United States District Court
District of Columbia

Republican Party of Louisiana et al., *Plaintiffs*	
v.	**Civil Case No. 1:15-cv-1241-CRC**
Federal Election Commission, *Defendant*	THREE-JUDGE COURT REQUESTED

Reply Memorandum Supporting Application for Three-Judge Court

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Table of Contents

Table of Authorities

Cases

Constitutions, Statutes & Rules

Other Authorities

Introduction

As explained in Plaintiffs' Three-Judge Court Memo (Doc. 3) ("Memo"), this case is straightforwardly substantial and non-foreclosed. While *McConnell v. FEC*, 540 U.S. 93 (2003), *facially* upheld the challenged BCRA provisions, central to this case are *as-applied* challenges. So this situation is like *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*")—an as-applied challenge to a BCRA provision that *McConnell* facially upheld—wherein the unanimous Supreme Court held that a facial holding does not foreclose an as-applied challenge despite some *language* that FEC might so interpret. In *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), WRTL prevailed on the merits (under BCRA § 403).

A central focus of the present case is the desire of state and local committees of a political party to make non-individualized, independent communications that are constitutionally like the "independent expenditures ... [that] do not give rise to corruption or ... [its] appearance." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).[1] Some communications will merely exhort registering and voting. To fund those communications, Plaintiffs want to use state-regulated contributions that they legally *have*, and routinely raise, from individuals. Alternatively they want to put such funds into an independent-communications account ("ICA") that will report under regulations and guidance that FEC provides (as it did with non-contribution accounts ("NCAs")). These plans put this case squarely in the independent-expenditure case line. But even were this a contribution-limit case, the analysis would be essentially the same because the Supreme "Court has identified only one legitimate governmental interest for *restricting campaign finances*: preventing corruption or ... [its] appearance." *McCutcheon v. FEC*, 134 S.Ct. 1434, 1438 (2014)

[1] Non-individualized, independent communications are constitutionally like independent expenditures (non-corrupting due to independence). (Memo at 10 n.15, 12-13, 22-23.) FEC does not rebut this, merely insisting these communications are not in the independent-expenditure case line because no unlimited contributions are involved. This error is refuted in Part III.B.1.

(controlling plurality opinion) (emphasis added). Both *Citizens United* and *McCutcheon* hold that preventing this narrow quid-pro-quo corruption is the *only* cognizable anti-corruption interest—not preventing "access," "gratitude," or *any other* theory of "corruption." So FEC must prove the challenged provisions tailored to such corruption as applied. It cannot, as a matter of law.

In its opposing memorandum (Doc. 15) ("Opposition"), FEC attempts to prove this action insubstantial/foreclosed based on two key arguments. First, it erroneously says Plaintiffs *really* challenge the $10,000 contribution limit (Opposition at 1,[2] 24-25) and an FEC regulation (Opposition at 29-31), thereby taking the case out of BCRA § 403's scope.[3] Second, FEC erroneously argues that by *not* challenging the $10,000 contribution limit, i.e., by "no longer seeking to raise unlimited funds for their proposed independent-expenditure-only accounts," "Plaintiffs have navigated away from the 'confluence' of precedents that led the Court to find their previous challenge substantial." (Opposition at 31.)[4] Beyond these two foundational but flawed arguments, FEC relies on certain opinion *language* instead of trying to prove this case insubstantial under the required interest-tailoring *analysis* based on current precedents.[5] All FEC's arguments about estoppel, standing, and so on rest on these flawed foundations and will be addressed after the foundations are shown to be flawed (though the flaws are self-evident). *See infra* at Part III.B.6.

The big picture here is that controlling holdings prove this action substantial and non-fore-

[2] ""[P]laintiffs' new complaint avoids mentioning FECA's $10,000 base annual limit ... to avoid admitting the obvious—that *they are again challenging this limit*." (*Id.* (emphasis added).)

[3] Of course Plaintiffs do *not* challenge the base limits or the regulation, so this foundation crumbles as further explained below. *See infra* at 3-4.

