UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN PARTY OF LOUISIANA, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:15-cv- 01241 (CRC-SS-TSC)
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., DEMOCRACY 21, AND CAMPAIGN LEGAL CENTER IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. No other entity has any form of ownership interest in it.

Amicus curiae Democracy 21 is a nonprofit, non-stock corporation. No other entity has any form of ownership interest in it.

Amicus curiae Campaign Legal Center is a nonprofit, non-stock corporation. No other entity has any form of ownership interest in it.

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INTEREST OF AMICI CURIAE[1]

As set forth more fully in their motion for leave to file this brief, amici curiae Public Citizen, Inc., Democracy 21, and Campaign Legal Center are organizations dedicated to fighting the corrupting influence of money in our electoral politics. They have devoted years of effort to promoting campaign finance reform legislation, encouraging appropriate implementation of that legislation by the Federal Election Commission (FEC), and participating as parties, amici curiae and counsel in litigation over the construction and constitutionality of campaign finance laws and regulations at all levels of the federal court system and in state courts as well. They submit this brief as amici curiae because of their concern about the harmful effects that could result if this Court were to strike down the contribution limits at issue, which prevent state and local party committees from raising unlimited soft money to fund activities affecting federal elections and benefiting federal candidates, and because of their belief that a concise discussion of the applicable legal principles could assist this Court in resolving this important case.

INTRODUCTION

In this action, the Republican Party of Louisiana and two of its local committees (collectively, "the Louisiana Republicans") raise what they describe as a series of as-applied and facial challenges to provisions of the Bipartisan Campaign

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[1] This brief was not written in whole or in part by counsel for a party, and no one other than the amici curiae and their counsel contributed money intended to fund the preparation of the brief. Counsel for the parties have stated that they do not oppose our motion for leave to file this brief.

Reform Act (BCRA) limiting the sources and amounts of contributions that state and local party committees may use to finance "federal election activity" as defined in BCRA. The Supreme Court upheld those provisions, which prohibit the use of "soft money"—that is, contributions not subject to the source and amount limits of the Federal Election Campaign Act (FECA)—against facial constitutional challenges in *McConnell v. FEC*, 540 U.S. 93, 161–73 (2003), and as-applied challenges in *Republican National Committee v. FEC*, 561 U.S. 1040 (2010), *aff'g* 698 F. Supp. 2d 150 (D.D.C. 2010) (*RNC*). Although the Louisiana Republicans in this case claim to challenge BCRA's prohibition on state and local parties' use of soft money for federal election activity as applied to an array of various types of federal election activity, their challenges boil down to one basic, and erroneous, proposition: that the First Amendment forbids Congress to limit contributions used by state and local political parties for federal election activities that are conducted independently of the candidates for federal office whose candidacies they benefit. Acceptance of that proposition would blow an enormous hole in the anticorruption protections erected by BCRA, as its logical implication would be that neither the federal government nor the states could impose contribution limits on funds used by political parties at any level for any independent spending affecting elections. The result would be a return to the era of unlimited use of soft money by the parties that BCRA sought to end.

The Louisiana Republicans' assertion that Congress cannot limit contributions used by state and local parties for "independent" federal election

activity does not square with the decisions in *McConnell* and *RNC* rejecting facial and as-applied constitutional challenges to the same BCRA soft-money provisions. In neither case did the decisions sustaining the soft-money provisions rest on whether a state party's federal election activity was coordinated with or independent of a federal candidate, and the Louisiana Republicans' current reliance on that consideration is inconsistent with the reasoning of both decisions.

The Louisiana Republicans' arguments not only disregard controlling authority, but also rest on a number of false premises. The Louisiana Republicans assert that BCRA's limits on the sources and amounts of contributions that state and local parties can use for federal election activity is not really a contribution limit, but a spending limit subject to strict First Amendment scrutiny. That argument was rejected both in *McConnell* and in *RNC*, and it reflects a fundamental misunderstanding of the difference between contribution and spending limits. The BCRA provisions at issue do not limit how much state and local parties can spend on federal election activity. Rather, they provide that the funds used for such spending must be raised in limited amounts, and only from sources permissible under FECA. That is what a contribution limit is.

