UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	)	REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission ("Commission") respectfully submits this reply memorandum in support of its motion for summary judgment. Plaintiffs' opposition essentially relies on two arguments: (1) "[T]he relevant issue [in this case] is the nature of Plaintiffs' intended First Amendment activities"; and (2) those activities "are too far removed from federal elections and campaigns to be regulated." (*See* Pls.' Mem. in Opp. to Def. FEC's Mot. for S.J. ("Pls.' S.J. Opp.") at 3.) Each of these arguments is contrary to law and unsupported by the factual record.

First, the "relevant issue" here is the constitutionality of a *contribution* limit; there is no prohibition on spending — i.e., "activities" — before the Court. *Compare McConnell v. FEC*, 540 U.S. 93, 134-42 (2003) (setting forth standard of review for contribution limits at issue here), *with* Pls.' S.J. Opp. at 3 & n.1 (citing *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2671 (2007) (discussing corporate spending restriction), and *Buckley v. Valeo*, 424 U.S. 1, 19 n.18 (1976) (discussing expenditure limit)). The Supreme Court's test for the constitutionality of contribution limits asks whether the contributions to be limited "have a corrupting influence or

give rise to the appearance of corruption," *McConnell*, 540 U.S. at 145, or whether the limits "prevent[ ] the circumvention" of other contribution limits, *id*. at 144. If the contribution limits further these important governmental interests, they are constitutional unless they "are so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *Id*. at 135 (quoting *Buckley*, 421 U.S. at 21); *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality).

As to the prevention of actual and apparent corruption, the *McConnell* record conclusively demonstrated that political parties' acceptance of unlimited donations had a "corrupting influence," 540 U.S. at 145, and created the appearance that legislative activity was improperly influenced by those who donated the largest amounts. *See id*. at 142-56. In their opposition, Plaintiffs ask this Court to disregard *McConnell*'s factual and legal holdings regarding the corrupting effects of soft money because, Plaintiffs argue, the soft money at issue in *McConnell* was spent on activities that "directly benefit[ted]" federal officials, whereas Plaintiffs' planned activities would not provide such direct benefits. (*See* Pls.' S.J. Opp. at 4-5, 8.) Thus, Plaintiffs assert, federal officials would not feel gratitude to donors of unlimited amounts, and so "the FEC's worry is for not [sic]." (*See id*. at 5.)

As with nearly every other argument Plaintiffs have made in this case, they raised this assertion in *McConnell*, and the Court found it untenable:

> The fact that officeholders . . . donat[e] their valuable time [to soft-money donors] indicates either that officeholders place substantial value on the soft-money contribution themselves, *without regard to their end use*, or that national committees are able to exert considerable control over federal officeholders. . . . Either way, *large soft-money donations to national party committees are likely to buy donors preferential access to federal officeholders no matter the ends to which their contributions are eventually put*.

McConnell, 540 U.S. at 155-56 (emphasis added; citations omitted). The Court thus unequivocally rejected the argument that the limits on soft-money contributions to political parties are justified only to the extent that those donations are spent to directly benefit federal officeholders. Rather, actual or apparent corruption arises because — as the facts in *McConnell* showed and Plaintiffs have not refuted — officeholders inevitably know who the largest soft-money donors to their parties are and feel tremendous pressure to assist those donors. (*See* FEC S.J. Opp. at 16-24 (Docket No. 39); FEC Mem. in Support of Mot. for S.J. at 7-11 (Docket No. 56) ("FEC S.J. Mem.").)[1] Thus, "'whether they like it or not,'" political parties accepting soft money "serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *McConnell*, 540 U.S. at 145 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001)). Because the Court specifically held that this actual or apparent corruption is inherent in allowing political parties to *accept* unlimited donations, Plaintiffs' argument that the governmental interest in limiting soft money only applies to funds *spent* on certain activities must fail as a matter of law.[2]

In a further attempt to avoid the plain holding of *McConnell*, Plaintiffs repeat their allegation that they will "not provide non-federal contributors with preferential access to federal

