell*'s treatment of the challenged FEA provisions as contribution restrictions, *id.* at 139, so it simply reiterates the *Buckley* contribution-limit argument that is inapplicable here because no contribution limit is challenged. Anyway, Plaintiffs' challenge is based on the lack of any quid-pro-quo risk, removing the government's interest.

FEC well knows of the actual burdens on state and local committees from the FEA restrictions from public testimony it solicited in the 2014 public forum it hosted. *See supra* at 5-7. That forum is part of the *big-picture view* that is important to put this case in context. As Joel Gora, law professor and former ACLU attorney in *Buckley*, 424 U.S. at 4, explains:

> There is only one severe drawback in all of this unlimited, political giving and spending, which is, by and large, so beneficial for our democracy. That is that our two most central, important political actors—our candidates and our parties—have to fight their political battles with one hand tied behind their back. While their expenditures cannot be limited, contributions to them can be. [So] candidates and parties face the prospect of being outspent by independent individuals and groups who are no longer restrained in terms of what they can raise and spend. That is a potential imbalance in our political and electoral speech system that should concern us.

Joel M. Gora, *In Defense of "Super PACs" and of the First Amendment*, 43 Seton Hall L. Rev. 1185, 1206-07 (2013). This "imbalance" with super-PACs[21] explains why political parties need more funds to make independent communications. Of a related case asserting the right of state committees to receive unlimited contributions to make independent expenditures, *RNC v. FEC* (14-0853 (CRC)) (voluntarily dismissed), former White House Counsel Bob Bauer opined: "the suit does not exploit a 'loophole'; it is not a 'soft money' lawsuit." Bob Bauer, *Circling Back (a Full 360°) to the RNC and Libertarian Party Lawsuits* (June 2, 2014), www.moresoftmoneyhardlaw.com/2014/05/circling-back-full-360-rnc-libertarian-party-lawsuits/. "Political committees can spend independently without limitation, and they can also accept contributions without limit to fund these expenditures. The [political-party] committees are simply saying: 'us, too.' These party organizations, looking to regain a measure of competitive parity with super PACs, are acting rationally ...." *Id.*

That need for competitive parity was echoed by a Democratic state-party chairman and a Democratic state-party executive director testifying at FEC's forum on the problems of state political

[21] "Super-PACs" make only independent expenditures, which "do not give rise to corruption or the appearance of corruption," *Citizens United*, 558 U.S. at 357, so "government ... ha[s] no anti-corruption interest in limiting contributions to [them]," *SpeechNow*, 599 F.3d at 696.

parties from BCRA. (SMF ¶¶ 31-35.) The state-party chairman testified: "[c]andidates and state parties are losing control over their voice" (SMF ¶ 33), and "if we do not address the growing imbalance ..., we may very well see the end of political parties at the state and local level" (*id.*). And as CCFR's *Recommendations* states, the monthly Reporting Requirement "has imposed a huge burden on state parties. State parties should be allowed to file quarterly; alternatively the thresholds for triggering monthly filing should be narrowed." (SMF ¶ 35 (bolding omitted). As the forum's bipartisan presenters noted, state parties need relief from onerous burdens imposed by BCRA.

A final burden is the requirement that Plaintiffs' FEA be done with a federal account. As set out more fully in the Complaint (¶¶ 36-39), Plaintiffs must pay for their planned FEA from a federal account (setting aside any considerations of a Levin account or an allocation account, which are not at issue here because Plaintiffs will not use Levin funds and no other allocation *using nonfederal funds* for FEA is possible). (Compl. ¶¶ 36-37, *citing* 11 C.F.R. §§ 300.30(b)(3)(iii), 300.30(b)(3)(iv), and 300.30(c)).) A state or local "committee that has receipts or makes disbursements for Federal election activity must establish its accounts" as prescribed in 11 C.F.R. 300.30(c), with a federal account required for the federal funds required for Plaintiffs' planned FEA, which federal account "must be treated as a separate political committee" 11 C.F.R. 300.30(c)(1). (Compl. ¶ 37.) So even if Plaintiff local committees need not be political committees based on triggers at 11 C.F.R. 100.5(c), they must establish a federal account treated and reporting (monthly under the Reporting Requirement) as a political committee to do its planned FEA. (Compl. ¶ 38.) FEC made numerous comments about this in its Answer (¶¶ 36-39), but though FEC attempts to drag in inapplicable Levin funds and allocation accounts, the federal-account requirement seems unrefuted.[22] FEC should show where a

[22] For example, FEC makes three denials *about* Complaint ¶ 39, which asserted that local committees sending an email exhorting registering/voting during FEA periods (per SMF ¶ 45), must establish a federal fund to pay costs. (**1**) FEC asserts that "'brief exhortation[s]' incidental to a

reasonable-accounting method is expressly allowed *for the FEA at issue herein* (without recourse to using Levin funds, which are not at issue). But even absent a federal-account burden, Plaintiffs are burdened as a matter of law by the challenged provisions as already shown above.

B. The Required Analysis Requires Careful Scrutiny of Interests and Tailoring Based on Narrow Quid-Pro-Quo Corruption.

The required analysis in First Amendment challenges is careful scrutiny of interests and tailoring in "each application." *WRTL-II*, 551 U.S. at 448. Substituting for that analysis a reliance on some prior *language* fails required scrutiny. That was the error in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), where the unanimous Court, rejected FEC's reliance on *language* in a *McConnell* footnote, declaring that "[i]n upholding [the ban on corporate/union electioneering communications] against a facial challenge, we did not purport to resolve future as-applied challenges, *id.* at 411-12. When *WRTL-II* did the required interests/tailoring scrutiny, it held the ban unconstitutional as applied to corporate/union issue advocacy. 551 U.S. 449.

That controls here: *scrutiny* of cognizable interests and tailoring in each application is required, not reliance on some prior *language*. For example, *McConnell* has language that FEC might cite in lieu of the required scrutiny, such as "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

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communication [are] not [FEA]." (Answer ¶ 39 (citations omitted).) But FEC ignores that FEC's E&J says the "exhortation to register to vote must be both brief *and* incidental," 75 Fed. Reg. at 55261-62 (emphasis in original) (Compl. ¶ 64), which the email would not be. And FEC did not deny this statement: "So emails with the *topic* of exhorting registration/voting will not be incidental, and *extended* exhortations (beyond such one-liners) to register/vote in emails or on a website would not be brief. (*Compare* Compl. ¶ 64 (emphasis in original) *with* Answer ¶ 64.) (**2**) FEC says Plaintiffs leave out Levin funds (Answer ¶ 39), but that fails because Plaintiffs have repeatedly explained that Levin funds are not at issue because Plaintiffs won't use them. (**3**) FEC denies that online costs might sweep, in by a "ripple effect," website, computer, and Internet access costs (Answer ¶ 39) but that is exactly what FEC said in the cited E&J (Compl. ¶ 39.) And *crucially*, FEC does *not* deny the underlying assertion that federal funds for FEA must come from a federal account. (Answer ¶ 39.)

funds are ultimately used." *Id.* at 155. To rely on such language in lieu of the required scrutiny would repeat the mistake rejected in *WRTL-I*. And *McConnell* pointed to "the close relationship between federal officeholders and the national parties," with national parties (not involved here) "inextricably intertwined with federal officeholders and candidates," *id.* at 154-55, but reliance on such language would dodge the required interest-tailoring scrutiny (and would encounter the footnoted holding).[23]

That scrutiny must be based on what is *now* cognizable corruption. *McConnell* repeatedly attacked Justice Kennedy's narrow view of "corruption," including the following:

> Justice Kennedy would limit Congress' regulatory interest only to the prevention of the actual or apparent quid pro quo corruption "inherent in" contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate.... Regulation of any other donation or expenditure—regardless of its size, the recipient's relationship to the candidate or officeholder, its potential impact on a candidate's election, its value to the candidate, or its unabashed and explicit intent to purchase influence—would, according to Justice Kennedy, simply be out of bounds. This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.

Id. at 152 (citation omitted). *McConnell* attacked Kennedy's narrow "appearance of corruption":

> At another point, describing our "flawed reasoning," Justice Kennedy seems to suggest that Congress' interest in regulating the appearance of corruption extends only to those contributions that actually "create ... corrupt donor favoritism among ... officeholders." .... This latter formulation would render Congress' interest in stemming the appearance of corruption indistinguishable from its interest in preventing actual corruption.154 n.49 (citation omitted).

In place of Justice Kennedy's narrow "corruption," the majority's "corruption" swept in "actual or apparent indebtedness" resulting from a "close relationship" between officeholders and political parties, along with "access" and "gratitude" (including synonyms). *Id.* at 155-56. So the findings of "corruption," "benefit," etc. from federal election activity in *McConnell* all turn on a *rejection* of

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[23] Reliance on the language in text would be particularly erroneous because *McConnell* held that, despite the "close relationship" and "inexplicable intertwin[ing]," political parties cannot be required to choose between making coordinated expenditures and independent expenditures. *Id.* at 213-19. So *no* amount of coordination eliminates the ability to do independent expenditures.

Justice Kennedy's narrow view of corruption.

But Justice Kennedy's view now *prevails* in both the independent-communications context (*Citizens United*) and the contribution-restriction context (*McCutcheon*). Both cases expressly repudiate *any* corruption beyond narrowly defined quid-pro-quo corruption, requiring a contribution to a candidate and being an act akin to bribery.[24] That excludes all else as cognizable corruption, e.g., access, gratitude, or "corruption" inherent in the close relationship between candidates/officeholders and party committees. So the "corruption" foundation of *McConnell* is gone. And regarding independent communications, the Court held they "do not give rise to corruption or the appearance of

[24] As the law now stands, ***cognizable corruption*** is as follows: "Corruption" means quid-pro-quo corruption or the appearance of quid-pro-quo corruption of a federal candidate, *McCutcheon,* 134 S.Ct. at 1441 (quoting *Citizens United,* 558 U.S. at 359), with quid-pro-quo corruption meaning only "a direct exchange of an official act for money," *id.* (citing *McCormick v. United States,* 500 U.S. 257, 266 (1991)). This is "an effort to control the exercise of an officeholder's official duties," *id.* at 1450, i.e., "an act akin to bribery," *id.* at 1466 (Breyer, J., dissenting). "Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption[.]" *Id.* at 1451 (plurality op.). No "conjecture"— including about "recontributed funds" or contributions "rerouted to candidates"—suffices. *Id.* at 1441 (citing *Ariz. Free Enter. Club's Freedom PAC v. Bennett,* 131 S.Ct. 2806, 2826-27 (2011) ("*AFEC*")). Influence, access, favoritism, and gratitude/ingratiation are not quid-pro-quo corruption or its appearance. *Citizens United,* 558 U.S. at 359 (citing *McConnell,* 540 U.S. at 296-98 (Kennedy, J., concurring/dissenting); *FEC v. Nat'l Conservative PAC,* 470 U.S. 480, 497 (1985) ("*NCPAC*") ("Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors")). For campaign expenditures to rise to the level of corruption, they must "be given as a *quid pro quo* for improper commitments from the candidate." *Colorado-I*, 518 U.S. at 615(quoting *Buckley,* 424 U.S. at 47. Such quid-pro-quo corruption occurs when a "public official receives a payment in return for his agreement to perform specific official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). That a candidate alters or reaffirms his positions on issues because of a contribution or makes a promise or commitment is not, in and of itself, evidence of quid-pro-quo corruption. *NCPAC*, 470 U.S. at 498; *Brown v. Hartlage*, 456 U.S. 45, 55-56 (1982) ("Some promises are universally acknowledged as legitimate, indeed 'indispensable to decisionmaking in a democracy,' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); and the 'maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system.' *Stromberg v. California*, 283 U.S. 359, 369 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote.").

corruption." *Citizens United*, 558 U.S. at 357. So "government ... ha[s] no ... interest in limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696. And political-party independent communications may not be presumed coordinated and are also non-corrupting. *Colorado-I*. 518 U.S. 604. So arguing *McConnell* language, while ignoring the removal of *McConnell*'s "corruption" foundation, fails the required interest-tailoring scrutiny.[25]

The same applies to statements about the Ban. *McConnell* said Congress concluded that "state committees function as an alternate avenue for precisely the same corrupting forces," 540 U.S. at 164, but that is based on *McConnell*'s now-non-cognizable "corruption." *McConnell* said "Congress also made a prediction" that contributors would use donations to state parties to gain "influence" and create "indebtedness," *id.* at 165, but such "corruption" is now non-cognizable and such "mere conjecture" is impermissible, *McCutcheon*, 134 S.Ct. at 1450, 1452. No evidence of real quid-pro-quo corruption was shown in *McConnell*'s massive record.[26] That dooms the Ban now that quid-pro-quo corruption is required in both expenditure and contribution contexts. And though *McConnell*

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[25] *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("*RNC-I*"), *aff'd* 561 U.S. 1040 (2010), said "*McConnell* ... appeared to rely ... on 'the close relationship between federal officeholders and the national parties,'" *id.* at 159 (citation omitted), and "'[g]iven this close connection and alignment of interests, 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.* (citation omitted). That cannot control because (**1**) "indebtedness" is not quid-pro-quo corruption; (**2**) the independent communications here pose no quid-pro-quo risk, *Citizens United*, 558 U.S. at 357; (**3**) *Colorado-I* held there is no cognizable corruption from political-party independent communications, 518 U.S. 604; (**4**) *McCutcheon* held that "large" contributions are not corrupting absent quid-pro-quo exchanges *with candidates*, 134 S.Ct. at 1450-51, so no corruption arises from *state*-account donations *used for independent communications*; and (**5**) *McConnell* held that, despite the "close relationship," political parties cannot be required to choose between making coordinated expenditures and independent expenditures because no amount of coordination eliminates a party's ability to do non-corrupting independent expenditures, 540 U.S. at 213-19.

