COLORADO COURT OF APPEALS Court Address: 2 East 14th Avenue Denver, CO 80203 District Court, City and County of Denver Honorable Robert L. McGahey Jr., Judge Case No. 2014CV031851	
Plaintiff/Appellee: COLORADO REPUBLICAN PARTY v. **Defendant/Appellant**: WAYNE W. WILLIAMS, in his official capacity as Colorado Secretary of State and **Intervenor Defendant/Appellant:** COLORADO ETHICS WATCH	▲ COURT USE ONLY ▲
Counsel for Amicus Curiae: Steven K. Imig* (CO Bar No. 39016) Teresa M. Abel (CO Bar No. 45808) Lewis, Bess, Williams & Weese P.C. 1560 Broadway, Suite 1400 Denver, CO 80202 Tel.: (303) 861-2828 simig@lewisbess.com	Case Number: 2014CA1945

BRIEF OF AMICUS CURIAE THE CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLANT AND INTERVENOR/DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g):

   X It contains 5,792 words.

   ___ It does not exceed 30 pages.

2. The brief complies with C.A.R. 28(k).

   N/A For the party raising the issue:
   It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

   ___ For the party responding to the issue:
   It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

3. I acknowledge that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Steven K. Imig
Steven K. Imig
(CO Bar No. 39016)
Lewis, Bess, Williams & Weese P.C.
1560 Broadway, Suite 1400
Denver, CO 80202
Tel.: (303) 861-2828
simig@lewisbess.com

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STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to strengthen the laws governing campaign finance and political disclosure. *Amicus* has participated in a number of the campaign finance cases underlying the claims at issue here, including *McConnell v. Federal Election Commission* (*FEC*), 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310 (2010), and was active in the development of the federal standards for coordination.

SUMMARY OF ARGUMENT

Plaintiff-Appellee Colorado Republican Party ("CRP") argues that contributions it raises for its independent expenditure committee ("IEC") pursuant to C.R.S. § 1-45-107.5 are not subject to the contribution limits and source prohibitions found in Colo. Const. art. XXVIII, § 3. This is an attempt to read C.R.S. § 1-45-107.5 to nullify a portion of Colorado's Constitution and open the door to the party's use of unlimited, unregulated funds, known as "soft money," for party independent expenditures. CRP's statutory construction argument, addressed in detail by Defendant/Intervenor-Appellant Colorado Ethics Watch ("CEW"), is based, in part, on the argument that the regulation of contributions a party uses for

independent expenditures is the equivalent of an unconstitutional restriction on the right of the political party to make independent expenditures. This is incorrect.

There is no dispute that political party committees have a constitutional right to make independent expenditures, *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) ("*Colorado Republican I*"), and there is no dispute that Colorado law permits a political party, such as CRP, to make truly independent expenditures without limit. But that is not the provision of Colorado law that CRP is challenging: CRP is challenging Colorado's regulation of contributions to the political parties. In so doing, CRP is conflating the ability of a political party to make independent expenditures with amount limits and source restrictions on contributions *to* a political party, which the party can then use to make independent expenditures. This not only ignores the constitutionally significant difference between laws restricting independent expenditures and laws restricting contributions in general, but also discounts the specific attributes of political parties that heighten the risk of corruption when they receive large contributions.

The Supreme Court in *McConnell* squarely held that soft-money contributions to political parties could be regulated because such contributions foster a risk of actual and apparent corruption "regardless of how those funds are ultimately used." 540 U.S. at 155. In fact, a review of the U.S. Supreme Court's

jurisprudence shows that the application of campaign finance limits and prohibitions to contributions to political parties is clearly constitutional—regardless of how the money is spent, and whether or not the money is placed in a separate account under the party's functional control—based on the important anti-corruption interests underlying party contribution limits.

Long experience has made clear that prohibiting parties from receiving unlimited contributions from any source is a necessary part of a comprehensive campaign finance scheme aimed at stopping real or apparent corruption. Congress addressed the unregulated "soft money" used by state and national party committees at the federal level by passing the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107–155, 116 Stat. 81.The core federal soft-money provisions, which placed limits on the unregulated flow of money through national and state party committees, were upheld in *McConnell*, where the Court made clear that given the "close connection and alignment of interests" between parties and officeholders, such contributions give rise to actual and apparent corruption "*regardless of how those funds are ultimately used*." 540 U.S. at 155 (emphasis added).