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[1] Plaintiffs note that two of the witnesses in this case, Messrs. Rozen and Greenwald, submitted in *McConnell* declarations that discussed, *inter alia*, officeholder solicitations of soft money, but Plaintiffs do not point out any discrepancies between the testimony in the two cases. (*See* Pls.' S.J. Opp. at 6-8.) Plaintiffs' burden in opposing the Commission's motion for summary judgment is to "set out specific facts" showing genuinely disputed issues of fact. *See* Fed. R. Civ. P. 56(e)(2). Regarding the Rozen and Greenwald declarations, Plaintiffs provide no evidence whatsoever disputing the declarants' testimony that — due to the inevitable officeholder knowledge of and gratitude for unlimited donations — the same actual and apparent corruption that existed before the Bipartisan Campaign Reform Act would arise under Plaintiffs' proposed soft-money system. (*See* Rozen Decl. ¶¶ 3-4 (FEC Exh. 31); Greenwald Decl. ¶ 11 (FEC Exh. 30).)

[2] Plaintiffs' argument also fails as a factual matter, given that the voter registration, GOTV, sham issue advertising, and other activities they wish to fund with unlimited donations do, in fact, benefit federal candidates. (FEC S.J. Mem. at 12-19; FEC SMF ¶¶ 57-83.)

candidates or officeholders." (Pls.' S.J. Opp. at 5-6, 8.) As noted above, however, the evidence shows that those donors who give the most soft money to the parties will receive such access and influence regardless of whether the parties actively facilitate it, just as was the case before the Bipartisan Campaign Reform Act ("BCRA"). So, if unlimited soft-money donations were to become permissible again, federal candidates and officeholders would know who the big donors are, and, whether directly or through lobbyists, those donors would exploit that knowledge to gain legislative influence that is unavailable to those who do not give huge sums, just as was the case before BCRA. Plaintiffs provide no argument — much less evidence — to contradict these showings of inevitable systemic corruption, relying instead on their allegations of future self-restraint in facilitating preferential treatment for soft-money donors. Even if taken as true,[3] however, Plaintiffs' unenforceable pledge to avoid selling access in exchange for soft money would not — and could not — prevent the same corruption that arose in the pre-BCRA system from infecting the soft-money system that Plaintiffs seek to create. The *McConnell* record established definitively that such corruption is inherent when political parties accept massive unlimited donations, because the parties are "'inextricably intertwined with federal officeholders and candidates.'" 540 U.S. at 155 (quoting 148 Cong. Rec. H409 (Feb. 13, 2002)).

[3] As the Commission noted in its prior brief, there is substantial reason to doubt Plaintiffs' self-imposed restriction: It is essentially identical to the RNC's sworn testimony in *McConnell* regarding its pre-BCRA policies — testimony that was not consistent with the factual record as found by the Court. (*See* FEC S.J. Mem. at 9-11; FEC SMF ¶¶ 11, 14.) Plaintiffs provide no facts to dispute the Commission's showing that their current pledge largely repeats their prior one. Plaintiffs continue to maintain that "the record from *McConnell* does not support" rampant pre-BCRA trading of soft money for access to federal officeholders by the RNC (Pls.' Statement of Material Issues ¶ 11), in spite of the Supreme Court's holding — supported by citations to five pages of the district court opinions — that "the RNC holds out the prospect of access to officeholders to attract soft-money donations and encourages officeholders to meet with large soft-money donors." (FEC SMF ¶ 11 (quoting *McConnell*, 540 U.S. at 150-52 (citing *McConnell*, 251 F. Supp. 2d at 500-03 (Kollar-Kotelly, J.), 860-61 (Leon, J.))).)