[26] *McConnell* facially upheld BCRA though defendants "identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees." *McConnell*, 251 F. Supp. 2d at 395 (op. Henderson, J.). *Accord McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (quoting *McConnell*, 251 F. Supp. 2d at 395 (op. Henderson, J.)).

upheld banning nonfederal funds for VR, GOTV, VID, and GCA (*see supra* note 2 (abbreviations)) because they "can be used to benefit federal candidates directly," 540 U.S. at 167, or "ha[ve] a direct effect on federal elections," *id.* at 168, or cause officeholders to be "grateful," *id.*, under *current* jurisprudence "benefit," "effect," and "grateful[ness]" are also not corruption. And as applied to non-individualized, independent communications at issue here, there can be no presumption that they *benefit* a candidate because "an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate," *Citizens United*, 448 U.S. at 360, and "'[t]he absence of prearrangement and coordination ... alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate,'" *id.* at 345 (quoting *Buckley*, 424 U.S. at 47), so "independent expenditures ... do not give rise to corruption or [its] appearance," *id.* at 357.

In sum, the required interest/tailoring scrutiny requires FEC to prove *quid-pro-quo* corruption.

C. Independent-Expenditure Cases Hold that Independence Removes Corruption.

In the expenditure context, controlling precedents hold that independent communications pose no risk of no quid-pro-quo corruption, so nothing justifies banning the use of nonfederal funds from a state account for them. Five matter-of-law holdings govern here: (**i**) "independent expenditures ... do not give rise to corruption or [its] appearance," *Citizens United*, 558 U.S. at 357; (**ii**) "because *Citizens United* holds that independent expenditures do not corrupt ..., the government ... ha[s] no ... interest in limiting contributions to independent expenditure-only organizations," *SpeechNow*, 599 F.3d at 696; *see also EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009) (recognizing right to have separate accounts for independent expenditures and contributions); *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011) (recognizing that *EMILY's List* authorizes non-contribution accounts ("NCAs") that may receive unlimited contributions for making independent expenditures)[27]; (**iii**)

[27] *See also FEC Statement on* Carey v. FEC (political committees may have non-contribution

party-committee independent-expenditure activity similarly poses no cognizable risk of corruption or its appearance, *Colorado-I*, 518 U.S. 604; and (**iv**) the fact that party-committees and candidates are "inextricably intertwined," *McConnell*, 540 U.S. at 155, does not pose a constitutionally cognizable risk of quid-pro-quo corruption or its appearance *regarding political-party independent-expenditure activity* because *McConnell* held that party-committees could not be forced to choose between coordinated expenditures and independent expenditures, *id.* at 213-19, (meaning that political parties are factually capable of doing independent expenditures, as a matter of law, even if they also do coordinated expenditures, and so have a constitutional right to do independent communications under prevailing law); and (**v**) if entities can do independent expenditures *separately*, they must be allowed to pool their resources for effective advocacy by doing them *together*. FEC, Advisory Opinion ("AO") 2010-11 (Commonsense Ten) at 3. Independence eliminates corruption.

D. Political Parties' Independent Activities Are Also Non-Corrupting.

Another example of language that does not control is in statements *about* political parties that do not apply the required interest/tailoring scrutiny to the claims here. Though independent-expenditure-only political committees ("IE-PACs") may receive unlimited contributions for making independent communications and other independent activity, IE-PAC case opinions have distinguished political parties. For example, *SpeechNow* said "FEC ... argues that we must look to the discussion about the potential for independent expenditures to corrupt in [*Colorado-I*]" then distinguished political-party independent expenditures and held that "a discussion in a 1996 opinion joined by only three justices cannot control our analysis when the more recent opinion of the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption." 599 F.3d at 695. Such distinctions of political parties

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accounts to receive unlimited contributions for making independent expenditures).

are (a) dicta, (b) based on an impermissible presumption of coordination, and (c) inaccurate.

1. IE-PAC Case Statements Distinguishing Party-Committees Are Dicta.

Statements distinguishing political parties in cases such as *SpeechNow* are dicta. They were unnecessary to the decision, and the constitutionality of the provisions challenged here as applied to non-individualized, independent communications, including from an ICA, was not at issue.

2. Party-Committee Coordination with Candidates May Not Be Presumed.

Distinguishing of party-committees in some opinions is based on *presumed coordination with candidates*. *Colorado-I* forbids that presumption regarding independent communications: "The question ... is whether the [lower] Court ... erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are 'coordinated.' We believe it did." 518 U.S. at 619. That independent-communication case (*Colorado-I*) must control, not *McConnell*, because "[t]his case ... is about independent expenditures," *Citizens United*, 558 U.S. at 361.

Nor may the government *presume that political parties pose a corruption risk* per se: "[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." *Colorado-I*, 518 U.S. at 618 (plurality). "'[A] vigorous party system is vital to American politics," and "'[p]ooling resources from many small contributors is a legitimate function and an integral part of party politics.'" *Id.* (citations omitted).[28] "[T]he basic nature of the party system ... [allows] party members [to] join together to further common political beliefs, and citizens can choose to support a party because they share ... beliefs." *McCutcheon*, 134 S.Ct. at 1461. So "recast[ing] such shared interest ... as an opportunity for ... corruption would

[28] "We are not aware of any special dangers of corruption associated with political parties ...." *Id.* at 616 (plurality). "What could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?" *Id.* at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).

dramatically expand government regulation of the political process." *Id.* (citations omitted).

Regarding *corruption* (or *circumvention* by illegal conduit-contributions) from independent-expenditure activity, no presumption is permissible because independent communications involve no contributions *to candidates*. Only contributions to candidates may pose a corruption risk because, unless a financial quid *reaches* a candidate, he could not provide a legislative quo.[29] "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497. *See also McCutcheon*, 134 S.Ct. at 1441 (same). But "independent expenditures ... do not give rise to corruption." *Citizens United*, 558 U.S. at 357. "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S.Ct. at 1450.[30]

Regarding *coordination* of party-committee independent expenditures with candidates, no presumption is permissible because the independent communications party-committees may make, 11 C.F.R. 109.30, may *not* be coordinated with a candidate, 11 C.F.R. 109.37 ("What is a 'party coordinated communication'?"). And *Colorado-I* expressly *rejected* FEC's presumption that party-

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[29] "*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 134 S.Ct. at 1460 (citation omitted). For the corruption risk to arise, "money [must] flow[] ... to a candidate." *Id.* at 1452.

[30] *FEC v. Colorado Republican Federal Campaign* Committee, 533 U.S. 431, 459 (2001) (*"Colorado-II*") cited a practice of the Democratic Senatorial Campaign Committee ("DSCC") whereby candidates might receive increased aid from DSCC proportional to contributions raised by candidates for DSCC. 533 U.S. at 459. The Court considered this (legal) practice in the independent-spending context as some indication of circumvention problems if party-committees were allowed unlimited *coordinated* spending. *Id.* at 459 & n.22. *Colorado-II* is inapplicable to *independent* spending, but even the tally-system argument is non-viable after FEC's 2012 decision that the DSCC fulfilled conciliation-agreement obligations regarding its *ongoing* tallying. In Matter Under Review 3620, http://fec.gov/em/mur.shtml, FEC decided that: (a) absent earmarking, party-committees may do what they want with contributions tallied to particular candidate's credit; (b) tallied contributions are not implicitly earmarked; and (c) tallied contributions trigger no quid-pro-quo or conduit-contribution risk. *Id.* Under FEC's decision, "attribution" to a contributor occurs only when there is *earmarking*, not mere tallying of credit to a candidate. *Id.*

committees cannot make independent communications because (as FEC presumed) *all* political-party committee communications were coordinated with a political party's candidates. 518 U.S. at 614-22. What the *Colorado-I* opinions said in rejecting presumed coordination controls here. The *Colorado-I* plurality held that, in examining alleged coordination, one may not look to "general descriptions of Party practice," such as a "statement that it was the practice of the Party to 'coordinat[e] with the candidate' campaign strategy" or a statement that a Party official is "'as involved as [he] could be' with the individuals seeking the Republican nomination ... by making available to them 'all of the assets of the party.'" *Id.* at 614. Rather, coordination analysis examines whether *particular* communications are *factually* coordinated, *id.*:

> These latter statements, however, are general descriptions of Party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate.... [W]e therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

Political party independent communications pose *less* corruption risk than those by individuals:

> If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See *Buckley*, [424 U.S.] at 45-46; *NCPAC*, [470 U.S.] at 498. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

Id. at 617-18. And *Colorado-I* rejected the notion that a party "expenditure is 'coordinated' because a party and its candidate are identical, *i.e.*, the party, in a sense, 'is' its candidates." 518 U.S. at 622. "We cannot assume ... this is so," the plurality continued, *id.*, and such "a metaphysical identity ... arguabl[y] ... eliminates any potential for corruption ...," *id.* at 623, *citing Bellotti*, 435 U.S. at 790 ("where there is no risk of 'corruption' of a candidate, the Government may not limit even contribu-

tions"). So in the independent-communication context, if the government argues that political parties and candidates have "an absolute identity of views and interests," *id.*, then there is no corruption potential and, consequently, no constitutional justification for any limit even on their *coordinated* expenditures. But since party-committees and their candidates are separate legal entities, as *Colorado-I* and FECA treat them, parties are factually capable of making communications independent of candidates. Whether any *particular* communication is coordinated, depends on coordination standards, *see* 11 C.F.R. 109.37 ("party coordinated communication"), as a *factual* question, and the planned activities here are verified independent. So party-committee status changes no controlling analysis here regarding cognizable corruption, circumvention, and coordination, and no cognizable governmental interest prevents party-committees from using nonfederal funds for their independent communications, including from an ICA.

Nonetheless, *SpeechNow* said that "[*Colorado-I*] concerned expenditures by political parties, which are wholly distinct from 'independent expenditures' as defined in [52 U.S.C. 30101(17)]." 599 F.3d at 695. But this dictum states a distinction without constitutional significance. An "independent expenditure" under 52 U.S.C. 30101(17) is "a communication expressly advocating the election or defeat of a clearly identified candidate" that is not "a coordinated communication under 11 C.F.R. 109.21 or a party coordinated communication under 11 C.F.R. 109.37." 11 C.F.R. 100.16.[31] The communication that the party-committee in *Colorado-I* had a First Amendment right

[31] 52 U.S.C. 30101(17) requires that communications not be coordinated with either candidates or *party-committees*. Because LAGOP is a political "party committee," *see supra* at 3 & n.6, whether its communications are coordinated should be governed by 11 C.F.R. 109.37 ("What is a 'party coordinated communication'?"), which governs when "[a] political party communication is coordinated with a candidate," *id.* at 109.37(a), not proscribing coordination with party-committees. But Plaintiffs' intended independent FEA will be independent under all laws and regulations applicable when they are able to do FEA with nonfederal funds. In any event, nothing prevents party-committees from running their own independent-expenditure programs, so there is no problem with an ICA. But *Buckley* recognized coordination with *candidates* (not parties) as creating in-kind contributions.

to make was also non-coordinated, but it criticized a Democratic candidate on the issues *without* express advocacy, *see Colorado Republican Federal Campaign Committee*, 839 F. Supp. at 1451,[32] yet *Colorado-I* held that "the expenditure in question is what this Court in *Buckley* called an 'independent' expenditure," 518 U.S. at 613. Here, Plaintiffs want to use nonfederal funds for independent communications that are constitutionally like "independent expenditures" in that they are not coordinated and pose no quid-pro-quo risk. The constitutionally significant feature of "independent expenditure" in 52 U.S.C. 30101(17) and *Colorado-I* is the *independence* of the public communication naming a candidate, not the presence or absence of express advocacy. This is so because both uses of "independent expenditure" are rooted *Buckley*'s holding that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47. *See Colorado-I*, 518 U.S. at 615 (quoting *Buckley*, 424 U.S. at 47). Now, *Buckley also* imposed *express-advocacy* constructions on two "expenditure" definitions to avoid vagueness and overbreadth. 424 U.S. at 44 n.52, 80. *That* is the source of the express-advocacy independent-expenditure definition at 2 U.S.C. 431(17). But the right of party-committees to make "independent expenditures" under *Colorado-I* turns on *independence*, not the presence or absence of express advocacy. So for constitu-

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424 U.S. at 46 n.53. So the reference to *party-committees* in § 30101(17) resurrects the presumption of party-candidate coordination that *Colorado-I* rejected, which view is supported by the fact that expenditures coordinated with *PACs* (not party-committees) are not coordinated under § 30101(17) nor in-kind contributions under 52 U.S.C. 30116(7)(B). The requirement that independent expenditures be independent from *party-committees* is a prophylaxes atop the "*base limits*[, which] themselves are a prophylactic measure" in a "prophylaxis-on-prophylaxis approach'" to preventing any possible corruption. *McCutcheon*, 134 S.Ct. at 1458 (emphasis in original) (citation omitted). Such prophylaxes are not justified for independent communications and ICAs, where no corruption exists.

[32] The district court applied an express-advocacy construction and dismissed FEC's enforcement proceeding because there was no express advocacy. *Colorado-I*, 518 U.S. at 612-13.

tional purposes, an express-advocacy communication from *Buckley* and a non-express-advocacy communication from *Colorado-I* are both an "independent expenditure," with the common, controlling factor being their independence.

3. What the *Colorado* Cases and *McConnell* Really Said Supports Plaintiffs.

Though courts may claim political-parties differ in kind from PACs based on the *Colorado* cases and *McConnell*, what those cases actually said favors Plaintiffs here. In holding that political-party communications lack corruption risk due to independence, the *Colorado-I* principal opinion said: "We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." 518 U.S. at 616. The opinion then said what *SpeechNow* noted (set out here as stated in *SpeechNow*):

> It is true that the opinion of Justice Breyer did discuss the potential for corruption or the appearance of corruption potentially arising from independent expenditures, saying that "[t]he greatest danger of corruption ... appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate," thus evading the limits on direct contributions to candidates. *Id.* at 617....

SpeechNow, 599 F.3d at 695 (citation omitted).[33] But as context, *Colorado-I* said that

> [c]ontributors seeking to avoid the effect of the $1,000 contribution limit indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See *Buckley*, [424 U.S.] at 44-48 (risk of corruption by individuals' independent expenditures is insufficient to justify limits on such spending). If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor.