The Republicans also contend that because the spending in which they wish to engage using contributions not subject to FECA limits will be "independent," the spending cannot pose a risk of corrupting or appearing to corrupt candidates. That argument overlooks that the threat of actual or apparent corruption at which the state-party soft money provisions are directed does not come from the party

spending, but from the contributions themselves. It is the close and unique relationship between parties and their candidates, which differentiates parties from other campaign spenders, that creates the threat. In light of that relationship, the possibility of corruption (and of circumvention of other anticorruption measures) inheres in unlimited contributions to parties and exists regardless of whether the party proceeds to spend those funds independently or in coordination with the candidate. In other words, the evil the statute targets is not that parties will corrupt candidates by spending to support their candidacies, but that contributors will corrupt candidates, or appear to corrupt them, by contributing to entities that are part of a common political enterprise with the candidates.

Finally, the Louisiana Republicans wrongly contend that *McConnell* and *RNC* have been superseded by a fundamentally different conception of the government's anti-corruption interest exemplified in the plurality opinion in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). Even if statements in an opinion subscribed to by four Justices were binding on this Court, however, the soft money restrictions are fully compatible with the *McCutcheon* plurality's view of corruption because they rest on a record demonstrating that very large contributions to party organizations present opportunities for the reality or appearance of prearrangement and corrupt bargains that involve more than mere "ingratiation" and "access." *See id*. at 1441.

ARGUMENT

I. *McConnell* and *RNC* are still controlling authority.

The Supreme Court has twice affirmed the constitutionality of BCRA's state-party soft money provisions. *See McConnell*, 540 U.S. at 161–73; *RNC*, 561 U.S. 1040. In neither case did the Court's holding that Congress may limit the contributions that state and local parties use for federal election activity rest in any way on the premise that federal election activity expenditures were coordinated with federal candidates. The Louisiana Republicans' assertion that the soft money provisions cannot be applied to contributions used for "independent" federal election activity thus cannot be squared with either Supreme Court ruling.

The Supreme Court's holding in *McConnell* that the soft money provisions are facially constitutional rested on a number of bases, including: (1) the Court's finding that the *McConnell* record substantiated the view that the close relationship between national political parties and their federal candidates made contributions to the parties a source of potential corruption, or its appearance, regardless of how the funds were ultimately used, *see* 540 U.S. at 143–56; (2) the Court's finding that Congress reasonably concluded that "state [party] committees function as an alternative avenue [to national party committees] for precisely the same corrupting forces," *id*. at 165, and that failing to restrict contributions used by state parties for activities affecting federal elections would thus allow ready circumvention of regulation of contributions to national parties, *id*. at 165–66; and (3) the Court's determination that the soft money provisions were not overbroad because their limitation to funding of federal election activity was "narrowly focused on regulating

contributions that pose the greatest risk of … corruption: those contributions to state and local parties that can be used to benefit federal candidates directly." *Id.* at 167. None of the Court's reasoning was premised on the idea that the state and local parties' federal election activity was coordinated with or otherwise not independent of federal candidates. *See also id.* at 167–71.

In *RNC*, state and local Republican party committees joined in an "as-applied" challenge to BCRA's state-party soft money provisions, contending that they were unconstitutional as applied to federal election activity that did not "target" the campaigns of specific federal candidates. A three-judge district court rejected that argument, reasoning that *McConnell*, in holding that the state-party soft money provisions were not overbroad, had considered and "squarely rejected" the argument that the provisions were unconstitutional as applied to activities that ostensibly "'pose[d] no conceivable risk of corrupting or appearing to corrupt federal officeholders.'" 698 F. Supp. 2d at 161 (quoting *McConnell*, 540 U.S. at 166). The three-judge court concluded that because *McConnell*'s holding that the provisions were facially constitutional rested on the view that the soft-money provisions could constitutionally be applied to the full range of federal election activity as defined in BCRA, the as-applied challenge was inconsistent with *McConnell*'s reasoning.