Regarding the second test of constitutionality for contribution limits, i.e., whether the limits are so low that the parties cannot "amass[ ] the resources necessary for effective advocacy," Plaintiffs make no effort to rebut the Commission's extensive factual showing that the political parties have raised billions of dollars since BCRA — amounts unquestionably large enough to finance "effective advocacy." (*See* FEC S.J. Mem. at 2-7; FEC SMF ¶¶ 40-50.)[4] In lieu of presenting any facts, Plaintiffs object that the Commission has no constitutional authority to determine what level of advocacy is "effective." (*See* Pls.' S.J. Opp. at 2-3.) This mischaracterizes the Commission's role in this case, which is to demonstrate the constitutionality of BCRA under the Supreme Court's "necessary for effective advocacy" test. By providing the Court with statistics about the parties' fundraising prowess, the Commission is not, as Plaintiffs argue, presuming that "all political speech is regulable" (*id.* at 2); rather, the Commission is simply explaining that hundreds of millions of dollars provide the parties with more than sufficient funds, in both absolute and relative terms, to have their voices heard in the political marketplace.

Finally, even if this Court were to consider the specific activities that Plaintiffs wish to fund with soft money, the Supreme Court has already held that reducing the corruption arising from soft-money donations to political parties is a governmental interest sufficiently important to justify Congress' decision to require parties to fund those activities with money raised pursuant to the Federal Election Campaign Act's source-and-amount limitations. (*See* FEC Mot. to Dismiss at 17-19 (discussing *McConnell*, 540 U.S. at 154-73).) In this context, the *McConnell* Court specifically considered the activities at issue here and found no constitutional difficulty in

[4] To properly apply the automotive analogy Plaintiffs cite in their opposition brief (at 3 n.1): BCRA Title I provides that Plaintiffs may drive any car as far and as often as they would like, as long as they buy the gasoline one tankful at a time; there is no limit on the total amount of gas that Plaintiffs can buy, the cars that they can fuel with it, where they can drive, etc.

the requirement that they be financed with federal funds.[5] (*Id.*) Plaintiffs' opposition brief provides no new facts regarding these activities; indeed, Plaintiffs do not respond at all to the Commission's primary factual showings regarding Plaintiffs' planned spending. Most notably, Plaintiffs provide no facts to dispute the Commission's evidence that (1) the RNC's "grassroots lobbying" activity would include — by Plaintiffs' own admission — the same sham issue advertising that the Supreme Court found regulable in *McConnell*; and (2) the RNC's "state election" activity and the other Plaintiffs' "federal election activity" — by Plaintiffs' own admission — affect federal elections.[6] (*See* FEC S.J. Mem. at 12-19; FEC SMF ¶¶ 60-67, 72-83; Pls.' S.J. Opp. at 8-12.) Because Plaintiffs cannot avoid *McConnell* as a matter of law or provide facts by which to distinguish it, the Commission is entitled to summary judgment on each of Plaintiffs' claims regarding particular soft-money activities.

For the foregoing reasons, the Commission respectfully requests that the Court grant summary judgment to the Commission.

Respectfully submitted,

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[5] Plaintiffs' assertion that "federal funds . . . by there [sic] very nature are raised for federal purposes" (Pls.' S.J. Opp. at 4) is purely semantic. "Federal funds" are simply funds raised within FECA's contribution limits, not funds that must be spent for any particular purpose. For example, Plaintiffs have spent federal funds on state elections, as demonstrated by the RNC's direct contributions of $2.2 million in federal funds to state candidates and parties in off-year elections. (FEC SMF ¶ 57.)

[6] As to elections in which there is no federal candidate on the ballot, Plaintiffs continue to assert that the "FEC's own expert in *McConnell* noted that contributions to state candidates in such elections do not affect federal elections." (Pls.' S.J. Opp. at 9 (citing *McConnell*, 251 F. Supp. at 830 (Leon, J.); Pls.' S.J. Reply at 13 (same).) That expert, however, testified only that donations to odd-year gubernatorial candidates were not "*intended* to affect a federal election," *McConnell*, 251 F. Supp. at 830 (Leon, J.) (emphasis added); *see also id*. at 769 n.31 (Leon, J.), 465 (Kollar-Kotelly, J.), and did not contradict the Commission's showing that voter registration efforts, for example, have continuing value in subsequent elections. (*See* FEC SMF ¶ 60.)

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