CRP's promise that soft money will be spent in a way that supposedly avoids the direct involvement of candidates is "beside the point." *Id.* at 154. It is

not how soft money is spent that gives rise to the risk of actual or apparent corruption; rather, *McConnell* held that it is "the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect." *Id.* at 154-55.

These attributes of political parties, combined with the long history of unchecked soft-money contributions flowing through the parties that enabled real and apparent corruption to flourish—which together served as the basis for the Supreme Court's decision to uphold the ban on soft money in *McConnell*—undermines any claims that a party-controlled IEC can be meaningfully independent. Fatally missing from CRP's analysis is the fact that, just as the Supreme Court has held that political parties have a constitutional right to make *truly* independent expenditures, it has also made clear that the government has a compelling interest in limiting the amount and sources of contributions to political parties. That interest prevails regardless of the purposes for which the contributions are used and, by extension, regardless of how the party proposes to segregate the contributions in an "independent" account under its control.

ARGUMENT

I. Contribution Limits Are Reviewed under the "Relatively Complaisant" "Closely Drawn" Standard, Not Strict Scrutiny.

Any analysis of the constitutionality of limitations and restrictions on contributions to political parties has to begin with the framework the Supreme Court has consistently adhered to for almost 40 years. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court first drew a sharp distinction between contributions made directly to candidates, political committees and political parties, and expenditures made independently of candidates, committees and political parties. According to the Court, an independent expenditure involves the use of a spender's own funds to amplify the spender's own speech, which is entitled to core First Amendment protection. Because of this, limitations on independent expenditures "impose significantly more severe restrictions on protected freedoms of political expression and association [than contribution limits]." *Id.* at 23. In contrast, when a person makes a contribution to a candidate or political committee, he or she is not in control of candidate's or committee's message and is consequently involved in a more symbolic expression of support. Therefore, a "limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20, "for it

permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21.

Compared to laws that restrict campaign expenditures, which are subject to strict scrutiny, contribution limits are therefore "subject to relatively complaisant review" under the First Amendment. *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). Unlike expenditure restrictions, "contributions lie closer to the edges than to the core of political expression," *id.*, so they need not meet the strict scrutiny standard of "promot[ing] a compelling interest and [being] the least restrictive means to further the articulated interest." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). Therefore, a contribution restriction "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (internal quotations omitted).[1]

Even though the Supreme Court has never departed from *Buckley*'s more deferential "closely drawn" standard in the context of a contribution limit, CRP implies that the Court has while relying almost exclusively on two cases that did

[1] The recent *McCutcheon* decision does nothing whatsoever to disturb this line of precedent with respect to base contribution limits, which were not at issue in *McCutcheon* and, as the Court noted, have long been upheld "as serving the permissible objective of combatting corruption." 134 S. Ct. at 1442; *see also id.* at 1451 & n.6 (noting that the decision "leave[s] the base limits undisturbed"); *id.* at 1445 (declining to revisit *Buckley*'s "closely drawn" standard of review).

not involve contribution limits: *Colorado Republican I* and *Citizens United*. Compl. ¶¶ 20-23. Not only did these cases not involve contribution limits, the latter did not even involve political parties. The present case, by contrast, concerns the source and amount restrictions in Colo. Const. art. XXVIII, § 3, which defines how much an individual can *contribute* and whether corporations and labor unions may *contribute* to a political party; it does not involve how much a political party can *spend*. Invoking inapposite decisions about expenditure limits cannot transform the contribution limits in Colo. Const. art. XXVIII, § 3 into expenditure limits. As the Supreme Court observed in upholding analogous federal provisions imposing source and amount restrictions on contributions to political parties, "neither provision in any way limits the total amount of money parties can spend. Rather, they simply limit the source and individual amount of donations. That they do so by prohibiting the spending of soft money does not render them expenditure limitations." *McConnell*, 540 U.S. at 139. *McConnell* accordingly reviewed the constitutionality of those provisions by "the less rigorous scrutiny applicable to contribution limits." *Id.* at 141. That same standard undoubtedly applies here.

II. The Supreme Court Has Long Distinguished between Unconstitutional Restrictions on Independent Expenditures and Constitutional Limitations on the Amounts and Sources of Political Contributions.