518 U.S. at 617 (citations omitted). Since contributors and political parties may each do independent expenditures, contributors and parties have an expressive-association right to do them together,

[33] *SpeechNow* quickly rejected this statement in *Colorado-I* as controlling: "[A] discussion in a 1996 opinion joined by only three Justices cannot control our analysis when the more recent opinion of the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption." 599 F.3d at 695.

including through an ICA.[34] So *Colorado-I* does not establish that large contributions that may be used for independent communications create corruption, and it supports Plaintiffs' activities here.

Colorado-I was remanded to decide whether the Party Expenditure Provision limits were unconstitutional facially, i.e., whether the government could limit *coordinated* expenditures. *Colorado-II*, 533 U.S. 431, held there could be limits on *coordinated* expenditures. Since Plaintiffs' intended activities do not involve coordination, *Colorado-II* neither controls nor informs this case. But note some things said in *Colorado-II*. The Court justified limits to prevent *circumvention* of contribution limits, not quid-pro-quo corruption directly. 533 U.S. at 465.[35] It said that party-committees "act as agents for spending on behalf of those who seek ... obligated officeholders." 533 U.S. at 452. This was about *coordinated*, not *independent*, communications. The next sentence emphasizes the context: "It is this party role, which functionally unites parties with other self-interested political actors,

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[34] The *Colorado-I* plurality recognized the *expressive-association* nature of political parties' independent expenditures for "'core' First Amendment activity," *id.* at 615-16:

> Given these established principles [concerning the high constitutional protection for, and non-corrupting nature of, independent communications], we do not see how a provision that limits a political party's independent expenditures can escape their controlling effect. A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.

[35] As to other alleged "corruption," the Court found it unnecessary to reach arguments based on "*quid pro quo* arrangements and similar corrupting relationships between candidates and parties," *id.* at 456 n.18, but the Tenth Circuit had rejected those arguments, *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1229-31 (10th Cir. 2000), as it had rejected the circumvention argument, *id.* at 1231-32. And the district court found no factual evidence of quid-pro-quo corruption between contributors, parties, and candidates. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1211-12 (D. Colo. 1999) (no corruption in the form of contributors "forc[ing] the party committee to compel a candidate to take a particular position"); *id.* at 1212-13 (no "corruption" from parties' influence over candidates because "decision to support a candidate who adheres to the parties' beliefs is not corruption"); *id.* at 1213 ("FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof.").

that the Party Expenditure Provision targets," i.e., what the Provision "targets" in *Colorado-II* is solely *coordinated* spending, as made clear by the Court, *id.* at 457 (emphasis added):

> Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' *coordinated* spending wide open.

McConnell justified the nonfederal-funds Ban on the idea that nonfederal funds could cause gratitude and influence, 540 U.S. at 145, 168, or access, *id.* at 119 & n.5, 124-25 & n.13, 155. "[S]oft money ... enabled parties and candidates to circumvent FECA's limitations ...." *Id.* at 126. *See also id.* at 145 ("widespread circumvention of FECA's limits on contributions" due to likelihood "that candidates would feel grateful ... and ... donors would seek to exploit that"). The Court said such access, gratitude, and consequent "circumvention" constituted "corruption" or "the appearance of corruption." *Id.* at 119 n.5, 142, 145. Also, "[t]he national committees ... are both run by, and largely composed of, federal officeholders and candidates," *id.* at 155, and "[g]iven this close connection and alignment of interests, 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. McConnell*'s analysis doe not control here because "corruption" based on *anything* other than narrowly defined quid-pro-quo corruption was rejected in *Citizens United*, 558 U.S. at 359-61 (expenditure context), and *McCutcheon*, 134 S.Ct. at 1441 (contribution context).[36]

But *McConnell* was correct that the independent-expenditure case line controls where (as here) independent communications are involved, 540 U.S. at 145 n.45 (citations omitted):

> Justice Kennedy contends that the plurality's observation in *Colorado I* that large soft-money

[36] And reliance on such "close relationship" language would be erroneous because *McConnell* held that, despite the "close relationship," political parties cannot be required to choose between making coordinated expenditures and independent expenditures. *Id.* at 213-19. So *no* amount of coordination eliminates the ability to do independent expenditures.

> donations to a political party pose little threat of corruption "establish[es] that" such contributions are not corrupting.... The cited dictum has no bearing on the present case. *Colorado I* addressed an entirely different question—namely, whether Congress could permissibly limit a party's independent expenditures—and did so on an entirely different set of facts.[37]

Citizens United also distinguished those case lines, holding that *McConnell* did not control an independent-communication case, 558 U.S. at 360-61 (citations omitted):

> The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials.... This case, however, is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule.

Citizens United distinguished the case lines based on whether they involved *independent communications*, not on the basis that *McConnell* involved party committees. That distinction controls.

III. The Challenged Provisions Are Unconstitutional, as Applied and Facially.

Three analytical keys control and readily resolve this case: (i) only narrow quid-pro-quo corruption is cognizable; (ii) independence eliminates it; and (iii) political parties' independent communications are equally non-corrupting. Plaintiffs have devoted most of their brief to establishing those keys and answering objections. The following application of those three keys to the challenged provisions in the four counts builds on all the foregoing and so may be brief.

Preliminarily, Plaintiffs note that the Ban, Fundraising Requirement, and Reporting Requirement fall as a unit, as they were so considered in *McConnell*,[38] because all were there justified by a now-

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[37] Whether any "set of facts" could prove cognizable corruption from independent expenditures was settled in *Citizens United*, which held, *as a matter of law*, that "independent expenditures ... do not give rise to corruption or the appearance of corruption." 558 U.S. at 357.

[38] *McConnell* mentions the Ban, *see, e.g.*, 540 U.S. at 161-62, but nowhere mentions the Fundraising Requirement or Reporting Requirement, other than to indicate that "[t]he remaining provisions of [now 52 U.S.C. 30125] largely reinforce the restrictions in [now 52 U.S.C. 30125(a)]," *id.*

rejected, broad definition of "corruption" and because quid-pro-quo corruption is absent as to all the activity at issue here. So Plaintiffs primarily argue against the Ban—which was the focus of argument and the opinion in *McConnell*—because it is central and the other provisions are derivative.

A. The Challenged Provisions Are Unconstitutional as Applied in Count I.

In Count I, Plaintiffs challenge the Ban, Fundraising Requirement, and Reporting Requirement "as unconstitutional under the First Amendment (I) as applied to (a) non-individualized, independent communications exhorting registering/voting and (b) non-individualized, independent communications by Internet." (Compl. ¶¶ 1, 118.)

Plaintiffs' First Amendment rights are burdened as a matter of law, *see supra* Part II.A, so FEC must (at minimum) prove a "fit," *see supra* Part I,[39] between the challenged provisions and preventing cognizable corruption, *see supra* note 24 ("cognizable corruption"), as applied. FEC cannot prove this fit because the independent communications at issue here pose no risk of quid-pro-quo corruption (or its appearance), *see supra* Part II.C, and the same is true of independent communications by committees of political parties, *see supra* Part II.D.

But Count I can be decided on the narrower grounds that the Ban prohibits using federal funds for non-individualized, independent communications (a) merely *exhorting registering/voting* and (b) *by Internet*. Regarding Count I(a), as explained above, *see supra* at 4-5, FEC's original definitions of VR and GOTV required "individualized" assistance and did not include "encouraging or urging"

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at 133 (thereby sweeping in the Ban and Fundraising Requirement, but not the Reporting Requirement at BCRA § 103a). Thus, as FEC has acknowledged, the provisions rise and fall together. (Dkt. 15 at 41 n.12 ("[O]ne of the district court opinions in *McConnell* also reviewed the analysis of section 30125(c) as deriving from the analysis of section 30125(b)'s restrictions on FEA." (citing 251 F. Supp. 2d at 412 (Henderson, J., concurring/dissenting)).)

[39] Because independent communications are restricted, strict scrutiny applies, *see supra* Part I.C, but even *McCutcheon*'s contribution-restriction test is strong, *see supra* Part I.B. *McConnell*'s deferential scrutiny based on broad "corruption" is gone.

registration or voting.[40] But FEC changed its definitions to include "encouraging or urging" and dropped the "individualized" requirement due to *Shays-III*, 528 F.3d 914. At the 2009 rulemaking hearing, commenters argued against an "encouraging" definition and for a voter-mobilization definition for VR and GOTV. (SMF ¶ 29.) But FEC decided that *Shays-III*, which it did not take to the Supreme Court, required it to drop the "individualized" requirement and include mere "encouraging" (as well as "urging") in the VR and GOTV definitions.

Though Plaintiffs have not brought a vagueness challenge in this BCRA case, serious vagueness exists in the "encouraging or urging" definitions of VR and GOTV, awaiting only a challenge for those definitions to fall to the First Amendment and due-process protections against vagueness. However, the vagueness adds to the chill on state and local committees and enhances the burden at issue here. FEC regulations do not define "encouraging or urging" in the VR and GOTV definitions, though FEC uses those terms synonymously with "exhorting." (SMF ¶¶ 27-28.) But FEC disputes that "encouraging or urging" means "exhorting" (Answer ¶ 66) and disputes that the constitutional analysis requiring *Buckley*'s construction requiring *express* advocacy, 424 U.S. at 42-44, would here require *express* exhorting, encouraging, or urging. (Answer ¶ 66). At the 2009 rulemaking hearing,

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[40] As noted above, *see supra* at 6, ASDC's CFFR lauded FEC's original approach and seeks a change back to the old, pre-BCRA rules:

> After extensive hearings and careful consideration, the FEC in 2002 issued thoughtful, practical yet rigorous regulations defining these activities. These definitions have been challenged by so-called "reform" organizations in a series of court cases which have forced the FEC in some cases to modify its definitions and in other cases have left the definitions in a state of confusion and uncertainty. Under the most recent iteration of the definition of "get-out-the-vote" almost all campaign activity is subsumed within the definition pulling most campaign activity within the definition even if no federal candidates are referenced in the communications.... [D]ue to the continual expansion of the definitions of "get-out-the-vote" as well as the additional problems created by the concept of "federal election activity," **Congress should consider repealing these provisions and allow party committees to undertake activities in accordance with rules in place prior to ... McCain-Feingold**.

Recommendations at 1-2 (bold in original).

one "reform"-community speaker asserted that "get out to vote for O'Malley" or "go vote for O'Malley" would be GOTV while "vote for O'Malley" (even if accompanied by the election date) would not be GOTV, though he did not dispute that the latter would encourage voting. (SMF ¶ 30.) The distinctions between those O'Malley statements are problematic at best, and FEC has provided no such clarification. So the foregoing chill and burden are part of the present constitutional s analysis.

But the present issue is how merely exhorting (or encouraging/urging) people to register and vote can pose any quid-pro-quo risk.[41] At a minimum, there must be a "fit" between such mere exhortation and cognizable corruption, *see supra* at note 24 ("cognizable corruption"). There is no fit. For example, LAGOP's nonpartisan "Get Registered," *supra* at 8-9, is a paean to political participation that results in no contribution to a candidate or anything else required for cognizable corruption. So the challenged provisions are unconstitutional as challenged in Count I(a).

Regarding Count I(b), Plaintiffs challenge the provisions at issue as applied to non-individualized, independent communications *by Internet*. Though FEC does not include Internet communications in the definitions of other FEA definitions (e.g., the PASO definition, 11 C.F.R. 100.24(b)(3)) that incorporate the "public communication" definition (which excludes Internet communications unless "placed for a fee on another person's Web site," 11 C.F.R. 100.26 (e)) and originally did not include online communications in its VR and GOTV definitions, FEC included online communications in its VR and GOTV definitions after *Shays-III*. (SMF ¶¶ 19-25.)

As part of the confusion, chill, and burden of the challenged provisions, note that in past rulemakings, FEC has indicated that where activity on a committee's website is defined as FEA, the committee might have to pay all costs for the website, including costs swept in by a "ripple effect"

[41] And note that the independent communications at issue are "non-individualized," in the sense that FEC intended in its original rules requiring "individualized" assistance to qualify as VR and GOTV, so they would not have been VR or GOTV under FEC's original analysis and rules.

(such as costs for computers, online access, etc.) because "the Commission is not convinced that the statute permits time/space allocation." FEC nowhere states that a time/space allocation is permissible for any online FEA. (SMF ¶¶ 23-25.) But FEC now disputes this. (Answer ¶ 62.)[42]

But the present issue is how non-individualized, independent online communications can pose any quid-pro-quo risk. At a minimum, there must be a "fit" between such communications and cognizable corruption, *see supra* at note 24 ("cognizable corruption"). There is no fit. For example, LAGOP's original online nonpartisan "Get Registered" communication, *supra* at 8-9, neither contributes to a candidate nor does anything else required for cognizable corruption. So the challenged provisions are unconstitutional as challenged in Count I(b).

This conclusion is reinforced by the fact, noted above, that online activity is excluded from other FEA definitions, but not VR and GOTV. For example, LAGOP's "Celebrating Jindal," *see supra* at 12, would not be PASO (and thus FEA) on LAGOP's *website* but would be if *broadcast*. This is so because the PASO definition, 11 C.F.R. 100.24(b)(3) (*see* Compl. ¶ 27 (text)), requires that PASO be a "public communication," and the "public communication" definition, 11 C.F.R. 100.26 (*see* Compl. ¶ 19 (text)), includes broadcasting but excludes Internet communication (except for "paid communications on another's Web site"). (SMF ¶ 63.) Now, if a PASO ad on one's own website cannot corrupt the named candidate, then VR and GOTV on one's own website that names no candidate cannot be corrupting. Or, if VR/GOTV on one's own website is corrupting, the exclusion from the PASO definition of a communication promoting a candidate on one's own website is underinclusive and the assertion of an anti-corruption interest regarding own-website VR/GOTV cannot be taken seriously. *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002).

[42] FEC later excluded de minimis FEA on a website (SMF ¶¶ 23-25), but that de minimis exception requires that the communication be "both brief *and* incidental" (SMF ¶¶ 26), so it protects none of Plaintiffs' described intended FEA activities.