[4] Note the conflict in FEC's arguments that Plaintiffs *do* and *do not* challenge the $10,000 limit. First, FEC argues that Plaintiffs *do* challenge the $10,000 limit (taking this case outside BCRA). Second, FEC says Plaintiffs do *not* challenge the limit (taking this case outside the independent-expenditure case line). This second foundation also crumbles because this case is squarely within that independent-expenditure case line. *See infra* at 10-12.

[5] Reliance on language from some opinion, as in *WRTL-I*, *see supra* at 1, instead of constitutional analysis is erroneous. (Memo at 14-17.)

closed (Memo at 9-27), which holdings FEC makes little effort to rebut. Under the required interest-tailoring analysis, *Citizens United* and *McCutcheon by themselves* prove this action substantial and non-foreclosed. Those cases profoundly changed First Amendment jurisprudence in political expenditure and contribution contexts. The risk of cognizable corruption (and its appearance) now "arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 134 S.Ct. at 1460. No contributions *to candidates or officeholders* are involved here, so no anti-corruption interest arises. And the non-individualized, independent communications central to this case are constitutionally like *non-corrupting* independent expenditures. So FEC has not proved this action *obviously* frivolous or *clearly* foreclosed *beyond debate*, as required. (Memo at 5.) Thus, BCRA § 403's special rules apply to this case, which is the next logical step in the *WRTL–Citizens United–McCutcheon* line of cases defending those engaged in core First Amendment speech and association from unconstitutional BCRA provisions.

I. This Action Meets BCRA § 403's Criteria.

Plaintiffs proved this action meets BCRA § 403's criteria: (i) a constitutional challenge (ii) to a BCRA provision. (Memo at 2.) FEC does not contest that the challenges are *constitutional* or that provisions actually challenged in the Complaint are *BCRA provisions*. But FEC, in the first of its two key arguments, insists that Plaintiffs *really* challenge (**1**) the $10,000 base limit (*see supra* at note 2 (quoting Opposition)) and (**2**) FEC's regulatory voter-registration-activity ("VR") and get-out-the-vote-activity ("GOTV") definitions (Opposition at 29-31), though the Complaint does not. FEC's arguments are designed to defeat BCRA § 403 jurisdiction, but FEC errs.[6]

(**1**) The $10,000 contribution limit, 52 U.S.C. § 30116(a)(1)(D), is *absent* from challenged

[6] FEC's arguments regarding estoppel, standing, redressability, injury, and causation are rebutted at Part III.B.6. For present, note that those arguments rely primarily on the erroneous notion that Plaintiffs really challenge the $10,000 limit, so the following refocusing on what Plaintiffs *actually* challenge answers those FEC arguments. *See* Part III.B.6.

provisions in the Complaint. (Compl. at 50-51.) Plaintiffs *did* challenge that base limit in the case they voluntarily *dismissed* (without prejudice), *Republican National Committee v. FEC* (No. 14-cv-853) ("*RNC-II*"). (*See RNC-II* Doc. 1 at 18.)[7] But in *this* case, Plaintiffs (as masters of their complaint) chose *not* to challenge the base limit. So they cannot seek the relief here of receiving *unlimited* contributions into a federal non-contribution account (an "NCA"). Plaintiffs *do* challenge BCRA's Ban on using nonfederal funds (the state-regulated funds state and local committees *have* and routinely raise) for federal election activity ("FEA") as applied to certain communications and contexts (and facially).[8] So by not challenging the base limit, Plaintiffs seek lesser relief than they did in *RNC-II* but thereby qualify for BCRA § 403's rules, which they hope will get them the valuable relief they do seek in time to be of use in 2016. (*See* Motion to Expedite and Memo, Docs. 9 and 9-1.) Thus, Plaintiffs do not challenge the base limit, and the requested relief will redress their injury of not being able to use nonfederal funds for FEA as sought.[9]

(**2**) FEC argues that Count I really challenges FEC's VR and GOTV definitions. (Opposition at 2, 29-31.) FEC errs for at least four reasons. First, the Complaint does not challenge those regulations. (Compl. at 50-51.) Second, as FEC's counsel admit (Opposition at 31), FEC was forced

[7] In *RNC-II*, this Court decided that a challenge to the base contribution limits (increased by BCRA) was a challenge to FECA and certified en-banc questions for qualified plaintiffs. (*RNC-II* Doc. 20 at 11-12.) For those not statutorily qualified, "the Court ... stay[ed] the claims of those parties pending the decision of the circuit on the certified questions." (*RNC-II* Doc. 26 at 2.)