Beginning with its articulation of the different standards of scrutiny it would apply to the different forms of campaign finance regulation at issue in *Buckley*, the Supreme Court has consistently found a "fundamental constitutional difference" between contribution limits and expenditure limits for the purposes of First Amendment review. *Colorado Republican I*, 518 U.S. at 614-15 (internal citations omitted). When it applied those different standards to the Federal Election Campaign Act of 1971, as amended ("FECA") provisions under challenge, the *Buckley* Court found that limiting "the actuality and appearance of corruption resulting from large individual financial contributions" was a constitutionally sufficient justification for contribution limits, and upheld the limits on contributions to political committees—including political party committees. 424 U.S. at 26. "Congress was surely entitled to conclude . . . that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28. At the same time, the Supreme Court held that it was unconstitutional to limit the amount an individual spent on election advocacy if that expenditure was made totally independently of a candidate. *Id.* at 51. In short, contributions made to a

candidate or political committee to fund the candidate's or committee's speech could be subject to limitations that would be unconstitutional if applied to an individual spending money to express his or her own her own views.

During the two decades following *Buckley*, the Court was called upon to review the constitutionality of numerous provisions of FECA.[2] Applying *Buckley*'s framework in each case, "the Court essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a compelling governmental interest in assuring the electoral system's legitimacy [and] protecting it from the appearance and reality of corruption." *Colorado Republican I*, 518 U.S. at 609 (internal quotations and citations omitted). Starting with *Buckley*,

> [T]he Court's cases have found a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign. This difference has been grounded in the observation that restrictions on contributions impose only a marginal restriction upon the contributor's ability to engage in free communication, because the symbolic communicative value of a contribution bears little relation to its size, and because such limits leave persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. At the same time, reasonable

[2] *See, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) ("*CalMed*").

> contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors.

Id. at 614-15 (internal citations and quotation marks omitted).

Notably, "[m]ost of the provisions [the] Court found unconstitutional imposed *expenditure* limits," whereas "[t]he provisions that the Court found constitutional mostly imposed *contribution* limits." *Id.* at 610. The Court therefore struck down various forms of spending restrictions, including limits on a candidate's ability to spend personal or campaign funds, as well as on an individual's or political committee's right "to make independent expenditures (not coordinated with the candidate or candidate's campaign)." *Id.* By contrast, the Court generally upheld contribution limits—"limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate," *id.*—because they are at a greater remove from the core of political speech *and* tied more directly to candidates.

The Supreme Court reaffirmed the distinction between the regulation of contributions and the regulation of independent expenditures in *McConnell*:

> Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing "both the actual corruption threatened

> by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." We have said that these interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."

540 U.S. at 136-37 (internal citations omitted).

In *Citizens United*, the Supreme Court again cited this constitutional framework as the basis for its expansion of the right to make independent expenditures from individuals to corporations (and presumably labor unions), as long as the expenditures were undertaken totally independently of a candidate. 558 U.S. at 357. However, nothing in *Citizens United* undercut the Supreme Court's longstanding distinction between the First Amendment right to make an independent expenditure and the government's compelling interest in limiting political contributions to candidates and political parties. *Id.* at 357 ("The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.").

III. Enabling Political Parties to Receive Unlimited Contributions for "Independent" Spending Would Fundamentally Misconceive the Nature of Parties and Create an Unacceptable Risk of Corruption.

Given the differences between how the Supreme Court analyzes limitations on independent expenditures and limitations on contributions, it is not surprising

that CRP argues that it "only seeks to be treated the same as all other persons and organizations" permitted to solicit unlimited funds for independent expenditures, asserting in its Motion for Summary Judgment: "Not only does Colorado law require this, but United States Supreme Court precedent, especially [*Colorado Republican I*] and *Citizens United*, demands it as well." CRP Mot. Summ. J. 1-2 (internal citations omitted). CRP is really arguing that, because the Supreme Court has said that independent expenditures present no opportunity for real or apparent corruption, a political party committee has a constitutional right to solicit and accept contributions outside of the limits and restrictions imposed by Colorado law to make those expenditures. In fact, a review of the Supreme Court's treatment of the federal soft-money restrictions affirmatively "requires" the contrary interpretation.

A. Extending the source and amount restrictions in Colo. Const. art. XXVIII, § 3 to a party-established independent expenditure committee effectuates the state's important interests in preventing corruption, the appearance of corruption and circumvention.