The three-judge court also rejected the *RNC* plaintiffs' argument that *McConnell*'s soft-money holding had been undermined by *Citizens United v. FEC*, 558 U.S. 310 (2010). The court pointed out that "*Citizens United* did not disturb *McConnell*'s holding with respect to the constitutionality of BCRA's limits on

contributions to political parties." 698 F. Supp. 2d at 153 (citing *Citizens United*, 558 U.S. at 361).

The parties in *RNC* appealed the three-judge court's ruling to the Supreme Court and argued, as the Louisiana Republicans do here, that "the government must demonstrate that each application of BCRA's prohibition on nonfederal money targets an activity that, if funded by nonfederal money, would create an appreciable risk of actual or apparent *quid pro quo* corruption of federal officeholders." *RNC v. FEC*, No. 09-1287, Jurisdictional Statement, at 10 (U.S. filed April 23, 2010). The appellants, much like the Louisiana Republicans here, invoked *Citizens United*'s holding that independent expenditures by corporations cannot be limited on an anti-corruption rationale and argued that that holding supported their contention that contribution limits could not be applied to state and local parties' federal election activities that were not "targeted" at specific federal candidates:

> *Citizens United* makes clear that independent expenditures—no matter their size—do not create a risk of *quid pro quo* corruption. It follows, *a fortiori*, that parties' solicitation and expenditure of donations of nonfederal money do not have sufficient *quid pro quo* potential to warrant stifling the speech and associational rights of parties and their members.

Id. at 19. The Supreme Court rejected those arguments and summarily affirmed the three-judge court's decision. 561 U.S. 1040.

Here, the Louisiana Republicans substitute "independent" federal election activity, as opposed to "non-targeted" federal election activity, as the category to which they claim the soft-money provisions cannot be applied. But the three-judge court's reason for rejecting the as-applied challenge in *RNC* is equally applicable

here: "[N]othing in *McConnell*," the court observed in *RNC*, "suggests that the question whether a state or local party's communication implicates the federal anti-corruption interest depends on whether the communication is 'targeted' at federal elections." 698 F. Supp. 2d at 161; *see also id.* at 162 ("The Supreme Court made clear that whether § 323(b) can be constitutionally applied to a particular state or local party activity depends, not on whether the party's primary 'target' is federal, but on whether the activity would provide a direct benefit to federal candidates."). Likewise, nothing in *McConnell* suggests that whether a state or local party's federal election activity may be subjected to contribution limits depends on whether it is coordinated with or independent of a federal candidate. Rather, whether contributions may constitutionally be limited depends on whether they are used for federal election activity that, as defined in BCRA, directly benefits federal candidates.

McConnell and *RNC* thus foreclose this purported as-applied challenge. As the court explained in *RNC*, a decision upholding a statute on its face does not bar an as-applied challenge as long as the challenge does not contradict the basis on which the Court upheld the statute, *see* 698 F. Supp. 2d at 157 (citing *Wisconsin Right to Life, Inc. v. FEC,* 546 U.S. 410, 412 (2006)), but "a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent." *Id.* As in *RNC*, "the as-

applied arguments raised against § 323(b) are essentially the same arguments considered and rejected in *McConnell." Id.* at 161. They are also essentially the same arguments considered and rejected in *RNC*. "There is nothing substantially new presented in plaintiffs' as-applied challenge to § 323(b)." *Id.*

Just as the *RNC* plaintiffs sought to avoid *McConnell* by arguing that it had been undercut by *Citizens United*, the Louisiana Republicans argue that this Court may disregard *McConnell* and *RNC* because their holdings concerning the soft-money provisions have been undermined by the reasoning of the plurality opinion in *McCutcheon v. FEC*, 134 S. Ct. 1434. The three-judge court's answer to the *RNC* plaintiffs' reliance on *Citizens United*—that that decision left *McConnell's* soft-money holding untouched, *see* 698 F. Supp. 2d at 153 (citing *Citizens United*, 558 U.S. at 361)—is equally applicable here. The *McCutcheon* plurality stated unequivocally that "[o]ur holding … clearly does not overrule *McConnell*'s holding about soft money." 134 S. Ct. at 1451 n.6.