[8] Plaintiffs believe that, if they receive that requested relief, FEC will reimpose the pre-BCRA allocation rules on their activity, so that they will have to pay for FEA with both federal and nonfederal funds under FEC allocation formulas. FEC's counsel argue that FEC might not reimpose allocation formulas on FEA, but that is up to FEC's commissioners and is not at issue in this case. This is not a "legislative request" (Opposition at 3), only a prediction of FEC action. If FEC does *not* reassert its pre-BCRA rules (which were wholly the FEC's creation), a holding that the Ban is unconstitutional as applied (or facially) would permit FEA to be funded with all nonfederal funds. But the representation that FEC might not reassert its pre-BCRA allocation rules seems unlikely. Anyway, it has nothing to do with whether the Ban is constitutional.

[9] Plaintiffs make a First Amendment claim, not a "federalism" one. (Opposition at 37 n.11.)

by *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays-III*"), to include merely encouraging registering/voting and Internet communications in those definitions because *Shays-III* held that BCRA, *the statute*, *required* such definitions. So the challenge is properly to the statute.[10] Third, any successful challenge to a statute automatically undercuts any contrary regulation, so it is unnecessary to challenge a regulation where the statute may be attacked on constitutional grounds. Fourth, FEC does not advise the Court of its experience in *WRTL-II* and *Citizens United*, which bears directly on FEC's argument. In *WRTL-II*, the Supreme Court held BCRA's ban on electioneering communications unconstitutional as applied to electioneering communications that were really issue advocacy under *WRTL-II*'s appeal-to-vote test. 551 U.S. at 469-70. As *Citizens United* describes it, FEC's reaction to *WRTL-II*'s objective appeal-to-vote test was to create "a two-part, 11-factor balancing test to implement" it. 558 U.S. at 335. The Court responded:

> This is precisely what *WRTL* sought to avoid. *WRTL* said that First Amendment standards "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'" 551 U.S., at 469 (opinion of ROBERTS, C.J.) (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 547 (1995); alteration in original). Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests.

Id. at 336. That flawed regulatory definition died (though not directly challenged) because the Supreme Court held the underlying ban on corporate electioneering communications unconstitutional. *Id.* at 365-66. The same happens to implementing regulations whenever their foundational statute is held unconstitutional. Plaintiffs here neither challenge the regulations nor need to.

II. BCRA § 403's Rules Were Employed in Similar Cases.

Plaintiffs established that BCRA § 403's rules were employed in *McConnell*, 540 U.S. 93,

[10] Plaintiffs explained the history of FEC's own resistance to including such mere exhortation, including by Internet, to show that FEC *itself* believed such definitions overbroad. Nowhere do Plaintiffs challenge the regulations as "unduly 'broad,'" as FEC implies. (Opposition at 30.) At the place FEC cites, Plaintiffs merely said: "That 2008 holding [*Shays-III*], rejecting FEC's individualized-assistance approach, led to the broad definitions ...." (Compl. ¶ 53.)

and *McCutcheon*, 134 S.Ct. 1434, with *the same or similar BCRA provisions*. (Memo at 3-4.)

In response—in a discussion of redressability (Opposition at 21)—FEC ignores Plaintiffs' focus on *the BCRA provisions involved* (conceding that those are BCRA provisions) and tries instead to distinguish *McConnell* and *McCutcheon*. (Opposition at 25.) While BCRA procedures were proper in *McConnell* and *McCutcheon*, FEC argues, the present case does not qualify because Plaintiffs "seek[] to avoid FECA's contribution limits due to the claimed 'independence' of the plaintiffs' concededly federal activities." (*Id.*) FEC errs for at least three reasons.