B. The Challenged Provisions Are Unconstitutional as Applied in Count II.

In Count II(a), Plaintiffs challenge the Ban, Fundraising Requirement, and Reporting Requirement "as applied to (a) non-individualized, independent communications." (Compl. ¶¶ 1, 131.) In Count II(b), they challenge the Ban and Fundraising Requirement as applied to "such communications from an independent-communications-only account ("ICA")." (Compl. ¶¶ 1, 132.)

Regarding Count II(a), Plaintiffs' First Amendment rights are burdened as a matter of law, *see supra* Part II.A, so FEC must (at minimum) prove a "fit," *see supra* Part I,[43] between the challenged provisions and preventing cognizable corruption, *see supra* note 24 ("cognizable corruption"), as applied. FEC cannot prove this fit because the independent communications at issue here pose no risk of quid-pro-quo corruption (or its appearance), *see supra* Part II.C, and the same is true of independent communications by committees of political parties, *see supra* Part II.D.

So "as applied to (a) non-individualized, independent communications," the Ban, Fundraising Requirement, and Reporting requirement are unconstitutional because they are not justified by the requisite anti-corruption interest because such communications pose no quid-pro-quo risk.

Regarding Count II(a), the foregoing analysis also controls, but, in the alternative, if the foregoing relief is not granted, Plaintiffs challenge the Ban and Fundraising Requirement, but not the Reporting Requirement, as applied to such communications from an ICA. *See supra* at 13 (describing nature of ICA). (*See also* SMF ¶¶ 68; Compl. ¶ 109.) The ICA would receive only funds (**a**) from *individuals*, (**b**) compliant with applicable state and listed federal restrictions (*see* SMF ¶ 66), and (**c**) either (**i**) transferred from LAGOP (under reasonable accounting methods assuring that subparagraph (b) is met) or (**ii**) fundraised in compliance with provisions governing such fundraising when

[43] Because independent communications are restricted, strict scrutiny applies, *see supra* Part I.C, but *McCutcheon*'s contribution-restriction test is also rigorous, *see supra* Part I.B.

LAGOP is able to operate an ICA for such independent communications. The ICA's receipts would be limited to Louisiana's contribution limit, currently $100,000 over a 4-calendar-year period (which LAGOP and its ICA must share). (SMF ¶ 68.)

The ICA is constitutionally analogous to the NCA (non-contribution account) that political committees (but not those of political parties) who make contributions may establish for making independent expenditures. *See FEC Statement on* Carey v. FEC. But an ICA does less. First, while an NCA may do independent expenditures as well as certain other independent spending, *id.*, the ICA would only make non-individualized, independent communications. Second, while an NCA may receive unlimited contributions, including from corporations and unions, *id.*, the ICA would only receive contributions from individuals limited by state contribution limits. Both would report as required, including by the Reporting Requirement for the ICA. Because independent expenditures and independent communications are constitutionally equivalent (since independence eliminates corruption), if other political committees may have NCAs, *a fortiori* state and local committees are constitutionally entitled to do the lesser thing of having ICAs.

C. The Challenged Provisions Are Unconstitutional as Applied in Count III.

Plaintiffs challenge the Ban, Fundraising Requirement, and Reporting Requirement as applied to all independent federal election activity. (Compl. ¶¶ 1, 140.) Plaintiffs' First Amendment rights are burdened as a matter of law, *see supra* Part II.A, so FEC must (at minimum) prove a "fit," *see supra* Part I, between the challenged provisions and preventing cognizable corruption, *see supra* note 24 ("cognizable corruption"), as applied.

FEC cannot prove this fit because independent FEA poses no quid-pro-quo risk, whether or not it takes the form of a communication. Plaintiffs have already established that independent communications pose no risk of quid-pro-quo corruption (or its appearance), *see supra* Part II.C, and that the

same is true of independent communications by committees of political parties, *see supra* Part II.D. But the corruption-eliminating effect of independence is not limited to communications. *Buckley* held that independence alleviates quid-pro-quo risk:

> independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

424 U.S. at 47. *Buckley* was scrutinizing the constitutionality of a $1,000 per year limit on "any expenditure ... relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate." *Id.* at 39. The Court construed the expenditure-relative-to language as requiring candidate advocacy, *id.* at 42, then applied a saving "express advocacy" construction on that to save the definition from unconstitutional vagueness and overbreadth, *id.* at 43-44. *See also id.* at 80 (same construction for purpose-of-influencing expenditure definition in disclosure context). So *Buckley* was dealing with a context in which it was construing expenditure definitions to reach only express-advocacy communications.

But what *Buckley* said in the block quote about the "absence of prearrangement and coordination" alleviating the quid-pro-quo risk is also true of non-communication expenditures. This is clear from the full "cognizable corruption" definition, *see supra* note 24, which indicates, inter alia, that "corruption" means quid-pro-quo corruption or the appearance of quid-pro-quo corruption of a federal candidate, *McCutcheon,* 134 S.Ct. at 1441 (quoting *Citizens United,* 558 U.S. at 359), with quid-pro-quo corruption meaning only "a direct exchange of an official act for money," *id.* (citation omitted). This is "an effort to control the exercise of an officeholder's official duties," *id.* at 1450, i.e., "an act akin to bribery," *id.* at 1466 (Breyer, J., dissenting). "Government's interest in preventing

the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption[.]" *Id.* at 1451 (plurality op.).

So given the independence of an act that constitutes FEA, there can be no "direct exchange of an official act for money" because no money flows to a candidate from independent FEA. No gratitude/access/benefit theory of corruption survives the restriction of "corruption" to narrow quid-pro-quo corruption. So if state and local committees do independent VR and GOTV, *see, e.g.*, "Get Registered," *supra* at 8-9, no cognizable corruption can arise from that. Or if they promote the party through GCA, *see, e.g.*, "African-American Outreach," *supra* at 11-12, no corruption arises therefrom. Or if they do an independent PASO ad, *see, e.g.*, "Celebrating Jindal," *see supra* at 12, no corruption arises (which is doubly so now that he has suspended his campaign, though technically he remains a federal candidate). But the same holds true for non-communication independent FEA, for the same reason. So no corruption arises from independent FEA in the form of GOTV involving taking voters to the polls, or VID that involves combing data instead of communicating with potential voters, or having an employee work more than 25% of her monthly time on such GOTV or VID. No money flows to a candidate from such independent FEA, so no cognizable corruption arises.

D. The Challenged Provisions Are Unconstitutional Facially (Count IV).

Plaintiffs challenge the Ban, Fundraising Requirement, and Reporting Requirement facially. (Compl. ¶¶ 1, 151.) *McConnell*, 540 U.S. 93, upheld the challenged provisions facially though FEC "identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds." *McConnell*, 251 F. Supp. 2d at 395 (op. Henderson, J.). *Accord McCutcheon*, 134 S. Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (quoting *McConnell*, 251 F. Supp. 2d at 395) (op. Henderson, J.).). However the Supreme Court, held in *Citizens United*, 558 U.S. at 359-60, and *McCutcheon*, 134 S.Ct. at 1450-51, that evidence of quid-

pro-quo corruption is required to uphold such restrictions. As a result, *McConnell* was wrongly decided and has been implicitly overruled. So the challenged provisions, which were all upheld facially on now-rejected theories of "corruption," are facially unconstitutional.

Conclusion

McConnell, 540 U.S. 93, facially upheld the challenged provisions based on theories of "corruption" rejected in *Citizens United*, 558 U.S. at 359-61 (expenditure context), and *McCutcheon*, 134 S.Ct. at 1441 (contribution context). *See supra* note 24 (cognizable corruption). And even despite *McConnell*'s emphasis on the "close connection and alignment of interests" between parties and candidates, 540 U.S. at 155, *McConnell* recognized and upheld political parties' ability and right to do independent expenditures in the face of a BCRA provision requiring them to choose between coordination with candidates and independent expenditures, *id.* at 213-19. Thus, no coordination presumption is permitted, so no amount of coordination not involving particular independent activity strips political parties of their ability and right to do that non-corrupting independent activity. Based on the non-corrupting nature of independent activity and the absence of quid-pro-quo corruption, the challenged provisions are unconstitutional as applied and facially.

Respectfully submitted,

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Certificate of Service

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United States District Court
District of Columbia

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

Plaintiffs' Statement of Material Facts Not in Genuine Dispute[1]

Plaintiffs have moved for summary judgment in their favor. Fed. R. Civ. P. 56. In support of that motion, Plaintiffs provide the following statement of material facts ("SMF") not in genuine dispute. LCvR 7(h)(1).[2]

Parties[3]

1. Republican Party of Louisiana ("LAGOP") is a "recognized political party." La. Rev. Stat. 18:442. It is a "[s]tate committee," 52 U.S.C. 30101(15), and a "state party committee" (as a "political committee"), 11 C.F.R. 100.5(e)(4).[4] Its purposes are: (1) electing Republicans to office and (2) supporting issues reflecting its principles. Bylaws art. I, § 3. LAGOP intends to do

[1] **Key to Evidentiary Citations:** Verified Complaint for Declaratory and Injunctive Relief (Dkt. 1) = Compl.; Answer (Dkt. 19) = Answer; Plaintiff JPGOP's Responses to FEC's First Set of Discovery Requests = JPGOP Discovery Response (Exhibit 1).

[2] The parties have agreed that the facts found in relevant cases are also admissible, e.g., *Colorado-I*, 518 U.S. 604 (1996); *McConnell*, 540 U.S. 93; *Citizens United*, 558 U.S. 310; *McCutcheon*, 134 S.Ct. 1434; *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) ("*RNC-I*"); et al.; but those are not all provided here as they are unnecessary to decide this matter-of-law case.

[3] The verb tense of facts verified in the Complaint (Doc. 1) is retained as stated in the Complaint, though certain referenced time frames have changed, e.g., certain federal election activity ("FEA") periods have now begun (in November and December 2015). Because Plaintiffs verified their intent to do materially similar activities in the future (Compl.. ¶ 114), the tense is proper.

[4] State or local committees (a.k.a. "party organizations," 11 C.F.R. 300.30(c)) are entities not necessarily registered as political committee so as to be *party* committees. (Compl. ¶ 6 n.1; Answer ¶ 6.)

independent federal election activity without complying with challenged provisions as lawful. (Compl. ¶ 6.)

2. Jefferson Parish Republican Parish Executive Committee ("JPGOP") is a "parish executive committee" controlled by elected members, not by the state political party, except the state party may establish member qualifications and prescribe officers, La. Rev. Stat. 18:444, and if a parish executive committee is not elected, the state central committee may convene qualified voters to elect one. *Id.* at 18:445. JPGOP is a "local committee," i.e., "part of the official party structure[] and ... responsible for the day-to-day operation of the political party at the [local] level." 11 C.F.R. 100.14(b). It is not a federal political committee, so not a "party committee." 11 C.F.R. 100.5(e)(4). It intends to engage in independent federal election activity without complying with the challenged provisions as lawful, but absent requested relief will not. (Compl. ¶ 7.)

3. Orleans Parish Republican Executive Committee ("OPGOP") is also a parish executive committee and local committee that intends to do independent federal election activity without complying with challenged provisions as lawful, but absent requested relief will not. (Compl. ¶ 8.)

4. FEC is the government agency with civil enforcement authority over BCRA and the Federal Election Campaign Act of 1971("FECA"), as amended, 52 U.S.C. 30101 et seq. (Compl. ¶ 9; Answer ¶ 9.)

Historical Context

5. As explained in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (per curiam) (three-judge court), before BCRA state party committees could allocate certain costs:

> FEC permitted ... state party committees to solicit and accept donations outside of FECA's source and amount limitations ("nonfederal money") .... [P]olitical committees were permitted to establish ... federal accounts ... and ... nonfederal accounts[].... FEC[] ... permitted

> ... party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws ..., even if those state laws ... permit[ted] contributions from corporate and labor union general treasury funds.

Id. at 196-7(footnotes omitted).[5] "[T]he allocation between the federal and nonfederal accounts for [administrative and generic voter drive expenses was] determined by the proportion of federal offices to all offices on a state's general election ballot." *Id.* (citing 11 C.F.R. 106.5(d) (1991)). (Compl. ¶ 10; Answer ¶ 10.)

6. FEC allowed allocation of the following, *id.* at 198 n.13:

> The Commission permitted, *inter alia*, the following expenses to be allocated: administrative expenses, which include rent, utilities, office supplies, and salaries, 11 C.F.R. § 106.5(a)(2)(i) (1991); the direct costs of a fundraising program or event, where federal and nonfederal funds are collected by one committee. 11 C.F.R. § 106.5(a)(2)(ii) (1991); and "generic voter drives," which included voter registration, and get-out-the-vote ("GOTV") drives where a specific candidate was not mentioned. 11 C.F.R. § 106.5(a)(2)(iv) (1991).

(Compl. ¶ 11; Answer ¶ 11.)

7. "[FEC's] rules ... mandated that ... national party committees disclose the details of their nonfederal accounts, ... [including donors'] 'name, mailing address, occupation or type of business, and the date of [donation] receipt,'" but "[s]tate parties ... were exempted" and required only to report information on their federal accounts. *Id.* at 198 (citations omitted). (Compl. ¶ 12; Answer ¶ 12.)

8. In Advisory Opinion ("AO") 1995-25 (RNC), FEC said non-express-advocacy "legislative advocacy media advertisements that focus on national legislative activity and promote the Republican Party should be considered as made in connection with both Federal and non-federal elections." *Id.* at 2. It said the cost of the issue ads could be allocated (as "administrative ex-

[5] *Federal funds* are defined at 11 C.F.R. 300.2(g); *nonfederal funds* are defined at 11 C.F.R. 300.2(k); *Levin funds* are explained at 11 C.F.R. 300.31 and .32(b)-(c), but are not involved here.

penses" or "generic voter drive costs," depending on content) with up to 35% from nonfederal funds in presidential-election years and up to 40% from nonfederal funds in other years. *Id.* (Compl. ¶ 13; Answer ¶ 13.)

9. Based on AO 1995-25, Republican and Democratic parties, at national and state levels, ran such issue ads (some mentioning candidates) "with a mix of federal and nonfederal funds as permitted by FEC allocation rules." *McConnell*, 251 F. Supp. 2d at 199-200. (Compl. ¶ 14; Answer ¶ 14.)