The Supreme Court has pointedly stated that lower federal courts lack authority to determine that "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Lower courts are required "to adhere to [the Supreme Court's] directly controlling precedents, even those that rest on reasons rejected in other decisions." *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). The three-judge court in *RNC* thus correctly recognized that it had no power to "get ahead of the Supreme Court," and left it up to the Supreme Court to revise or limit *McConnell*'s soft-

money holding "as the Court sees fit." 698 F. Supp. 2d at 160. The wisdom of that decision was validated when the Supreme Court did *not* "see fit" to alter *McConnell*'s approval of the soft-money provisions and summarily affirmed the three-judge court. Likewise, here, the four-Justice opinion in *McCutcheon* does not undermine *McConnell*'s premises (*see infra* at 17–22), but even if it did, it would still be up to the Supreme Court to determine whether *McConnell*'s reasons for upholding the application of the soft-money provisions to the full range of federal election activity in which state and local parties engage remain sound.

II. The challenged provisions limit contributions.

In urging this Court to disregard *McConnell* and *RNC* and strike down BCRA's soft-money provisions as applied to the funding of "independent" federal election activity, the Louisiana Republicans posit that the provisions are actually spending limits subject to strict scrutiny, not contribution limits subject to less demanding First Amendment scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 20–25 (1976). That erroneous argument is foreclosed by directly applicable precedent.

The challenged provisions do not limit the amount state and local parties may spend on federal election activity. State and local parties are perfectly free to spend as much as they want as long as the spending is not coordinated with federal candidates. (Coordinated spending is generally treated as a contribution to the candidate and is subject to limits that are not challenged here. *See FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*).) BCRA limits the sources and amounts of contributions that the parties may accept and use for federal election purposes, not the total amount of contributions that the parties may

accumulate and spend. If words are to retain their meaning, such provisions are contribution limits, not spending limits. To be sure, the statute applies those contribution limits only to funds used for certain purposes (that is, federal election activity, as well as express advocacy involving federal candidates and contributions to federal candidates). But from FECA's very beginnings, contribution limits have applied only to funds raised for purposes related to federal elections: Even the limits on contributions to federal candidates only apply to contributions to be used to influence federal elections, not to gifts intended to be used for other purposes. That does not mean they are not contribution limits.

Not surprisingly, then, courts have repeatedly rejected the exact argument the Louisiana Republicans press here. In *McConnell*, the Supreme Court addressed the contention that the state-party soft money provisions should be treated as spending limits subject to strict scrutiny, and concluded that although BCRA's state-party soft money provision "prohibits state party committees from spending nonfederal money on federal election activities," it does not "in any way limit[] the total amount of money parties can spend. … Rather, [it] simply limit[s] the source and individual amount of donations. That [it] do[es] so by prohibiting the spending of soft money does not render [it an] expenditure limitation[]." 540 U.S. at 139. *McConnell* therefore sustained the provisions under the level of scrutiny applicable to contribution limits under *Buckley*.

In *RNC*, the three-judge court faced a rehash of the same argument. Like the Louisiana Republicans here, the plaintiffs in *RNC* argued that, as applied to their

proposed spending on federal election activity that was not "targeted" at federal candidates, the contribution limits imposed by BCRA would "function as expenditure limits." 698 F. Supp. 2d at 155. The three-judge court, in language equally applicable here, held that the *RNC* plaintiffs' "argument flies in the face of *McConnell*, which squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not depend on how the candidate or party chooses to spend the money or to structure its finances." *Id*. The three-judge court further noted that the majority opinion in *Citizens United* "expressly left intact this portion of *McConnell*." *Id*. The *RNC* court therefore applied the "less rigorous scrutiny" applicable to "limits on *contributions*." *Id*.