First, Plaintiffs do *not* concede that their planned activities are "federal"—in fact, Plaintiffs cited FEC itself for the proposition that the overbroad VR and GOTV definitions eventually promulgated "'would ... federalize a vast percentage of ordinary campaign activity.'" (Memo at 30 (citation omitted).) Second, Plaintiffs do *not* challenge the $10,000 base contribution limit. *See supra* at 3-4. So FEC's invocation of this Court's rejection of a three-judge court in *RNC-II*—which this Court did based on an *actual* challenge to the base contribution limits—is built on FEC's flawed key argument that Plaintiffs challenge what they do not challenge. (Opposition at 25.)[11] Third, FEC's next statement confuses constitutional analysis. FEC asserts that "plaintiffs' claim similarly [to the challenge to the FECA contribution limit in *RNC-II*] does not ultimately hinge on any alterations made by BCRA, but by the purported 'absence of prearrangement and coordination' (citation omitted)]—the independence justification upon which *Buckley* invalidated FECA's *expenditure* limits." (*Id.* (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)) (emphasis in original).) That purported constitutional analysis is badly confused. The proper analysis is as follows. Plaintiffs *do* challenge BCRA provisions on the First Amendment ground that no anti-corruption

[11] This flawed argument (that Plaintiffs challenge the $10,000 base limit) so permeates FEC's opposition that time and space do not permit Plaintiffs to systematically catalog all occurrences. But since all Opposition arguments build on this foundation, its flaw dooms all built on it.

interest justifies them as applied, inter alia, to non-individualized, independent communications (including from an ICA) that are constitutionally like independent expenditures that are non-corrupting due to their independence. That is straightforward constitutional analysis. FEC's confused argument does not alter the qualification of this case for BCRA § 403's rules. And FEC's preceding arguments do not show that this Court cannot redress Plaintiffs harms as FEC claims (Opposition at 27.) Redressability is further addressed below. *See* Part III.B.6.

III. This Action Presents Substantial, Non-Foreclosed Claims.

This action presents substantial, non-foreclosed claims. (Memo at 4-39.)

A. Any Criteria Beyond BCRA's Two Criteria Must Be Narrow.

Plaintiffs showed that any criteria beyond BCRA § 403(a)'s two stated criteria must be narrow for several reasons. (Memo at 4-9.) Particularly, the test stated in *Feinberg v. FDIC*, 522 F.2d 1335 (D.C. Cir. 1975), is narrow, requiring FEC to prove this action *obviously* frivolous or *clearly* foreclosed *beyond debate*. (Memo at 5.) FEC does not rebut *Feinberg*'s requirements, (Opposition at 19-20), so that is the issue regarding each count.

B. Controlling Holdings Prove this Action Substantial and Non-Foreclosed.

Plaintiffs established that *contribution* and *expenditure* precedents prove this a substantial, non-foreclosed action. (Memo at 9-27.) As they explained (and will do so further in merits briefing), the Supreme Court has wrought a profound change in First Amendment jurisprudence after *McConnell* in the recent decisions in *Citizens United* (independent-expenditure context) and *McCutcheon* (contribution-to-political-party context). This profound change in constitutional analysis includes (i) reaffirmation of the vital role of political participation in our republic and the need to protect political speech and association, including the doctrine that all ties in judicial scrutiny go to free speech and association; (ii) narrowing of the anti-corruption interest to pre-

venting only quid-pro-quo corruption (and thus not *anything* else); (iii) reinvigorated scrutiny, including for closely drawn scrutiny; (iv) rejection of mere speculation by Government to meet its burden of proof in First Amendment cases; (v) reaffirmation that the First Amendment trumps deference to Congress; and (vi) the holding that independent communications pose no risk of quid-pro-quo corruption or its appearance, as a matter of law. (Memo at 9-17.) Gone are *McConnell*'s broad "corruption," deference to Congress, willingness to accept speculation in place of evidence, and so on that led to the facial upholding of the Ban. The Supreme Court's profound jurisprudential change goes to the core of this case, which like *Citizens United* involves non-corrupting independent communications and like *McCutcheon* involves non-corrupting contributions to committees of political parties.