10. In BCRA, Congress altered the foregoing practices by (**a**) defining "federal election activity" to sweep in voter mobilization, party promotion, and issue advocacy, *see* Compl. ¶¶ 16-27; (**b**) banning state and local committees from using nonfederal funds (except "Levin funds," not at issue here) for federal election activity (the "Ban"), *see* Compl. ¶¶ 32-33; (**c**) requiring federal funds for fundraising for federal election activity (the "Fundraising Restriction"), *see* Compl. ¶ 34; and (**d**) requiring reporting of federal election activity (the "Reporting Requirement"), *see* Compl. ¶ 35, so federal election activity may no longer be allocated between federal and nonfederal accounts under 11 C.F.R. 106.7(b).[6] (Compl. ¶ 15; Answer ¶ 15 .)

Applicable Federal Election Activity ("FEA") Periods

11. FEC publishes federal-election-activity periods for (**a**) voter-registration activity ("VR") (120 days before regular election, 52 U.S.C. 30101(20)(A)(i)) and (**b**) voter-identification ("VID"), generic-campaign activity" ("GCA"), and get-out-the-vote activity ("GOTV") (all three run from earliest primary filing date to the general election, 11 C.F.R. 100.24(a)(1)). (Compl.

[6] Levin funds may be used for allocation but are restricted in fundraising and use. *See* 11 C.F.R. 300.31 and .33(c). (Compl. ¶ 15 n.4; Answer ¶ 14.) Plaintiffs do not use Levin funds due to the complexity, burdens, and restrictions associated with them. (Compl. ¶ 15 n.4.) As FEC notes, *joint* fundraising costs may be allocated under 11 C.F.R. 300.33. (Answer ¶ 15.)

¶ 28; Answer ¶ 28.)

12. FEC provided 2012 Louisiana periods at www.fec.gov/info/charts_fea_dates_2012.shtmls thus: VID/GCA/GOTV = 12/09/11–11/06/12; VR = 11/25/11–03/24/[12] and 4/19/12–11/06/12. (Compl. ¶ 29; Answer ¶ 29.)

13. FEC provided 2014 Louisiana periods at www.fec.gov/info/charts_fea_dates_2014.shtml thus: VID/GCA/GOTV = 08/22/14–12/06/14; VR = 04/24/14–12/06/14. (Compl. ¶ 30; Answer ¶ 30.)

14. Louisiana federal-election-activity periods related to 2016 elections[7] follow: VID/GCA/GOTV = 12/02/15–11/08/16; VR = 11/06/15–03/05/16 and 07/11/2016–11/08/16. (Compl. ¶ 31; Answer ¶ 31.)

FEC Rulemaking and Litigation on Federal-Election-Activity Definitions

15. FEC's litigation summary regarding its BCRA rulemaking and the *Shays v. FEC* cases is available at http://fec.gov/law/litigation_CCA_S.shtml#shays_06. The summary explains the holding from *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays-III*"), as relevant here:

> **Definitions of GOTV and Voter Registration Activity.** The court of appeals upheld the district court's decision to remand the definitions of "GOTV" and "voter registration activity." The court held that the definitions impermissibly required "individualized" assistance directed towards voters and thus continued to allow the use of soft money to influence federal elections, contrary to Congress' intent.

Id. That 2008 holding, rejecting FEC's individualized-assistance approach, led to the broad definitions those two terms now employ, which include "[e]ncouraging or urging" registration and voting "by any ... means," 11 C.F.R. 100.24(a)(2)(i)(A) and (3)(i)(A). (Compl. ¶ 53; Answer

[7] *See* www.sos.la.gov/electionsandvoting/publisheddocuments/electionscalendar2016.pdf ("Presidential Preference Primary" election = 3/5/2016 with "[q]ualifying period begin[ning] 12/2/2015"; "Open Primary/Presidential/Congressional" election 11/8/2016). (Compl. ¶ 31 n.6; Answer ¶ 31 n.6.)

¶ 53.)

16. In 2002, FEC "define[d] voter registration activity to encompass *individualized* contact for the specific purpose of *assisting* individuals with the process of registering to vote.... The Commission ... expressly rejected an approach whereby merely encouraging voter registration would constitute Federal election activity." FEC, "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money," 67 Fed. Reg. 49063, 49066 (July 29, 2002) ("2002 E&J ") (emphasis added). FEC said it "must define GOTV in a manner that distinguishes ... [it] from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates.... [I]f GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity." *Id.* Consequently, *id.* (emphasis in original):

> the Commission adopt[ed] a definition of "GOTV activity" as "contacting registered voters * * * to assist them in engaging in the act of voting." This definition is focused on activity that is ultimately directed to *registered* voters, even if the efforts also incidentally reach the general public. Second, GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law. The Commission understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate.

(Compl. ¶ 54; Answer ¶ 54.)

17. In 2004, *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), held that FEC did not provide adequate notice of its approach, remanding for rulemaking. In 2006, FEC "retain[ed its] ... definitions of 'voter registration activity' and 'GOTV activity,' which exclude mere encouragement of registration and/or voting," *id.* at 8928, explaining that mere encouragement "would be overly broad." "Definition of Federal Election Activity," 71 Fed. Reg. 8926, 8929 (Feb. 22, 2006) ("2006 E&J"). It reaffirmed "that these definitions will not lead to circumvention of FECA because the regulations prohibit the use of non-Federal funds for dis-

bursements ... for ... activities ... actually register[ing] individuals to vote." *Id.* (Compl. ¶ 55; Answer ¶ 55.)

18. In 2008, *Shays-III* noted that FEC defended its individualized-assistance definitions on two bases: (**a**) a need to avoid capturing brief, incidental exhortations appended to speeches or events, which the court said could be dealt with by an exemption, and (**b**) providing a bright line, which the court said was only an argument for bright lines. 528 F.3d at 932. *Shays-III* made no mention of any First Amendment arguments against overbroad definitions. (Compl. ¶ 56; Answer ¶ 56.)

19. In 2010, noting that *Shays-III* rejected its individualized-assistance approach, FEC adopted definitions sweeping in "encouraging or urging" registration or voting "by any ... means" (except for brief *and* incidental exhortations). 2010 E&J, 75 Fed. Reg. at 55260-64. (Compl. ¶ 57; Answer ¶ 57.)

20. However, after explaining *McConnell*'s rationale for holding that restricting funding of federal election activity is constitutional, 2010 E&J, 75 Fed. Reg. at 55258 (quoting *McConnell v. FEC*, 540 U.S. 93, 163-66 (2003)), FEC reiterated its rationales for its earlier positions, *see* ¶¶ 54-55, and a rationale for its earlier positions based on *McConnell*:

> In reaching its decision, the Court noted that BCRA regulated only "those contributions to state and local parties that can be used to benefit Federal candidates directly" and therefore posed the greatest threat of corruption. *Id.* at [167]. As such, the Court found BCRA's regulation of voter registration activities, which "directly assist the party's candidates for federal office," and GOTV activities, from which Federal candidates "reap substantial rewards," to be permissible methods of countering both corruption and the appearance of corruption. *Id.* []; see also *id.* [] (finding that voter registration activities and GOTV activities "confer substantial benefits on federal candidates" and "the funding of such activities creates a significant risk of actual and apparent corruption," which BCRA aims to minimize).

2010 E&J, 75 Fed. Reg. at 55258. (Compl. ¶ 58; Answer ¶ 58.)

21. FEC recounted that "its 2006 E&J [said] that its [original] regulations would not lead to the circumvention of the Act precisely because they captured 'the use of non-Federal funds ... for those activities that actually register individuals to vote.'" *Id.* at 55259 (citation omitted). (Compl. ¶ 59; Answer ¶ 59.)

22. The 2010 E&J said a "commentator argued that the Commission should exempt from the definition of voter registration activity [and 'GOTV activity'] all Internet communications, stating that such communications are made at 'virtually no cost.'" *Id.* at 55261 and 55263. That commentator was the Democratic National Committee ("DNC"), by counsel Rebecca H. Gordon, and DNC's arguments went beyond "virtually no cost." DNC said FEC should "create an exception ... for voter registration and GOTV messages ... conveyed though the internet," which FEC "could accomplish ... very simply by limiting the covered communications to those that qualify as 'public communications' under current regulations." DNC Comments at 4.[8] DNC explained:

> In its 2006 rulemaking on Internet Communications, the Commission explicitly acknowledged that the unique features of the internet—in particular its accessibility, low cost, low barrier to entry, and interactive features—merited regulatory restraint. *See* Internet Communications, 71 Fed. Reg. 18,589 ... ("[T]he Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach."). This position of restraint led the Commission to ... exclude from the disclaimer requirements, the coordination rules, and other regulatory provisions most communications made over the internet.

DNC Comments at 3. Denying the exception "exacts too high a cost on political speech[,] ... contravenes the Commission's stated views about internet communications, and fails to advance Congress's stated purpose ... to reduce the flow of so-called 'soft money' in federal elections." *Id.* (Compl. ¶ 60; Answer ¶ 60.)

23. In the cited "Internet Communications" E&J, 71 Fed. Reg. 18589 (April 12, 2006), FEC

[8] Available at http://sers.fec.gov/fosers/showpdf.htm?docid=10065.

justified its definition of "public communications," which is incorporated into the generic-campaign-activity and PASO-communication definitions, 11 C.F.R. 100.25 and 100.24(b)(3). The public-communication definition excludes Internet communications, "except for communications placed for a fee on another person's Web site." 11 C.F.R. 100.26. So

> a State party committee that pays to produce a video that PASOs a Federal candidate will have to use Federal funds when the party committee pays to place the video on a Web site operated by another person. This is ... consistent with how the party committee would be required to pay for a communication that it distributes through television or any other medium that is a form of "public communication." In such circumstances, the party committee must pay the costs of producing and distributing the video entirely with Federal funds. See 11 CFR 300.32(a)(2).

71 Fed. Reg. at 18597. Thus, state committees posting generic-campaign-activity or PASO communications on their *own* website would not be doing federal election activity. (Compl. ¶ 61; Answer ¶ 61.)

24. The "Internet Communications" E&J (in 2006) also said, 71 Fed. Reg. at 18597,

> one reason [FEC] ... excluded Internet activities from the ... 'public communication' [definition] ... was to permit State ... and local party committees to refer to their Federal candidates on the committees' own Web sites or post generic campaign messages without requiring that the year-round costs of maintaining the Web site be paid entirely with Federal funds.

This 2006 comment explained why FEC's previous rule "excluded [all] Internet activities from the ... 'public communication' [definition]," a policy it essentially followed with its revised rule by still excluding online activity from "public communication," "except for communications placed for a fee on another person's Web site." 11 C.F.R. 100.26. But the last part of the quote indicates FEC's position that if Internet communications were not generally excluded from "public communication," then communications meeting the federal-election-activity definition (in this case because of the "public communication" definition) on a state-committee website would require the committee to pay the costs of the website with federal funds while those FEA

communications are present on the website, including costs swept in by a "ripple effect," because, as FEC explained, 71 Fed. Reg. at 18597 n.37,

> the Commission is not convinced that the statute permits time/space allocation of any "public communication" that features PASO information about a Federal candidate. The existence of PASO would require the organizations to pay for the "public communications," i.e., the Web site itself, entirely with Federal funds. Such a result is inconsistent with the Act's regulation of Federal, but not non-Federal activity. For example, such a determination could have a ripple effect on the payment of other costs. The acquisition of the computers or the phone line (two costs that are generally allocated as administrative expenses) arguably could become expenses that would be required to be paid for entirely with Federal funds because one of the uses of the equipment would be to access or maintain a Web site.

(Compl. ¶ 62; Answer ¶ 62.)[9] FEC nowhere states that a time/space allocation is permissible for any federal-election-activity communications done online. *See, e.g.*, 11 C.F.R. 100.1 et seq.

25. Despite these justifications, FEC did *not* exclude Internet communications from voter-registration-activity and GOTV-activity definitions. The "[e]ncouraging or urging" portions of the definitions, 11 C.F.R. 100.24(a)(2)(i)(A) and(3)(i)(A), are *not* limited to "public communications" and expressly *include* communications "by ... e-mail ... or by any other means." (Compl. ¶ 63; Answer ¶ 63.)

26. The brief-and-incidental exceptions to the voter-registration-activity and GOTV-activity definitions require a "brief exhortation ... incidental to a communication, activity, or event." 11 C.F.R. 100.24(a)(2)(ii) and (3)(ii). "[T]he exception[s] operate[] identically," 75 Fed. Reg. 55263, as follows, 75 Fed. Reg. at 55261-62 (emphasis in original):

> To qualify for the exception, the exhortation to register to vote must be both brief *and* incidental. Exhortations to register to vote that go on for many minutes of a speech, for example, or that occupy a large amount of space in a mailer are not brief and will not qualify .... Similarly, exhortations, however brief, must also be incidental to the communication, activity or event. For example, a one-line exhortation to "Register to vote!" appear-

[9] A later definition would exclude de minimis federal election activity on a website. *See Definition of Federal Election Activity*, 75 Fed. Reg. at 55265. (Answer ¶ 62.)

> ing at the end of a campaign flier would be incidental to the larger communication, whereas a communication stating only "Register to Vote by October 1st!" and containing no other text would not be incidental and, thus, would not come within the exception from the definition of "voter registration activity."
>
> The exception applies to brief, incidental exhortations regardless of the forum or medium in which they are made. The exception covers an exhortation offered in a speech at a rally, for example, as well as one appearing in an e-mail.
>
> Two examples ... that would be covered under the exception appear at new paragraphs (a)(2)(ii)(A) and (a)(2)(ii)(B) of 11 CFR 100.24. The first example is a mailer praising the public service record of a mayoral candidate and/or discussing the candidate's campaign platform. The mailer concludes by reminding recipients: "Don't forget to register to vote for [the mayoral candidate] by October 1st." The second example involves a phone call for a State party committee fundraising event. The call provides recipients with information about the event, solicits donations, and concludes by reminding the listener: "Don't forget to register to vote."