The case law compellingly illustrates why an "independent" expenditure committee sponsored, maintained and operated by a political party, such as CRP's IEC in this case, should still be subject to the contribution source and amount limitations applicable to political parties generally: because a party committee, even one with "non-coordination" protocols, can never be meaningfully divorced

from its essential nature of being closely tied to candidates. A rigidly formalistic approach to the regulation of political party activities would be at odds with Supreme Court precedent, which has uniformly taken the view that parties are different and should be treated as such.

If CRP ultimately gets its way, the consequences are foreseeable: It would simply replicate in Colorado elections the soft-money abuses that afflicted the federal campaign finance system for decades and that the Supreme Court found ultimately undermined the limits and prohibitions it had upheld in *Buckley*. Under the soft-money system, national political party committees were raising and spending vast amounts of money from individuals, corporations and labor unions outside the federal limits and prohibitions under the fiction that, because they were not being used to expressly advocate the election of federal candidates, the funds did not present any threat of real or apparent corruption. *See McConnell*, 540 U.S. at 122-25.

> Shortly after *Buckley* was decided, questions arose concerning the treatment of contributions intended to influence both federal and state elections. Although a literal reading of FECA's definition of "contribution" would have required such activities to be funded with hard money, the FEC ruled that political parties could fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money. In 1995 the FEC concluded that the parties could also use soft money to defray the costs of "legislative advocacy media advertisements," even if the ads

> mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat.

Id. 123-24 (footnote omitted) (internal citations omitted).

Congress finally took measures to combat the federal soft-money scourge when it passed BCRA in 2002. BCRA § 323(a) subjects all funds solicited, received, directed, or spent by the national parties to federal contribution limits regardless of their ultimate use. Section 323(b) extends this requirement to state and local party entities, imposing federal limits on contributions to such entities that are used to finance "federal election activity," including voter registration, voter identification, and public communications that promote or oppose a clearly identified federal candidate. *See* 52 U.S.C. § 30125(b). Significantly, none of the "federal election activities" set forth in § 323(b) necessarily involves contributions to candidates, and most often such activities are undertaken independently of candidates.

Even though BCRA limited contributions that were ultimately used for independent spending, *McConnell* held that these BCRA provisions were constitutional because they were closely drawn to match the important state interest of preventing corruption and the circumvention of the campaign finance laws. *McConnell* expressly rejected the view that only contributions "made directly

to" or used "in coordination with" a federal officeholder or candidate were potentially corrupting. 540 U.S. at 152; *see also id*. at 286-341 (Kennedy, J., concurring in judgment in part, and dissenting in part). The majority instead determined that large contributions, even those made to political parties and used for independent expenditures, threatened the integrity of the political system, because they allowed contributors to gain access and influence over federal candidates and thus raised the specter of corrupt quid pro quos. *See id.* at 146-51. As the Court noted, "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used*." *Id*. at 155 (emphasis added).

This formulation of the state's anti-corruption interest was based on the Court's understanding of the "realities of political fundraising," where information about fundraising flowed freely between party committees and candidates. *Id*. at 152. The record in *McConnell* indicated that party committees made candidates "well aware" of contributors to the party, and donors themselves "would report their generosity to officeholders." *Id*. at 147. Indeed, candidates were active participants in the circumvention of campaign finance laws and "commonly asked donors to make soft-money donations to the national and state committees" in order to assist their campaign. *Id*. at 146. Given the exchange of information

between the party committees and federal candidates, "[i]t is not only plausible, but likely, that candidates would feel grateful for [soft-money donations to parties] and that donors would seek to exploit that gratitude." *Id*. at 145.

In addition, the Court recognized that BCRA's soft-money provisions served Congress's interest in preventing the circumvention of campaign finance laws. The Court has long recognized that large contributions to political parties are a means of circumventing limitations on contributions to candidates. Regarding the constitutionality of BCRA § 323(b), for instance, *McConnell* affirmed that Congress could limit all contributions to state party committees used "for the purpose of influencing federal elections." *Id*. at 167. Although these activities might not pose a threat of state and local parties themselves corrupting federal candidates, they would allow the contributors to corrupt through these committees:

> Congress knew that soft-money donors would react to §323(a) by scrambling to find another way to purchase influence. It was neither novel nor implausible for Congress to conclude that political parties would react to §323(a) by directing soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. . . . Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

Id. at 165-66 (internal citations and quotation marks omitted). The Court thus affirmed that circumvention was a valid state concern in this context, even if the

funds raised outside the federal limits were used only for independent party spending.[3]