And a prominent campaign-finance-reform group has just called for rethinking campaign-finance regulation to empower political parties in view of their vital role and declining power. *See* Brennan Center for Justice, *Stronger Parties, Stronger Democracy: Rethinking Reform* (2015) ("*Stronger Parties*").[12] The Brennan Center expressly calls for "reform ... to relax some of BCRA's federalization of state and local parties." *Id.* at 15. And it recommends higher contribution limits "for specific party activities that enhance grassroots participation, such as voter registration and GOTV." *Id.* at 16. On the same day *Stronger Parties* was released, a prominent op-ed called for fixing the "steady erosion of the power of political parties, as opposed to that of independent expenditure committees," and advocated "changing the law to put political parties on the same plane as super PACs and other independent groups." Thomas B. Edsall, *Can Anything Be Done About All the Money in Politics?*, N.Y. Times, Sept. 16, 2015.[13] Former (Obama) White

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

[13] *See* http://www.nytimes.com/2015/09/16/opinion/can-anything-be-done-about-all-the-

House Counsel Bob Bauer took note of both publications and added that "the reevaluation is necessary and there has been significant movement in that direction, now blessed by a leading reform organization and one of the press' more informed and experienced commentators on campaign finance." Robert F. Bauer, *Parties and the Rethinking of Reform*, More Soft Money Hard Law, Sept. 17, 2015.[14] These calls to help political parties, especially state and local committees, echo the calls for help by these committees at FEC's own 2014 public forum. (Compl. ¶¶ 69-73.) So even campaign-finance reformers see little corruption risk in empowering state and local committees to do VR and GOTV without BCRA burdens, as discussed further in Part.III.C.

But FEC ignores the vital interests of state and local parties and the needs of our democratic system. And it largely ignores the Supreme Court's sea change on political-speech jurisprudence that allows this Court to help those parties in this case. Instead of addressing that sea change, FEC belittles Plaintiffs' careful explanation of the Supreme Court' profound change as "lengthy and erroneous interpretive contortions." (Opposition at 3.) And where FEC does touch on the sea-change subject, primarily in a footnote, it mostly ignores the profound changes described above (e.g., what is now cognizable corruption) and instead resorts to argument by such language as "bizarrely assert," "sophistic twist," "deconstructs," and "fictional holdings." (Opposition at 35 & n.10.) Such argument-by-pejorative does not carry FEC's burden of proving that the Supreme Court has *not* profoundly altered First Amendment jurisprudence since *McConnell*. FEC's limited specific argument is addressed in the following discussion of controlling precedents.

For present, note that (i) the challenged provisions have caused serious unintended consequences,[15] as the campaign-finance-reform community recognizes; (ii) the reform community

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money-in-politics.html.

[14] *See* http://www.moresoftmoneyhardlaw.com/2015/09/parties-rethinking-reform/?.

[15] This heightens scrutiny: "the strength of the governmental interest must reflect the serious-

(which promoted BCRA and helped defend it in past cases) no longer sees any sufficient corruption risk to prevent more money for the traditional activities of state and local parties, especially for VR and GOTV; (iii) the profound change in First Amendment jurisprudence makes relief for such parties constitutionally proper in this case; and (iv) FEC's extensive efforts to show this case insubstantial in such a context are misguided.

1. *McConnell* Deemed the Ban a Contribution Restriction, But the Communications at Issue Are Like those Protected in the Independent-Expenditure Cases.