The Louisiana Republicans ask this Court to repudiate these precedents and treat the contribution limits applicable to state and local party committees as spending limits because, in *McCutcheon*, the plurality opinion described the contribution limits at issue there as implicating rights to engage in "speech." *See*, *e.g.*, 134 S. Ct. at 1449. But the *McCutcheon* plurality's use of the term "speech" did not purport to change the standard of scrutiny applicable to contribution limits. On the contrary, the plurality opinion expressly declined to "revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review," *id*. at 1445, and it concluded that the aggregate limits at issue failed the less rigorous standard of scrutiny applicable to contribution limits under *Buckley*. *See id*. at 1446. Indeed, the separate opinion of Justice Thomas, who cast the fifth vote to strike down the aggregate limits,

criticized the plurality for adhering to *Buckley*'s standard of scrutiny for contribution limits. *See id.* at 1464 (Thomas, J., concurring in the judgment).

The Louisiana Republicans' argument thus rests on the supposition that the four Justices in the *McCutcheon* plurality somehow overruled opinions that they specifically disavowed overruling. If a lower court lacks authority to hold that the Supreme Court has overruled precedents by *implication*, *see Agostini*, 521 U.S. at 237, it certainly cannot disregard precedents that the Supreme Court has *explicitly* left intact. Thus, contribution limits are still contribution limits, and they are still subject to *Buckley*'s "relatively complaisant review under the First Amendment," *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). There is no reason to think there is a majority on the Supreme Court to change that settled law, and even if there were, it would be up to that Court, not this Court, to do so.

III. The Louisiana Republicans' focus on the "independence" of their spending reflects a fundamental misunderstanding of the interest served by the contribution limits.

The Louisiana Republicans rely heavily on the assertion that because the Supreme Court has held that independent expenditures themselves do not pose a sufficient risk of corruption to justify restricting them, the contribution limits imposed by BCRA must be unconstitutional as applied to funds to be used for the party committees' independent spending on federal election activity. That argument fundamentally misperceives the rationale for the contribution limits, which is not that a political party's *spending* will corrupt its own candidates, but that large *contributors* to the party pose a real risk of corrupting, or appearing to corrupt, the party's candidates. One of the reasons that a party's independent spending by itself

may pose a lesser risk of corruption than spending by outside individuals or groups is that the party and its candidates already have a close relationship and conjunction of interests. *See Colo. Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615–18 (1996) (opinion of Breyer, J.) (*Colorado I*); *see also id.* at 623. For that very reason, however, *contributions* to party committees pose much the same threat of corruption as contributions to the candidates those party committees support and with whom they are intimately connected. Thus, as the Supreme Court has put it, parties, "whether they like it or not, … act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452.

The Supreme Court has therefore held that limits on contributions to parties are constitutional even if limits on independent party spending are not, because it is the large contributions, not the party's spending, that present the relevant threat of corruption. Thus, the controlling opinion in *Colorado I* emphasized that, although parties could spend in unlimited amounts if they did so independently, corruption could be held in check by adequate limits on the amounts donors could contribute to the parties, and it observed that "Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties." 518 U.S. at 617. And when Congress in fact did so in BCRA by imposing new contribution limits that eliminated the parties' ability to use soft money in connection with federal elections, the Court upheld those limits in *McConnell*—not because it found that party *spending* was inherently corrupting, but because the large *contributions* that

fueled that spending posed the same risk of corrupting candidates as large contributions to the candidates themselves. *See* 540 U.S. at 143–56; 161–71.

In particular, *McConnell* pointed to the "close connection and alignment of interests" between national parties and federal candidates, *id*. at 155, and the "similarly close ties between federal candidates and state party committees," *id*. at 161. That intimate relationship leads candidates to place sufficient value on large contributions to the parties to justify viewing such contributions as posing a threat of corruption similar to that of contributions to the candidates themselves, regardless of the particular way in which the money is ultimately spent in connection with federal elections. *See id*. at 156, 164–71.[2] The record in *McConnell*, moreover, amply demonstrated that regardless of the independence with which the parties may expend these funds in support of their electoral efforts and those of their candidates, the manner in which large contributions were raised by the parties presented ample opportunities for the reality or appearance of prearrangement and corrupt bargains between contributors and candidates. *See* 540 U.S. at 145–56, 161–62.