In upholding BCRA's soft money provisions, then, *McConnell* necessarily found that contributions to party political committees can corrupt, irrespective of whether such contributions are subsequently used for coordinated or independent expenditures. The Court's key observation was that a contribution's ultimate use is not the basis for identifying its corruptive potential. Rather, the potential for corruption arises where there is an opportunity for quid pro quo exchanges

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[3] The Court has long maintained that reducing circumvention is part of the government's compelling interest in protecting the integrity of candidate contribution limits and thereby combating corruption, and has upheld a broad range of campaign finance laws on this basis. *See, e.g.*, *McConnell*, 540 U.S. at 144; *Beaumont*, 539 U.S. at 155 ("[R]estricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits.'") (alteration in original) (citation omitted); *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 456 (2001) ("*Colorado Republican II*") (upholding coordinated party spending limits to prevent the "exploitation [of parties] as channels for circumventing contribution and coordinated spending limits binding on other political players"); *CalMed*, 453 U.S. at 197-98 (upholding limits on contributions to political committees "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*").

These decisions all make clear that measures targeting real and apparent corruption by preventing the use of party committees as conduits for making large contributions to candidates—and thereby circumventing the candidate contribution limits—advance a vital governmental and public interest.

between a donor and a candidate as a result of the donor's political party contributions.

There is nothing in the Court's subsequent campaign finance decisions to undermine *McConnell*'s clear holding. Furthermore, CRP's reliance on *Citizens United* and *Colorado Republican I* is misplaced; neither involved limits on contributions to political parties, and *Citizens United* did not involve political parties at all. Invoking *Colorado Republican II* is likewise unavailing: while *Colorado Republican I* involved independent *expenditures by* political parties—as the Supreme Court noted in *McConnell*, 540 U.S. at 145 n.45—in *Colorado Republican II*, the Colorado Republican Party challenged the federal coordinated party expenditure limits. In upholding this contribution limit, the Supreme Court recognized that "[p]arties . . . perform functions more complex than simply electing candidates," as "they act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452; *see also id.* at 450-51. The Court has thus consistently recognized that unlimited contributions to political parties present the same danger of corruption and the appearance of corruption as is created by unlimited contributions to candidates—and on that basis has upheld reasonable regulation of such contributions.

CRP also suggests that adhering to Article XXVIII's contribution limits puts it at an unconstitutional disadvantage relative to corporations and labor unions, "who are permitted under Colorado law to solicit unlimited funds for independent expenditures." CRP Mot. Summ. J. 1-2. First, although the Party may wish "to be treated the same as all other persons and organizations," it is well established that parties *are not the same* as other persons and organizations as regards their relationship to candidates. Second, the supposed disadvantages weighing upon political parties are counterbalanced by other privileges: Colorado law—like federal law—"actually favors political parties in many ways." *McConnell*, 540 U.S. at 187-88 (rejecting political parties' equal protection challenge based on alleged differential treatment).

For example, under the contribution limits set forth in Colo. Const. art. XXVIII, § 3, as they have been increased to account for inflation, political party committees may receive up to $3,400 per year from any person, candidate or political committee, and up to $17,075 per year from small donor committees. *See* Rules Concerning Campaign and Political Finance, Rule 10.14.2(d), (e), 8 C.C.R. 1505-6 (2012). By contrast, political committees and candidates for executive office can only accept $550 per election cycle, and state legislative candidates are

limited to $200 per election cycle. *See* Campaign and Political Finance Rule 10.14.2(b), (f), 8 C.C.R. 1505-6 (2012).

B. Segregating certain aspects of a party-controlled committee from the central party does not render the committee "independent."

CRP styles its constitutional argument as, essentially, an as-applied claim demanding relief from Article XXVIII's contribution and source and amount limits on the basis that the IEC pledges to remain "independent" from—and thus to avoid corrupting—state candidates. The organization's self-imposed standing rules form the core of this "no-corruption" guarantee. First, given the political party context, CRP's notion of "independence" is fatally unsound and runs counter to longstanding U.S. Supreme Court case law. Second, CRP's assurances that the standing rules will obviate any actual or apparent quid pro quo corruption strain credulity in light of long experience during the federal soft-money era. Finally, CRP cannot supplant Colorado's voter-enacted corruption controls—namely, party contribution limits—with self-imposed "limits" most likely devoid of any meaningful oversight.

i. The IEC's standing rules cannot alter its fundamental character as a political party committee.