As Plaintiffs established, *McConnell* treated the nonfederal-funds Ban as a contribution restriction, but *McCutcheon* treated restrictions on contributions to a political party as a restriction on "speech" (Memo at 9 (citation omitted)) without deciding whether to apply strict or closely drawn scrutiny because, under either, a "fit" with a narrow anti-corruption interest was required but lacking. (Memo at 10.) That is true here. Whether considered contribution or expenditure restrictions, the challenged provisions fail because there is no fit between them and preventing narrow quid-pro-quo corruption (or its appearance), especially as applied to independent communications, including those funded through an ICA. (*Id.* at 10-14, 22-23, 34-35.) Plaintiffs also explained that, because the challenged provisions restrict independent communications that are constitutionally like non-corrupting independent expenditures, this case is part of the independent-expenditure line of cases. (*Id.*)

FEC responds with its second key argument—attempting to show that such independent communications and ICA are not within the independent-expenditure case line because Plaintiffs do *not* challenge the $10,000 contribution limit. "By no longer seeking to raise unlimited funds for their proposed independent-expenditure-only accounts," "Plaintiffs have navigated away from the 'confluence' of precedents that led the Court to find their previous challenge substantial."

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ness of the actual burden on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008).

(Opposition at 31.) FEC pronounces this "too clever by half." (Opposition at 31.)

FEC is wrong. The independent-expenditure case line turns on the *independence of communications*. The line began with *Buckley*, 424 U.S. 1, which held that "independent advocacy," *id.* at 46, poses no corruption (or its appearance) *due to independence*, *id.* at 47:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

Buckley's holding had nothing to do with raising unlimited funds for an independent-expenditure-only account, so FEC must insist that *Buckley* is not in the independent-expenditure case line. Likewise, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"), and *Citizens United*, 558 U.S. 310, reiterated *Buckley*'s holding that independent communications pose no corruption risk *due to their independence* and therefore held that independent advocacy, by political-parties and corporations, poses no corruption risk. But *Colorado-I* and *Citizens United* had nothing to do with unlimited funds for an independent-expenditure account so, per FEC's argument, neither is in *Buckley*'s independent-advocacy case line. Of course, those three cases *are* the independent-advocacy case line with which lower courts must comply when considering whether independent advocacy poses a corruption risk. The sole constitutional basis of *Buckley*'s independent-advocacy case line is that *independence* removes any cognizable risk of corruption (or its appearance). Plaintiffs' non-individualized, independent communications (including from an ICA) likewise pose no risk of corruption because of their independence. So this case is squarely in *Buckley*'s independent-advocacy case line and squarely presents the confluence between that line of cases and *McConnell*'s theories of "corruption" that have been

expressly rejected in the *McCutcheon* context of contributions to political parties. If contributions to political committees (PACs) to be used for independent expenditures pose no quid-pro-quo-corruption—because of the communications' *independence*—contributions to state and local committees that are used for independent communications likewise pose no corruption.

2. *Contribution* Precedents Prove this Action Substantial and Non-Foreclosed.

Plaintiffs noted that in the contribution-restriction context *McCutcheon* controls and provides controlling holdings. (Memo at 10-12.) FEC needed to show that *McCutcheon* did *not* say what Plaintiffs *quoted* from the case's constitutional analysis. FEC did not, could not. Rather FEC sought to dismiss the controlling holdings as "strain[ing] credulity." (Opposition at 35 n.10.) FEC tried to support this solely by asserting that Plaintiffs claim "that *McCutcheon altered* the 'closely drawn" standard of scrutiny that has applied since *Buckley*." (*Id.* (emphasis added).)