[2] *See also RNC*, 698 F. Supp. 2d at 159 ("In relying in part on the inherently close relationship between parties and their officeholders and candidates, the Court suggested that federal officeholders and candidates may value contributions to *their national parties*—regardless of how those contributions ultimately may be used—in much the same way they value contributions to *their own campaigns*. As a result, the reasoning goes, contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption.").

The relationship between parties and their candidates sharply distinguishes the issue of the constitutionality of limiting contributions to the parties from the question whether limiting contributions to *outside* groups that engage only in independent spending is permissible. In *SpeechNow.Org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the D.C. Circuit struck down such limits on the theory that, if independent outside spending poses no risk of corrupting candidates, contributions made to outside spending groups "also cannot corrupt or create the appearance of corruption." *Id.* at 694. The Supreme Court has never addressed that issue, but even assuming the correctness of *SpeechNow*'s holding, it has no relevance here. The court in *SpeechNow* recognized that because of the relationship between parties and candidates, "expenditures by political parties … are wholly distinct" from independent expenditures by outside groups. *Id.* at 695. The court therefore made clear that its holding affected only limits on contributions to "outside, independent expenditure-only group[s]," and did not address the constitutionality of other contribution limits. *Id.* at 696. *RNC*, decided on the very same day, and written by a judge who joined the unanimous opinion in *SpeechNow*, apparently saw *SpeechNow*'s holding regarding contributions to outside independent-spending groups as irrelevant to the constitutionality of contribution limits applicable to state and local party committees, as the decision was not even cited in *RNC*. *SpeechNow* does not suggest that Congress may not limit contributions to political parties.

IV. The *McCutcheon* plurality's view of corruption does not control the outcome of this case.

The third major premise of the Louisiana Republicans' position is that the plurality opinion in *McCutcheon v. FEC* adopted a narrow view of the compelling governmental interest in combatting corruption and the appearance of corruption—a view that supersedes the rationale offered in *McConnell* for upholding BCRA's soft-money provisions. According to the Louisiana Republicans, the *McCutcheon* plurality opinion stands for the proposition that even direct quid pro quo exchanges of campaign dollars for official favoritism do not qualify as corruption, or the appearance of corruption, if an officeholder provides only "access" or other preferential treatment to a contributor and stops short of promising to sell a vote or to take other formal, official action. *See*, *e.g.*, La. Repub. S.J. Mem. 24 (arguing that corruption is limited to "act[s] akin to bribery"). Thus, according to the Louisiana Republicans, the *McConnell* record fails to support BCRA's soft-money provisions because—while it is replete with examples where parties openly sold access to officeholders for campaign cash, and officeholders demonstrated favoritism toward party contributors based on their contributions—it does not in their view demonstrate that officeholders sold legislative votes for contributions to state or local parties.

As the FEC's summary judgment memorandum demonstrates (at pp. 40–44), the historical record, the *McConnell* record, and the record of this case provide ample evidence of politicians exchanging more than mere access in return for large contributions to political parties. And in any event, the *McCutcheon* plurality's

statements about corruption provide no substantive basis for casting aside *McConnell*'s anticorruption rationale for approving BCRA's soft money provisions. *McCutcheon* largely echoed statements previously made by the Court in *Citizens United* to the effect that, *in the absence of the opportunity for prearrangement and quid pro quo deals that contributions afford*, any apparent ingratiation or preferential access that may result from purely independent spending by persons or groups unaffiliated with a candidate is not actual or apparent corruption that can justify a limit on such spending. *Citizens United*, 558 U.S. at 357–60; *see McCutcheon*, 134 S. Ct. at 1450–51. Like the Court in *Citizens United*, however, the *McCutcheon* plurality did not purport to validate preferential access or other forms of favoritism that result not from merely "[s]pending large sums," *id.* at 1450, but from prearrangements or understandings reached in exchange for contributions. Indeed, the Court had acknowledged in *Citizens United* that the *McConnell* record established that such transactions had occurred in the soft money era. *See Citizens United*, 558 U.S. at 360–61. *Citizens United* also recognized that the Court owed deference to congressional findings of such abuses. *Id.* at 361. Nothing in the *McCutcheon* plurality opinion's citations of *Citizens United* suggests a retraction of those points.