According to CRP, the standing rules will ensure that its IEC remains "truly independent" from state candidates, and therefore, it would be unconstitutional to

place any limits on the IEC's fundraising. CRP Mot. Summ. J. 2. The apparent logic underlying this claim—that contributions to a political party committee cannot be limited unless the party committee has explicitly coordinated with candidates—is fundamentally irreconcilable with the Supreme Court's clear recognition that parties and candidates are "inextricably intertwined." *McConnell*, 540 U.S. at 155. Moreover, *McConnell* specifically rejected the view that the state's anticorruption interest can only justify, at most, regulation of "contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate." *Id.* at 152. The Court went on to reject the argument that BCRA's soft-money ban was "impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including . . . funds spent on purely state and local elections in which no federal office is at stake." *Id*. at 154. The Court stated that "[t]his observation is beside the point" because the challenged prohibition "regulates contributions, not activities." *Id*.; *cf. CalMed*, 453 U.S. at 198-99 & n.19 (plurality opinion) (upholding FECA's limitations on contributions to political committees even if the funds are to be used purely for administrative expenses).

In the context of political parties, which both have and are perceived to have very intimate ties with candidates, standing rules like CRP's do little to alleviate the risk of actual and apparent corrupt quid pro quos. In *Republican Nat'l Committee (RNC) v. FEC*, 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 561 U.S. 1040 (2010), a three-judge federal district court panel recognized as much in rejecting a challenge very similar to CRP's. There, the court found that assurances about the intended use of funds contributed to an "independent" account were insufficient to overcome *McConnell*'s finding that soft-money contributions to parties—regardless of how the contributions will be spent—raise the specter of corruption due to the "inherently close relationship between parties and their officeholders and candidates." *Id.* at 159 (citation omitted).

CRP has suggested that the *RNC v. FEC* case has no bearing on the constitutional claims here because this case involves "[i]ndependent expenditure efforts expressly subject to non-coordination requirements," which purportedly "were not considered in [*RNC v. FEC*]." *See* CRP Reply Supp. Mot. Summ. J. 9 n.6. However, the proposed soft-money contributions at issue in *RNC* would not be solicited by candidates, spent on federal election activities, or used to facilitate greater "RNC-arranged access to federal candidates," *RNC*, 698 F. Supp. 2d at 159—in other words, the contributions would be solicited independently from

federal candidates and would not be spent to benefit any federal candidates. Basing its analysis on *McConnell*, the *RNC* panel ruled broadly, finding that soft-money contributions to political parties are potentially corrupting "regardless of how those contributions ultimately may be used," *id.*, and accordingly upheld the constitutionality of applying the limits to the RNC's proposed activities. The decision left no doubt that the corruptive potential posed by contributions to parties for speech that would not be "unambiguously campaign-related" was constitutionally sufficient to support the limits given the unique character of political parties. Certainly, CRP's planned use for the unlimited contributions solicited and received by its IEC—namely, direct campaign spending in support of state candidates—poses no *less* of a threat than the non-federal election activity at issue in *RNC*.

ii. The Party's assurances that the standing rules remove any potential for corruption are unavailing given the political party setting.

As an initial matter, CRP premises its entitlement to form a connected IEC on the existence of self-selected "non-coordination" protocols that will allegedly maintain the committee's independence, but there is no showing of how it plans to enforce those rules over time. Even on their own terms, moreover, the standing rules hardly erect impermeable barriers between the central party apparatus, its

independent expenditure-only account, and state candidates. CRP's "rules" primarily involve interaction with the candidate in the specific context of making the independent expenditures. It does not appear that any of these restrictions limit the ability of candidates, officeholders or party officials to solicit and raise unlimited contributions from those seeking favors for the independent expenditure committee or to tell contributors which candidates the independent expenditure committee will support. This is the very type of activity that the Supreme Court in *McConnell* found gave rise to real or apparent corruption and justified BCRA's ban on party committee soft-money.