So emails with the *topic* of exhorting registration/voting will not be incidental, and *extended* exhortations (beyond such one-liners) to register/vote in emails or on a website would not be brief. (Compl. ¶ 64; Answer ¶ 64.)

27. Neither 11 C.F.R. 100.24 nor the 2010 E&J define "encouraging or urging." The Notice of Proposed Rulemaking ("NPRM") had proposed definitions with "encouraging or assisting" but not "urging." FEC, "Definition of Federal Election Activity," 74 Fed. Reg. 53674, 53680 (Oct. 20, 2009) ("2009 NPRM"). The 2010 E&J indicated that FEC used "encouraging" because "the *Shays III* court suggested that the Commission's regulations should reach ... efforts that '*encourage* people to vote or to register to vote.'" 75 Fed. Reg. at 55261 (emphasis in original). The 2010 E&J did not explain why "urging" was added nor how it differs from "encouraging." (Compl. ¶ 65; Answer ¶ 65.)

28. "Encouraging or urging" apparently both mean "exhorting" because the brief-and-incidental-exhortation exceptions, 11 C.F.R. 100.24(a)(2)(ii) ("[e]ncouraging or urging" in VR definition) and (3)(ii) ("brief exhortation to vote" excluded from VR definition), consistently use "exhortation" and "exhorting" as synonyms for "encouraging or urging." (Compl. ¶ 66. *But see*

Answer ¶ 66 ("unsupported by the quoted language or citations.")

29. At the December 16, 2009 rulemaking hearing, commenters argued against an "encouraging" definition. *See* Transcript, http://sers.fec.gov/fosers/showpdf.htm?docid=10056. For example, Brian Svoboda, for the Democratic Legislative Campaign Committee, argued against "encouraging," Transcript at 26-29, and for a voter-mobilization definition

> to capture those spheres of activity that genuinely are intended to mobilize, not simply to persuade people to vote for a state or local candidate, because at bottom, this whole business is about getting people to vote on Election Day, everything they do from beginning to end, but looking at that special subset of activity that's actually directed toward voter mobilization.

Transcript at 22. *See also id.* at 30-31 (Svoboda: same persuasion-mobilization distinction).

(Compl. ¶ 67; Answer ¶ 67.)

30. Paul S. Ryan, for Campaign Legal Center, argued: "[I]t is in fact possible and even likely that a particular communication will fall into both categories of persuasive and get-out-the-vote type of activity. But Congress was clear that those types of communications, if they constitute get-out-the-vote activity, they're covered by these provisions of BCRA." *Id.* at 36. He insisted the voter-registration-activity and get-out-the-vote definitions must include "encourage." *Id.* at 24. He said "get out to vote for O'Malley" or "go vote for O'Malley" *would* be federal election activity, while "vote for O'Malley" would *not* be. *Id.* at 83. This was also so if "vote for O'Malley" were accompanied by the election date because "Congress decided to cover get-out-the-vote type communications and ... not ... straightforward express advocacy for a single candidate," *id.* at 84, though he did not dispute that "Vote for O'Malley ... [is] encouraging you to go vote," *id.*

(Compl. ¶ 68; Answer ¶ 68.)

FEC Political Party Forum on Federal-Election-Activity Problems

31. On June 4, 2014, FEC "Chairman Lee Goodman and Vice Chair Ann M. Ravel ... hosted

a public forum on the challenges faced by political parties ....." *See* FEC, News Release (June 4, 2014) (available at www.fec.gov/press/ press2014/news_releases/20140604release.shtml). The audio recording is at www.fec.gov/audio/2014/20140604_FORUM.mp3 ("Audio"). (Compl. ¶ 69; Answer ¶ 69.)

32. In the forum, lawyers for, and representatives of, state and local committees explained problems created by federal-election-activity laws and regulations, the need for changes, and how FEC could help, but to date no related regulatory changes have resulted. (Compl. ¶ 70; Answer ¶ 70.)

33. For example, the first extended presenter at the forum was Ken Martin, Chairman of the Minnesota Democratic Farmer Labor Party. Audio at 4:16-8:42. He testified that he had worked in the non-political-party, independent-expenditure world before coming to work in the political-party context and on arrival was "shocked at how over regulated state parties are." He noted that though political parties are good and accountable, they are increasingly unable to assist their candidates vis-a-vis independent-expenditure groups due to BCRA. "Candidates and state parties are losing control over their voice," he testified. In December 2012, Martin asked the Association of State Democratic Chairs to establish a committee to help level the playing field and help build up parties to be able to help their candidates. ASDC established the Committee on Campaign Finance Reform ("CCFR") which issued "Legislative Recommendations for Campaign Finance Reform,"[10] which document was distributed at the FEC forum. The Recommendations document was approved and its proposals are the subject of supportive resolutions by many Democratic state parties, as part of the campaign to improve their ability to engage in federal election activity. Martin declared, "It's my sincere belief that if we do not address the growing imbalance of

[10] Available at http://images.politico.com/global/2014/02/14/asdc_recs_081213.pdf.

political money flowing towards unregulated shadow organizations, we may very well see the end of political parties at the state and local level." Audio at 7:49. (Compl. ¶ 71; Answer ¶ 71.)

34. The next presenter was Scott Arceneaux, Executive Director of the Florida Democratic Party, who explained that the vast majority of a state party's efforts are nonfederal, "[y]et you're seeing this slow federalization of all the activities that we do, for no ... solid, good policy reason." Audio at 10:55. He added, Audio at 13:36:

> [A]ll this has created what I call the federalization of state parties. We are basically becoming fifty mini federal committees because the ever-expanding definition of federal election activity is basically slowly, slowly encompassing everything we do until we are essentially, at some point in time—a date determined with some bit of ambiguity—a federal committee. And what that means in reality is that nonfederal candidates don't want to work with us.

(Compl. ¶ 72; Answer ¶ 72.)

35. CCFR's "Legislative Recommendations for Campaign Finance Reform" ("*Recommendations*") makes observations and recommendations, including the following:

> **Repeal Levin Amendment or create reasonable definitions for "Federal election activity"**
>
> Under McCain-Feingold, how state parties pay for their activities is determined, in large part, by the extent to which such activities are classified as "Federal election activity" under that law. After extensive hearings and careful consideration, the FEC in 2002 issued thoughtful, practical yet rigorous regulations defining these activities. These definitions have been challenged by so-called "reform" organizations in a series of court cases which have forced the FEC in some cases to modify its definitions and in other cases have left the definitions in a state of confusion and uncertainty. Under the most recent iteration of the definition of "get-out-the-vote" almost all campaign activity is subsumed within the definition pulling most campaign activity within the definition even if no federal candidates are referenced in the communications. The Levin Amendment is too complicated to administer and several state parties have decided to just federalize their get-out-the-vote programs due to the complexity of administering and complying with the Levin Amendment. In addition, due the continual expansion of the definitions of "get-out-the-vote" as well as the additional problems created by the concept of "federal election activity," **Congress should consider repealing these provisions and allow party committees to undertake activities in accordance with rules in place prior to the passage of McCain-Feingold**.

Recommendations at 1-2 (underline and bold in original). *Recommendations* adds that "House-

added restrictions have rendered the so-called 'Levin amendment' completely useless. The restrictions serve no discernible policy purposes and should be eliminated." *Id.* at 2-3 (bold removed). And *Recommendations* highlights problems with the 25% employee rule and mandatory monthly reporting thus, *id.* at 3 (underline and bold in original):

> **Payment of Staff Payroll and Benefits**
>
> Under McCain-Feingold, employees who work more than 25% of their time in connection with federal elections must be paid for exclusively with federal funds. However, the FEC has interpreted this statute to not only include federal activity but also "federal election activities." Therefore, merely working on generic or non-federal activity has triggered federal payroll requirements. For example, if a state party hires employees to go door-to-door to do a voter identification project for a state or local candidate, those employees must be paid exclusively with federal funds. This has created a disincentive for party committees to engage in non-federal voter id or non-federal get-out-the-vote projects, even if there are no competitive federal races on the ballot. **Congress should either repeal this provision or clarify that it did not intend for the provision to include "federal election activities."**
>
> **Repeal mandatory monthly filing for state party committees**
>
> Under current law, state party committees must file FEC reports monthly if they spend funds on "federal election activity." This has imposed a huge burden on state parties. **State parties should be allowed to file quarterly; alternatively the thresholds for triggering monthly filing should be narrowed.**

(Compl. ¶ 73; Answer ¶ 73.)

Plaintiffs' Intended Federal Election Activity ("FEA")

36. Plaintiffs LAGOP, JPGOP, and OPGOP intended to do independent federal election activity in 2014 without complying with challenged provisions, had it been legal to do so, and they intend to do so in 2015 and future years, when legal to do so. Examples are provided below. (Compl. ¶ 74.)

37. LAGOP currently complies with the Ban, Fundraising Requirement, and Reporting Requirement by using all federal funds from a federal account for federal election activity. But its ability to do desired federal election activity is burdened by the inability to allocate costs to nonfederal funds as allowed before BCRA, and it cannot do some desired federal election activ-

ity due to this inability. LAGOP reasonably believes that it will have sufficient funds to pay for some or all of the examples of federal election activity described below if it may allocate them as possible absent the challenged provisions. But it will not do some or all of the examples described below absent requested relief. (Compl. ¶ 75.)

38. JPGOP and OPGOP do not currently do federal election activity because of the complexity and burden of compliance, including creating a federal account to fund such activity, they want to do independent federal election activity without complying with the challenged provisions, and they will not do their intended activities absent requested relief. (Compl. ¶ 76.)[11]

39. The examples described below are planned to occur in relevant federal-election-activity periods relating to elections in 2016 and beyond and fit federal-election-activity definitions. (Compl. ¶ 77.)

40. The examples of federal election activity Plaintiffs want to do will be independent. (Compl. ¶ 77.) All that is required for independence of any activity or communication is compliance with the applicable statutes and regulations governing independence that are in place at the time that the activity or communication is done. *See, e.g.*, 11 C.F.R. §§ 109.20, 109.21, 109.30, 109.37.

a. Communications Exhorting Registration ("VR") and Voting ("GOTV")

41. Plaintiffs want to make non-individualized communications exhorting registration and voting during applicable federal-election-activity periods that will be VR (voter-registration activity) and GOTV (get-out-the-vote activity) under the "encouraging or urging" standard of 11 C.F.R. 100.24(a)(2)(i)(A) and (3)(i)(A). Non-individualized communications would not have been VR or GOTV under FEC's 2002 regulations because they will be in substantially similar

[11] JPGOP *inadvertently* engaged in online federal election activity. *See infra* at ¶ 76.

form to multiple persons without "individualized contact for the specific purpose of assisting individuals with the process of registering to vote [or voting]." FEC, 2002 E&J, 67 Fed. Reg. at 49067. *See supra* ¶ 16 (quotes from 2002 E&J). Nine examples follow. (Compl. ¶ 84.)

42. *First*, when the Complaint was filed, LAGOP had on the home page of its *website* a drawn outline of Louisiana, across which are the words "click here to REGISTER TO VOTE" (linking to www.lagop.com/get-registered) and below which were the words "Get Registered." *See* www.lagop.com.[12] The imperative "Get Registered" was "[e]ncouraging or urging potential voters to register to vote," so this communication would have to be paid for with all federal funds starting November 6, 2015. Also on the website then were Instagram images, one of which said "Geaux Vote Today," which referred to the last general election but would become get-out-the-vote activity (for exhorting voting) and require all federal funds for the communication on December 2, 2015, unless taken down.

When the Complaint was filed, LAGOP had also posted on its website a nonpartisan article merely exhorting registration and voting without promoting any political party as follows, www.lagop.com/get-registered:

> Your right to vote for public officials and representatives is valuable. It is rare in human history. It was hard-won by America's founders.
>
> Before America gained independence, the colonies were ruled by Great Britain. In the Declaration of Independence, the founders listed many grievances against British rule, especially the lack of representation. The Declaration said King George would not enact needed laws "unless ... people ... relinquish[ed] the right of Representation in the Legislature." It said the British were "suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."
>
> The Revolutionary War rejected British rule. America established a republic where citizens select their representatives in government. Yet astonishingly, many people don't

[12] The federal-election-activity definition excludes "*[d]e minimis* costs associated with" a party committee, on its website, "enabling visitors to download a voter registration form ...." 11 C.F.R. 100.24(c)(7)(ii). But the exception seems not to apply to "Get Registered." (Compl. ¶ 85 n.14.)

register and vote.

As Americans who enjoy the benefits that a democratic society offers, it is our civil duty to actively participate in government by voting. But more importantly, voting allows citizens the opportunity to make direct decisions that better our communities and allows us to build a free and prosperous society. Many people in the world live in places where their voices will not be heard because they are unable to vote. So take a stand to let your voice be heard, and help build a stronger America by registering to vote today!

The Louisiana Secretary of State's website provides valuable information to help you register and vote. For registration information and to register online, see

- www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx and
- www.sos.la.gov/ElectionsAndVoting/Pages/OnlineVoterRegistration.aspx.

For voting information, see

- www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx.

The calendar of elections and deadlines for registration and voting by mail, see

- www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2016.pdf.

Check out those websites today, and let your voice be heard in 2016!

The article provided hyperlinks to *state* election materials, which do not constitute federal election activity at any time. 11 C.F.R. 100.25(c)(7).[13] And this article was not federal election activity when the Complaint was filed. But it would become voter-registration activity on November 6, 2015 and get-out-the-vote activity on December 2, 2015, if it remained on the website. LAGOP asserted it would take it down absent requested relief. (Compl. ¶ 85.)