Nor did the *McCutcheon* plurality purport to disavow *RNC*'s holding that *McConnell*'s soft-money ruling remains valid after *Citizens United*. 561 U.S. 1040, *aff'g* 698 F. Supp. 2d 150. The three-judge court in *RNC* expressly held that the *Citizens United*'s discussion of corruption did *not* undermine *McConnell*'s holding

that the interest in avoiding the reality and appearance of corruption justifies BCRA's soft-money bans. *See* 698 F. Supp. 2d at 158–62. In particular, the court pointed out that, although *Citizens United* stated that mere access and ingratiation resulting from independent spending by unaffiliated persons and groups is not corruption, *Citizens United* had not validated what the *McConnell* record showed to have occurred in the soft-money era: "the *selling* of *preferential access* to federal officeholders and candidates in exchange for soft-money contributions." *Id*. at 158. Nor, *RNC* concluded, did *Citizens United*'s discussion of corruption undermine the *McConnell* Court's conclusion that candidates and parties are so closely connected that candidates value contributions to the parties nearly as much as they value contributions to their own candidacies, and thus the same obvious anticorruption interest that unquestionably justifies candidate contribution limits validates party limits as well. *See id*. at 159. The Supreme Court's affirmance in *RNC* confirmed that, as the three-judge court had found, *Citizens United*'s discussion of corruption left *McConnell*'s soft-money holdings unscathed.

The *McCutcheon* plurality's brief discussion of corruption restates *Citizens United*'s observation that "mere influence or access"—absent any quid pro quo arrangement—is not corruption. *See* 134 S. Ct. at 1450–51. The plurality's statements on the issue seem to have had little or nothing to do with their decision. Rather, their reasons for striking down the aggregate contribution limits at issue rested principally on their skepticism that *limited* contributions spread among a plethora of candidates, party committees, and other political committees would be

likely to corrupt any particular candidate or circumvent base limits on contributions to candidates and party committees. *See id.* at 1452–56. Rather than adopting a new and narrower understanding of corruption, the plurality concluded that "widely distributed support [for political parties] *within all applicable base limits*" was unlikely to present opportunities for corruption. *Id.* at 1461 (emphasis added). Moreover, although the FEC and its supporters had argued that in the absence of aggregate contribution limits, there were many ways in which large sums could be solicited by or amassed to benefit particular candidates, the plurality took the view that those scenarios were implausible, unlikely, and unsupported by evidence, and would or could be prevented by the operation of other laws.[3] *See id.* at 1453–60.

Critically, just as the majority in *Citizens United* stressed that the decision did not overturn limits on soft money contributions, the *McCutcheon* plurality emphasized that the base limits on contributions—including the limits on contributions to party committees at issue here—would remain in effect. *Id.* at 1451 & nn.6–7. Indeed, the *McCutcheon* plurality strongly reaffirmed *Buckley*'s analysis of the anticorruption interests served by base limits. *See*, *e.g.*, *id.* at 1441, 1450. If, as *RNC* held, the *Citizens United* comments on corruption left *McConnell*'s anticorruption rationale for soft-money limits intact, the *McCutcheon* plurality's repetition of the point could not require a different result.

[3] Thus, even if the plurality's opinion were itself authoritative, its discussion of "corruption" would fairly be characterized as dicta, just as the *McCutcheon* dissenters justifiably labeled *Citizens United*'s comments on corruption dicta. *See* 134 S. Ct. at 1471 (Breyer, J., dissenting).

And even if the *McCutcheon* plurality opinion were authoritative and could be read to go beyond *Citizens United*, the *McConnell* record would remain relevant and adequate to demonstrate a threat of actual or apparent corruption justifying party contribution limits. The *McCutcheon* plurality reaffirmed that "Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the *opportunities* for abuse inherent in a regime of large individual financial contributions.'" 134 S. Ct. at 1450 (quoting *Buckley*, 424 U.S. at 27) (emphasis added). Even if a sale of access in exchange for a contribution to a party is not itself "corruption," the existence of such transactions demonstrates that party contributions present the *opportunity* for prearrangement and quid pro quo transactions: If such contributions can buy access, they surely also create the opportunity and, at least, the very real potential for even more sinister transactions and the appearance that such deals may be occurring.