Furthermore, because it would be established and maintained by the Colorado Republican Party, all of the IEC's activities are undertaken with the Party's imprimatur, whether or not the two share office space or personnel. Indeed, the state chairman is specifically permitted to solicit unlimited contributions for the IEC, *see* CRP Mot. Summ. J., Ex. B ("CRP Standing Rules"), Rule 14, highlighting the degree to which the party and its IEC will never be meaningfully separate. And although the standing rules prohibit the executive director and management committee from "actively participating" on the campaign or finance committee of "any candidate for public office that will be the beneficiary of any independent expenditure made by the IEC in the current election cycle," they

permit the executive director and management committee to make contributions in their personal capacity to candidates and to attend public and fundraising events where candidates will be present. CRP Standing Rules 8-9. So although a current member of the IEC's management committee may not "actively" serve on a candidate's campaign, she has ample opportunity to interact and curry favor with the candidate.

In any event, removing the direct link between the party's IEC and candidates does not necessarily foreclose the opportunity for corrupt quid pro quos. As noted in *McConnell* with respect to the federal soft-money system, the identities of contributors are easily ascertained and routinely discussed by party officials, officeholders, staff, and opposing lobbyists. *See* 540 U.S. at 148 n.47.[4]

Segregating IEC personnel as set forth in the standing rules likewise does little to prevent party leadership from exercising substantial control over IEC activities, including its expenditures in support of candidates. Under the standing

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[4] *See also McConnell v. FEC*, 251 F. Supp. 2d 176, 488 (D.D.C. 2003) (Kollar-Kotelly, J.) ("[T]here is communication among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff.") (quoting CEO Wade Randlett) (quotation marks omitted); *id*. at 487 (Kollar-Kotelly, J.), 853-54 (Leon, J.) ("[Y]ou cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party.") (quoting Sen. Bumpers) (quotation marks omitted); *id*. at 487-88 (Kollar-Kotelly, J.), 854 (Leon, J.) ("Legislators of both parties often know who the large soft money contributors to their party are . . . .") (quoting Sen. McCain) (quotation marks omitted).

rules, members of the IEC's management committee are appointed by the state party chairman to fixed terms of "not less than one year nor more than three years." CRP Standing Rule 2. This revolving door means that a party official who regularly interacts with the party chair—and with candidates—can be installed as the chair of the "independent" committee. Any IEC leader who fails to please candidates can simply be replaced at the end of her one-year term (if not sooner for cause).

Finally, none of these assurances does anything to address the constitutionally significant interest in preventing the appearance of corruption. Allowing unlimited contributions to flow through a party committee—even assuming the public is aware that contributions will be placed in a separate bank account and/or that party officials and IEC management committee members cannot discuss the specific details of a specific IEC expenditure—will undoubtedly be perceived as corrupting. In fact, the IEC has already been the subject of controversy: its first executive director recently pleaded guilty to coordinating contributions between another independent expenditure committee he ran and a 2012 Virginia congressional race.[5]

[5] *See* Ernest Luning, *GOP consultant's guilty plea riles some Colorado Republicans*, Colo. Statesman, Feb. 18, 2015, http://coloradostatesman.com/content/995399-gop-consultants-guilty-plea-riles-some-colorado-republicans.

CONCLUSION

For all these reasons, this Court should reverse the lower court's grant of summary judgment and find that as a political party, CRP is not authorized to sponsor, maintain and operate an IEC.

RESPECTFULLY SUBMITTED this 6th day of March 2015.

/s/ Steven K. Imig
Steven K. Imig*
(CO Bar No. 39016)
Teresa M. Abel*
(CO Bar No. 45808)
Lewis, Bess, Williams & Weese P.C.
1560 Broadway, Suite 1400
Denver, CO 80202
Tel.: (303) 861-2828
simig@lewisbess.com
tabel@lewisbess.com

J. Gerald Hebert
Megan P. McAllen
Lawrence M. Noble
Tara Malloy
Paul S. Ryan
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, D.C. 20002
Tel.: (202) 736-2200

Counsel for *Amici Curiae*

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2015, a true and correct copy of the foregoing was filed and served via ICCES upon the following:

Counsel for Intervenor-Appellant Colorado Ethics Watch
Luis Toro
Margaret Perl
Colorado Ethics Watch
1630 Welton Street, Suite 415
Denver, CO 80202

Counsel for Plaintiff-Appellee Colorado Republican Party
Richard A. Westfall
Allan L. Hale
Peter J. Krumholz
Hale Westfall LLP
1600 Stout Street, Suite 500
Denver CO 80202

Counsel for Defendant-Appellee Secretary of State Scott Gessler
Matthew D. Grove
Sueanna Johnson
Office of the Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

s/ *Greg Apt*