43. On November 20, 2015, Plaintiffs filed the Plaintiffs' Notice Regarding Changed Facts (Doc. 22), notifying the Court of verified changed facts regarding the foregoing as follows:

> Plaintiffs notify the court of the following changed facts regarding
> (A) the removal of voter-registration activity ("VR") and get-out-the-vote activity ("GOTV") from LAGOP's website .... This notice is verified.
>
> ***A. LAGOP Removed VR and GOTV Items from Its Website.***
>
> 1. Plaintiff LAGOP recently removed VR and GOTV from its website, *see* www.lagop.com, because of the impending federal-election-activity periods for VR and GOTV and because it does not want to fund such non-individualized communications exhorting registration and voting with federal funds, *see* Compl. ¶¶ 74, 84-85.
>
> 2. The initial dates for those periods are November 6, 2015, for VR, and December 2,

[13] The federal-election-activity definition excludes "*[d]e minimis* costs associated with" a party committee providing, on its website, hyperlinks to an election-board's site, downloadable registration and absentee-ballot forms, and voting dates, hours, and locations. *Id.*

2015, for GOTV. *Compare* Compl. (Doc. 1) ¶ 31 (periods) *with* Answer (Doc. 19) ¶ 31 (admit).

3. LAGOP currently uses federal funds to pay for its website costs in federal-election years, such as 2016, but uses nonfederal funds to pay for its website costs in non-federal-election years, such as 2015.

4. In ¶ 85 of the Complaint, LAGOP noted that at www.lagop.com the words "Get Registered" are in the imperative and so exhort VR. Those words have now been changed to "To Register."

5. In ¶ 85 of the Complaint, LAGOP noted that the website included Instagram images such as "Geaux Vote Today," which is GOTV. That and similar images have been removed from www.lagop.com.

6. In ¶ 85 of the Complaint, LAGOP noted that at www.lagop.com/get-registered the following nonpartisan article appeared:

> Your right to vote for public officials and representatives is valuable. It is rare in human history. It was hard-won by America's founders.
>
> Before America gained independence, the colonies were ruled by Great Britain. In the Declaration of Independence, the founders listed many grievances against British rule, especially the lack of representation. The Declaration said King George would not enact needed laws "unless ... people ... relinquish[ed] the right of Representation in the Legislature." It said the British were "suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."
>
> The Revolutionary War rejected British rule. America established a republic where citizens select their representatives in government. Yet astonishingly, many people don't register and vote.
>
> As Americans who enjoy the benefits that a democratic society offers, it is our civil duty to actively participate in government by voting. But more importantly, voting allows citizens the opportunity to make direct decisions that better our communities and allows us to build a free and prosperous society. Many people in the world live in places where their voices will not be heard because they are unable to vote. So take a stand to let your voice be heard, and help build a stronger America by registering to vote today!
>
> The Louisiana Secretary of State's website provides valuable information to help you register and vote. For registration information and to register online, see
>
> - www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx and
> - www.sos.la.gov/ElectionsAndVoting/Pages/OnlineVoterRegistration.aspx.
>
> For voting information, see
>
> - www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx.
>
> The calendar of elections and deadlines for registration and voting by mail, see
>
> - www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2016.pdf.
>
> Check out those websites today, and let your voice be heard in 2016!

That nonpartisan article has been stripped of all exhortation to register and vote, leaving

only the following, *see* www.lagop.com/get-registered:

> The Louisiana Secretary of State's website provides valuable information to help you register and vote. For registration information and to register online, *see*
> - www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx and
> - www.sos.la.gov/ElectionsAndVoting/Pages/OnlineVoterRegistration.aspx.
>
> For voting information, see
> - www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx.
>
> The calendar of elections and deadlines for registration and voting by mail, *see*
> - www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2016.pdf.

(Doc. 22 at 1-3.)

44. *Second*, LAGOP wants to *email* the same nonpartisan article in the paragraph 42 to potential voters, with the same election-information links as on the website (those excluded from "federal election activity" if done on its *website*, 11 C.F.R. 100.24(c)(7)), if it may do so without complying with challenged provisions. Such an email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015. (Compl. ¶ 86.)

45. *Third*, JPGOP and OPGOP want to *email* a nonpartisan article substantially similar to the nonpartisan article described in ¶ 85, with links of the sort excluded from "federal election activity" if done on a *party committee's website*, 11 C.F.R. 100.24(c)(7), if they may do so without complying with challenged provisions. Such an email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015. (Compl. ¶ 87.)

46. *Fourth*, LAGOP wants to *mail* communications exhorting potential voters to get out and vote Republican, without promoting, attacking, supporting, or opposing (PASOing) any clearly identified federal candidate, if it may do so without complying with challenged provisions. Such mail will be GOTV starting December 2, 2015. If LAGOP does a "mass mailing," 11 C.F.R. 100.27 (over 500 "substantially similar" pieces in 30 day), the mailings will be a "public commu-

nication," 11 C.F.R. 100.26, and so also "generic campaign activity" (GCA) for promoting a political party, 11 C.F.R. 100.25, starting December 2, 2015. (Compl. ¶ 88.)

47. *Fifth*, LAGOP wants to post a recording of the following script on its website, then broadcast it as a radio ad, if it may do so without complying with challenged provisions:

> **DEMOCRAT OUTREACH**
> **Republican Party of Louisiana**
> **:60 Commercial**
> <Folksy>
> Back a couple decades ago, the Republican Party didn't much exist in Louisiana.
> In fact, until Dave Treen became Governor in 1980, I can't think of one elected republican.
> But the democrat party in Louisiana used to be a lot different than it is today.
> Back then we could expect certain things from any Louisiana politician—defending our oil and gas industry, fighting for a strong military and protecting traditional marriage and the life of the unborn.
> The democrats even used to give a damn about a balanced budget and keeping taxes as low as possible.
> But let's face it, the days of the John Breaux democrat are gone.
> The National Democrat Party has moved so far to the left these days, its like they forgot what it means to be an American.
> Supporting gay marriage, and abortion—trying to tax and spend their way outta this recession.
> You may be registered a democrat ... but if you're like me, you probably been voting more often for Republicans than democrats over the last 10 years.
> I didn't even vote for Landrieu this last time. She had just gone too far with the liberals and I had had it.
> That's why I switched my party registration to the Republican Party. And I don't feel like I left the Democrat Party. No sir, I feel like the Democrat Party left me.

On LAGOP's website the recording will be VR starting November 6, 2015. The recording promotes a political party, but the recording cannot be GCA (generic campaign activity, 11 C.F.R. 100.25) while on LAGOP's website because it would not be a public communication, 11 C.F.R. 100.26. If broadcast, it will be a public communication and so GCA starting December 2, 2015. (Compl. ¶ 89.)

48. *Sixth*, LAGOP wants to post a recording of the following script on its website, then

broadcast it as a radio ad, if it may do so without complying with challenged provisions:

> **VOTER DRIVE FOR PRESIDENTIAL PRIMARY**
> **Republican Party of Louisiana**
> **:60 Script**
>
> As you already know, the election for President is this year.
>
> This election is historic. Washington needs new Conservative leadership; another Democrat president would just be more of the same.
>
> And it's important that Republicans pick a strong candidate who can defeat the Democrat candidate.
>
> But if you're not currently registered as a Republican, you won't get to participate in the March 1st Louisiana presidential primary to help pick the Republican nominee.
>
> That's why the Republican Party of Louisiana is launching the greatest voter registration drive in Louisiana history.
>
> On the weekend leading up to "President's Day" (Feb 13-15), the LAGOP will be dispatching to 100 locations throughout the state, creating an easy opportunity for conservative Independents and Democrats everywhere to conveniently switch their party Identification
>
> From Grand Isle, up to Vivian, over to Bastrop and down to Lake Calcasieu - and everywhere in between...Representatives will be set up in a location near YOU.
>
> Go check out SWITCH-G.O.P.-DOT-COM and just type in your zip code and find out the registration location closest to you.
>
> This year, don't let the Republican nominee for president be chosen for you. Get involved. Let your voice be heard.
>
> That's SWITCH-G.O.P.-DOT-COM.

On LAGOP's website the recording will become VR starting November 6, 2015. The recording also promotes a political party, but cannot be GCA on LAGOP's own website because it would not be a public communication. If broadcast, the recording would become a public communication and GCA starting December 2, 2015. (Compl. ¶ 90.)

49. *Seventh*, LAGOP wants to mail communications to conservative Democrats and independents exhorting them to register as Republicans, enclosing instructions and forms for switching, if it may do so without complying with challenged provisions, This will be followed up with phone calls for the same purpose. This will also be followed up with a door-to-door campaign for the same purpose, if resources permit. Such mail will be VR starting November 6, 2015. If LAGOP does a mass mailing, 11 C.F.R. 100.27, the mailings will be a public communication, 11

C.F.R. 100.26, and so GCA, 11 C.F.R. 100.25, starting December 2, 2015. (Compl. ¶ 91.)

50. *Eighth*, LAGOP wants to mail communications exhorting individuals to register as Republicans, targeted to new state residents identified as Republicans in their former state of residence and high school and college students eligible to register, and providing instructions and forms for registering, if it may do so without complying with challenged provisions. Such mail will be VR starting November 6, 2015. If LAGOP does a mass mailing, 11 C.F.R. 100.27, it will be a public communication, 11 C.F.R. 100.26, and so GCA, 11 C.F.R. 100.25, starting December 2, 2015. (Compl. ¶ 92.)

51. *Ninth*, Louisiana has a program for those 65 or older, or with a disability, to vote absentee and automatically receive absentee ballots. *See* www.sos.la.gov/ElectionsAndVoting/Pages/DisabledElderlyCitizens.aspx. LAGOP wants to mail communications exhorting Republicans and conservative voters fitting the criteria to sign up for this program, if it may do so without complying with challenged provisions. Such mail will be GOTV starting December 2, 2015. If LAGOP does a mass mailing, 11 C.F.R. 100.27, it will be a public communication, 11 C.F.R. 100.26, and so also GCA, 11 C.F.R. 100.25, starting December 2, 2015. (Compl. ¶ 93.)

b. Voter-Identification ("VID") Communications

52. LAGOP wants to make communications that will be VID (voter identification), 11 C.F.R. 100.24(a)(4), because they will be designed to "acquire[] information about potential voters," including "verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates," *id.*, if it may do so without complying with challenged provisions. (Compl. ¶ 94.)

53. For example, LAGOP wants to communicate with potential voters asking them to provide information about their generic identification (conservative, liberal, libertarian, etc.), their

likelihood of voting in coming elections, and their likelihood of voting for certain candidates. These communications will include non-individualized mail requests for such information, i.e., multiple pieces with substantially similar language but variation in nonmaterial details, such as recipient name and address. (Communications need not be "public communications" to be VID.) (Compl. ¶ 95.)

54. LAGOP plans, in the fall of 2015, to use nonfederal funds to engage in VID related to state legislative and gubernatorial candidates, which in itself would not be federal election activity. LAGOP wants to use that VID information in 2016. But if LAGOP uses that VID information "in a subsequent election in which a Federal candidate appears on the ballot," the 2015 VID would retroactively become federal election activity. *See* 11 C.F.R. 100.24(a)(4) and (c)(5). LAGOP must either sideline the 2015 VID information for 2016 (when federal candidates will be on the ballot) or comply with federal-election-activity requirements for its 2015 VID. LAGOP asserts that there is no constitutional justification for foreclosing its use of 2015 VID in 2016. (Compl. ¶ 96.)

c. Generic-Campaign-Activity ("GCA") Communications

55. LAGOP wants to make public communications that will be GCA, i.e., "public communication[s] ... promot[ing] ... a political party and ... not promot[ing] or oppos[ing] a clearly identified ... candidate," 11 C.F.R. 100.25, if it may do so without complying with challenged provisions. Examples follow. (Compl. ¶ 97.)

56. LAGOP wants to make audio recordings explaining what it stands for, to be posted on LAGOP's website, where they will *not* be GCA because not public communications, 11 C.F.R. 100.26. But LAGOP also wants, if it may do so without complying with challenged provisions, to air radio ads from these recordings during coming federal-election-activity periods, the next

starting December 2, 2015, when they *will* be public communications and so GCA. An example of such ads is "Democrat Outreach," *supra* ¶ 89, which fits both VR and GCA definitions.

(Compl. ¶ 98.)

57. Another example of a recording to be placed online, then broadcast in 2016, follows:

AFRICAN-AMERICAN OUTREACH
Republican Party of Louisiana
:60 Script
February is Black History Month.
It is a time to honor those who have fought to secure freedom and prosperity for our people.
A great distinction must be attributed to the Republican Party, which was FOUNDED in 1854 with one simple creed: that "Slavery is a violation of the rights of man."
You see, the movement to end slavery and the creation of the Republican Party were one and the same.
Abolitionist leaders like Harriet Tubman and Sojourner Truth were committed Republicans. Frederick Douglass was one of the party's early champions.
The first Republican President was Abraham Lincoln—author of the Emancipation Proclamation.
Republicans voted unanimously for the 13th Amendment, which abolished slavery.
The Republican Party has never been the party of white Americans. Or Black Americans. It is the party for all Americans ... promoting freedom, justice and equal opportunity for all.
FEMALE VO: This moment in black history has been brought to you by the Republican Party of Louisiana.

(Compl. ¶ 99.)

58. Another example of a recording to be placed online, then broadcast in 2016, follows:

YOUTH OUTREACH SCRIPT - "The R Word"
Republican Party of Louisiana
:60 Script
In 2008, I eagerly voted for Barack Obama. I was 19 and it was my first time to ever vote. I liked his message of "Hope & Change" and he seemed a lot different than George Bush.
And even though I felt a little let down by the first 4 years, I hesitantly voted for him again in 2012.
But now that I'm older, I've really started to learn a little more about the two parties. I realize now that democrats like Barack Obama want to solve every problem by just creating some new government agency.
<sarcasm>
Y'know ... because when I think of "cool," I think of "bureaucracy."

> Also, the economy still seems really bad. Tons of my friends are having trouble finding real jobs and a lot of them still live at home.
>
> Obama also promised peace throughout the world, but I realize now that I was a little naive to believe him. The world is a bigger mess than I can ever remember.
>
> The democrats always talk about "freedom," but ironically it's really the Republicans who are the ones whose policies really create liberty.
>
> The democrats are always screaming for more government to fix everything, but the Republicans are the only ones ever talking about "less government."
>
> That includes Less Taxes—so that people who own businesses have more money to hire people. That makes sense to me now.
>
> I don't know why I ever associated more government, higher taxes and more bureaucracy with the word "cool."
>
> So this election, I'm keeping an open mind. And I'm not ready to call myself the "R-word" ... but I gotta admit, when I listen to the debates ... I find myself identifying more with the R-candidates than the Democrats—who just sound like more "hope & change."