Finally, in asserting that the *McCutcheon* plurality implicitly rejected *McConnell*'s reasoning, the Louisiana Republicans are mounting not an as-applied challenge within the framework of *McConnell*, but a direct frontal assault on *McConnell*'s basis for upholding BCRA's soft-money provisions against the facial challenges asserted in that case. As *RNC* recognized, that kind of claim is "an argument for overruling a precedent," which only the Supreme Court has the power to do. 698 F. Supp. 2d at 157. And whatever it says about corruption, the *McCutcheon* plurality opinion provides no basis for this Court to conclude that the Supreme Court has overruled *McConnell* on soft money. Not only did the plurality

opinion expressly state that it was "clearly" not overruling *McConnell*'s soft-money holding, 134 S. Ct. at 1451 n.7, but the reasoning of four Justices could not supersede a majority holding of the Court in any event. Because the *McCutcheon* opinion's comments on corruption "did not represent the views of a majority of the Court," courts in later cases are "not bound by its reasoning." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987); *see United States v. Brobst*, 558 F.3d 982, 991 (9th Cir. 2009); *see also United States v. Epps*, 707 F.3d 337, 351 (D.C. Cir. 2013). In appears quite unlikely that a majority of the Supreme Court would agree with the extreme version of the *McCutcheon* plurality's views advocated by the Louisiana Republicans, but even if it were possible that the Justices might consider whether to overrule *McConnell* on such a basis, this Court cannot.

V. The Louisiana Republicans' arguments would have extraordinarily far-reaching negative consequences.

The Louisiana Republicans obscure the enormous consequences of accepting their argument. Although they present their claims as a focused set of as-applied challenges, the theory that underlies all the challenges is that funds used for any independent spending by a party committee—even independent spending for express candidate advocacy, and even independent spending by a national rather than a state party committee—cannot be subject to the source and amount limitations imposed by federal law. If their argument were accepted, the only party fundraising that could be subjected to contribution limits would be funds used for direct cash contributions to federal candidates and funds used for coordinated expenditures (which are treated as contributions under federal law). Because the

amounts of such contributions and coordinated spending are subject to limits, they amount to a relatively small proportion of the parties' overall spending. The remainder, accounting for the vast bulk of party spending, could not be subjected to federal contribution limits at all under the Louisiana Republicans' theory. The return to the era of soft money would be complete.

Indeed, although the Louisiana Republicans purport not to challenge the pre-BCRA laws and regulations requiring allocation of spending between hard-money and soft-money accounts for certain state-party activities affecting federal elections, those rules, too, would be unconstitutional under their theory. If no interest is sufficient to support contribution limits (that is, the use of hard money) to fund such activities as long as they are "independent," no rationale would be sufficient to support requiring that *part* of the money used for them must be subject to federal contribution limits.

Nor can the Court derive any comfort from the Louisiana Republicans' assertion that they would raise funds for federal election activity subject to the (very high) limits on contributions imposed by Louisiana for contributions to the state parties. If federal limits on the funds used for such "independent" federal election activity cannot be justified under the First Amendment, it would follow that state contribution limits applicable to fundraising for the same activity would be equally suspect. After all, the states, too, are subject to the First Amendment. Success in this challenge would inevitably lead to a follow-on challenge to state-law limits. The natural consequence of the Louisiana Republicans' theories, and their

undoubted ultimate goal, is the eradication of all limits on contributions to parties for "independent" campaign activity.

Fortunately, that result is foreclosed by precedent. The constitutionality of contribution limits applicable to state and local party fundraising has twice been authoritatively sustained, and those limits remain constitutional as applied to federal election activity, independent or not.

CONCLUSION

This Court should deny the Louisiana Republicans' motion for summary judgment, grant the Federal Election Commission's cross-motion for summary judgment, and dismiss this action with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served by the Court's ECF system on all parties to this action.

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