(Compl. ¶ 100.)

d. PASO Communications

59. LAGOP wants to make PASO communications ("public communications" that will be deemed to promote, attack, support, or oppose a federal candidate, 11 C.F.R. 100.24(b)(3)), without express advocacy, when legal to do so without complying with challenged provisions. Examples follow. (Compl. ¶ 101.)

60. LAGOP wanted in 2014 to make public communications that would have criticized U.S. Senator Mary Landrieu, then a federal candidate, for her support of government policies, such as Obamacare, without expressly advocating her defeat. (Compl. ¶ 102.)

61. LAGOP wants to put on its website, then broadcast, in early 2016, "Voter Drive for Presidential Primary," *see* ¶ 48, but with the first three paragraphs edited to read thus:

> As you already know, the election for President is this year.
>
> This election is historic. Washington needs new Conservative leadership; ~~another Democrat president~~ Hillary Clinton would just be more of the same.
>
> And it's important that Republicans pick a strong candidate who can defeat the ~~Democrat candidate~~ Clinton Machine....

On LAGOP's website, this would be VR starting November 6, 2015, but it would not be a PASO

communication because it would not a public communication. If broadcast, it would become a public communication and a PASO communication. (Compl. ¶ 103.)

62. LAGOP wants to put on its website, then broadcast, in 2015 and/or 2016, "Youth Outreach Script," *see* ¶ 58, but edited with the last paragraph thus:

> So this election, I'm keeping an open mind. And I'm not ready to call myself the "R-word" ... but I gotta admit, when I listen to the debates ... I find myself identifying more with the R-candidates than ~~the Democrats~~ Hillary—who just sounds like more "hope & change."

On the website, this would not be a public communication, so neither GCA nor PASO. If broadcast, it might be deemed PASO, making it *not* GCA. The equation of "Hillary" to "more 'hope & change'" is descriptive, with hearers viewing her favorably or unfavorably depending on their opinion of "hope & change." FEC would likely deem this a PASO communication. (Compl. ¶ 104.)

63. LAGOP wants to post on its website, then broadcast on radio, in 2015 and/or 2016, "Celebrating Jindal," following this script:

> **CELEBRATING JINDAL**
> **Repubican Party of Louisiana**
> **:30 Commercial**
>
> In 2008, Louisiana's state government was out of control, having tripled in size in just 12 years. Then came Bobby Jindal.
>
> And since becoming governor, Jindal has cut the state budget by more than 26% Louisiana now has 30,000 fewer public employees and our reputation across the country has never been better.
>
> Governor Jindal was one of the first governors in the United States to create a School Choice program to help children escape failing schools.
>
> Let's face the facts. Bobby Jindal has been the nation's finest example of a Republican leader, refusing to compromise on all of the major conservative issues: taxes, spending, abortion, guns, school choice, religious liberty, you name it.
>
> As his tenure ends here, Louisiana's loss is America's gain, as Governor Jindal travels across America spreading his message of freedom and traditional values.
>
> Bobby Jindal. Proven leadership for America.

On LAGOP's website, this would not be a public communication, so it could not be a PASO

communication. When broadcast, the support for a clearly identified federal candidate would make this a PASO communication. (Compl. ¶ 105.)

64. On November 20, 2015, Plaintiffs filed the Plaintiffs' Notice Regarding Changed Facts (Doc. 22), notifying the Court of verified changed facts regarding the foregoing as follows:

> Plaintiffs notify the court of the following changed facts regarding ...
> (B) the suspension of Gov. Bobby Jindal's presidential campaign. This notice is verified....
>
> ***B. Gov. Bobby Jindal Suspended His Presidential Campaign.***
>
> 7. In ¶ 105 of the Complaint, LAGOP provided the script of a commercial titled "Celebrating Jindal," which it wants, inter alia, to broadcast on radio in 2015 and/or 2016. Because Governor Jindal is a federal presidential candidate, the ad would constitute federal election activity (as a public communication that promotes, attacks, supports, or opposes ("PASOs") a federal candidate.
>
> 8. On November 17, 2015, Governor Jindal suspended his campaign for President. *See* http://www.foxnews.com/politics/2015/11/17/bobby-jindal-suspends-2016-presidential-campaign.html (reporting on-air announcement). Though he technically remains a federal candidate with an open candidate committee, *see* www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=C00580159&tabIndex=1 (Jindal for President filings with FEC), Governor Jindal is not actively campaigning and is highly unlikely to become President in 2016.

(Doc. 22 at 1, 3.)

e. Employee Services

65. LAGOP wants, when legal without complying with challenged provisions, to make federal/nonfederal allocation of "[s]alaries, wages, and fringe benefits paid for employees who spend more than 25% of their compensated time in a given month on [independent] Federal election activities or on [independent] activities in connection with a Federal election," 11 C.F.R. 106.7(d)(1)(i)-(ii), as allowed for spending 25% or less on such activities, 11 C.F.R. 106.7(1)(d). (Compl. ¶ 106.)

f. Independent Federal-Election-Activity Funding

66. In paying for intended independent federal election activities, Plaintiffs want to use

nonfederal funds, on hand or to be raised, compliant with state law and applicable federal law, other than challenged provisions, including:

- BCRA's ban on nonfederal funds for national-party committees, 52 U.S.C. 30125(a), which bans them and their officers from directing, transferring, etc. such funds to all;
- BCRA's ban on federal candidates or officeholders from soliciting nonfederal funds for, or directing them to, anyone "in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of [FECA]," 52 U.S.C. 30125(e)(1);
- BCRA's ban on state and local candidates and officeholders "spending any funds for a [PASO] communication" with nonfederal funds." 52 U.S.C. 30125(f)(1);
- FECA's ban on any contributions by national banks and congressionally authorized corporations "in connection with any election," 52 U.S.C. 30118(a); 11 C.F.R. 114.2(a);
- FECA's ban on federal government contractors making "contribution[s] to any political party, committee, or ... or any political purpose or use." 52 U.S.C. 30119(a); and
- FECA's ban on contributions or donations from foreign nationals "in connection with a Federal, State, or local election," 52 U.S.C. 30121; *accord* 11 C.F.R. 110.20(b)-(c).

(Compl. ¶ 107.)

67. Federal funds were not, and will not be, used to *raise* nonfederal funds for intended activities, but the nonfederal funds used were (and will be) compliant with state law and non-challenged, applicable provisions of federal law as set out in the preceding paragraph. (Compl. ¶ 108.)

68. In Count II, LAGOP challenges the Ban and Fundraising Requirement as applied to independent communications from an independent-communications-only account ("ICA"). This ICA would receive only funds (**a**) from *individuals*, (**b**) compliant with state law and the federal restrictions in ¶ 107, and (**c**) either (**i**) transferred from LAGOP (under reasonable accounting methods assuring that subparagraph (b) is met) or (**ii**) fundraised in compliance with provisions governing such fundraising when LAGOP is able to operate an ICA for such independent communications. The ICA's receipts would be limited to Louisiana's contribution limit, currently $100,000 over a 4-calendar-year period (which LAGOP and its ICA must share). (Compl. ¶ 109.)

69. LAGOP wants to make disbursements of over $5,000 per calendar year for federal election activity in 2015 and 2016, which would require it to report receipts and disbursements for federal election activity, but LAGOP wants to report its nonfederal funds used for such activity as it reports other nonfederal funds absent BCRA's Reporting Requirement (with the exception of the alternative, ICA, as-applied challenge in Count II, which would comply with the Reporting Requirement). The local-committee Plaintiffs want to spend under $5,000 in 2015 and 2016 on federal election activity, so they would not be subject to the Reporting Requirement. (Compl. ¶ 110.)

70. In 2014, LAGOP wanted to use approximately $100,000 in nonfederal funds for federal election activity, but could not because it did not want to do so under the challenged provisions. (Compl. ¶ 111.)

General

71. None of the federal election activities that Plaintiffs want to do herein would otherwise qualify as "contributions," or "expenditures," or "exempt activities" and so would not trigger political-committee status for the local-committee Plaintiffs. (Compl. ¶ 112.)

72. Plaintiffs seek requested relief as soon as possible, given that PASO communications become such immediately; voter-registration activity becomes federal election activity starting November 6, 2015; and voter-identification, voter-registration activity, and get-out-the-vote activity become such starting December 2, 2015. Absent requested relief, Plaintiffs are chilled from exercising First Amendment rights. (Compl. ¶ 113.)

73. In the future, Plaintiffs intend federal election activities materially similar to those they verify plans to do herein, as legal to do so. Given recurring elections, the time required to resolve such litigation, and the ongoing restrictions, it is likely that situations similar to those described here will recur without opportunity for full litigation. So if this litigation is not concluded before federal-election-activity periods related to 2016 elections end, this case will not be moot because it will be capable of repetition yet evading review. *See, e.g.*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 461-63 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.) (stating the holding, *Marks v. United States*, 430 U.S. 188, 193 (1977)). (Compl. ¶ 114.)

74. Plaintiffs face a credible threat of civil enforcement and prosecution if they proceed with planned activities without complying with challenged provisions, absent requested relief. (Compl. ¶ 115.)

75. Absent requested relief, Plaintiffs will be deprived of their First Amendment rights and suffer irreparable harm. There is no adequate remedy at law. (Compl. ¶ 116.)

76. In JPGOP's December 20, 2015 response to FEC's Interrogatory 13 ("State in dollars the total amount of funds YOU have spent on FEA singe January 1, 2013"), JPGOP explained that it had just discovered that it had inadvertently engaged in VR and GOTV in the following verified statement, which Plaintiffs reiterate here both as to an Interrogatory thus answered and for the truth of the following verified facts:

Plaintiff states it has just discovered that it has spent something on FEA, though it is at a loss as to how to calculate its value (and thus to keep any record of an expenditure for it). The activity involved some minor voter-registration activity ("VR") and get-out-the-vote activity ("GOTV") on its website and on Facebook. Plaintiff did not realize until December 18, 2015 that this type of VR and GOTV, done online, could be FEA, and it immediately altered some material and took down other material so as not to be FEA, or to possibly be deemed FEA under the broad definition of VR and GOTV as mere exhortation (including "encouraging or urging") to register or vote. (Of course, most online activity is excluded from FEA definitions.) But since the material had been up online since the start of the current FEA period for VR (11/6/2015) and GOTV (12/2/2015), it was (or some of it may have been) FEA for that brief time. The activity was as follows.

First, under a "Links" tab, Plaintiff had a link titled "Register to Vote Republican Today," with the link leading to the Secretary of State's website allowing for online registration. Of courses there is an exception to FEA for mere links to such governmental websites, but the invitation not just to register but to register as a Republican seems likely to take the link title out of that exception, so "Republican" was removed and the title now reads "Register to Vote Today." Now whether the use of imperative language, instead of saying something like "To Register to Vote Today," takes the current title out of the exception is a question on which the FEC is welcome to provide guidance in its briefing. For now, Plaintiff has the current title.

Second, Plaintiff has an "Endorsed Candidate" tab that leads to a list of endorsed candidates, which lists endorsed state candidates, and until it was taken down, had a section simply listing federal candidates (without endorsements as to any particular one). Though the list of federal candidates does not exhort people to register or expressly exhort people to vote for one of these Republican federal candidates, Plaintiff has taken down the list of federal candidates just to be certain it isn't inadvertently doing FEA by indirectly exhorting people to vote for these Republican candidates by listing them on the endorsed-candidates page.

Third, Plaintiff has a "Press Release" tab that links to press releases that announced endorsements of both state and federal candidates in 2014 and urged voters to vote for them, so it exhorted people to vote when it was first posted and, because it was still on the website in the current FEA period, it is an exhortation to vote in a current FEA period. This problem of old material remaining on websites into FEA periods arising later is a dangerous and burdensome trap for all those burdened by challenged FEA provisions, because it requires one to search online postings to assure that VR and GOTV is purged before each new FEA period engages. Those press releases have all been removed (or will be shortly).

Fourth, on its Facebook page, Plaintiff had two posts that exhorted voting. One was posted "November 9" and had a graphic saying "Vote Early" with text with a heading of "Early Voting" and text providing early voting dates, "Nov 9 - Nov. 14," with location information. The other was posted "November 18" and said, "Please exercise your precious right to vote on Saturday, November 21!" When posted, Plaintiff believes neither was in an FEA period for GOTV, but they remained online into the current FEA period for GOTV and each exhorts voting. So Plaintiff believes it has fallen into the trap for online material not deleted before a new FEA period engages. But how does one state a dollar value for this activity? Plaintiff did pay Facebook to "boost" the message to "[p]lease exercise your

> precious right to vote," so the message would appear to certain Facebook users, but that was done before the current FEA period for GOTV engaged on December 2, 2015, so neither that expense nor any resulting Facebook messages count as GOTV expenses for the current messages left online. There is no way to break out the value of posting and maintaining these online messages, especially since, as FEC well knows, FEC commissioners have stated that valuing material on a website may not be subject to some sort of valuation based on a time/space allocation because a "ripple effect" might require including the costs of computers, online access, etc. (Doc. 1, ¶ 62 (citation omitted).).

JPGOP Discovery Response at 22-25 (Exhibit 1).

Brennan Center Publication

77. A prominent campaign-finance-reform group recently called for rethinking campaign-finance regulation to empower political parties in view of their vital role and declining power. *See* Brennan Center for Justice, *Stronger Parties, Stronger Democracy: Rethinking Reform* (2015).[14] The Center calls for "reform ... to relax some of BCRA's federalization of state and local parties." *Id.* at 15. And it recommends higher contribution limits "for specific party activities that enhance grassroots participation, such as voter registration and GOTV." *Id.* at 16.

Respectfully submitted,

/s/ James Bopp, Jr.

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[14] *See* https://www.brennancenter.org/publication/stronger-parties-stronger-democracy-rethinking-reforming#.Vfshsx74b-s.twitter (available as PDF download).

Certificate of Service

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

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