But what Plaintiffs *actually* said was that "*McCutcheon* stated a *strong* 'closely drawn' test," followed by direct quotes from *McCutcheon* about what the test requires. (Memo at 10 n.16 (quotation marks omitted) (emphasis in original).) And the strength of the test is evident from *McCutcheon*'s language and choice of quotes to describe it, such as this: "if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, *Buckley,* 424 U.S., at 25, it cannot survive 'rigorous' review[, *id.* at 29]." *McCutcheon*, 134 S.Ct. at 1446. And *McCutcheon* emphasized that the test requires "'means narrowly tailored to achieve the desired objective.'" *Id.* at 1456 (citations omitted). The strength of this statement of the test—equating contributions and *speech* and requiring *rigorous* review and *narrow* tailoring—is readily apparent by comparing it with FEC's own statement of the test in *McCutcheon* briefing: "the government [must] 'demonstrate[] a sufficiently important interest and employ means closely drawn to avoid the unnecessary abridgement of association freedoms.'" Brief for the Appellee at 18, *Mc-*

Cutcheon, 134 S.Ct. 1434 (No. 12-536). FEC made no mention of *rigorous* review or *narrow* tailoring, and it did not equate contributions with speech. *McConnell* faulted Justice Kennedy for wanting a more rigorous test: "Justice Kennedy has long disagreed with the basic holding of *Buckley* and its progeny that less rigorous scrutiny—which shows a measure of deference to Congress in an area where it enjoys particular expertise—applies to assess limits on campaign contributions." 540 U.S. at 185 n.72. But Justice Kennedy's view has prevailed and *McCutcheon* holds that the required closely-drawn scrutiny is *more*, not less, rigorous.[16] So *McCutcheon* did state a strong version of closely-drawn scrutiny, and its holdings control here, going to the core of the required constitutional analysis and compelling the relief Plaintiffs seek.

3. *Expenditure* Precedents Proves this Action Substantial and Non-Foreclosed.

Plaintiffs provided five matter-of-law holdings from *Buckley*'s "independent communication" line of cases that control this case because Plaintiffs' non-individualized, independent communications are non-corrupting. (Memo at 12-13.) FEC's response is to try to claim that Plaintiffs have taken this case outside of that case line. This argument has already been refuted. *See supra* at 10-12. So this case is controlled by those matter-of-law holdings, which compel the result Plaintiffs seek. Again, FEC refuses to join issue on the controlling analysis.

4. No *McConnell* or Other Case *Language* Forecloses this Action.

Plaintiffs explained that mere language from *McConnell* or other case opinions cannot substitute for the required interest-tailoring constitutional analysis (under *current* holdings on what constitutes corruption) that would be necessary in an attempt to prove this case foreclosed. (Memo at 14-17.) The Memo cited the example of FEC's reliance on mere language from *McConnell* instead of constitutional analysis in *WRTL-I*, *see supra* at 1, and how the unanimous Supreme

[16] *Cf. Wisconsin Right to Life v. Barland*, 751 F.3d 804, 840-42 (7th Cir. 2014) (relying on *McCutcheon* for a strong version of exacting scrutiny).

Court held that the mere language to which FEC pointed did not foreclose an as-applied challenge. In *WRTL-II* plaintiffs won based on the required interest-tailoring analysis. *See id.* And the Memo pointed to some specific language from *McConnell* on which FEC might rely (Memo at 14)—in lieu of the required interest-tailoring analysis based on what is *now* cognizable corruption. Plaintiffs explained how this *McConnell* language was based on a broad view of "corruption" that was expressly rejected in *Citizens United* and again in *McCutcheon*, in the directly applicable context of a BCRA restriction on contributions to a political party. (Memo at 14-17.)

FEC responds (Opposition at 35 n.10) that

> Plaintiffs bizarrely assert that the FEC should not be able to rely on "some prior language" from cases like *McConnell* [citation omitted] or others such as *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc)[,] that "distinguished [independent-expenditure-only] PACs from party-committees" [citation omitted], as if those decisions should be treated differently from "language" in court decisions generally.

Review of Plaintiffs' actual argument shows nothing "bizarre." FEC simply refuses to join issue on the required interest-tailoring analysis under *now*-cognizable corruption. Without rebutting the fact that *Citizens United* and *McCutcheon* rejected the "corruption" on which the *McConnell* quotes were grounded, FEC continues to recite them. (*See, e.g.*, Opposition at 32.)

FEC says *McConnell* "found that 'large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used.'" (Opposition at 32 (citation omitted).) That is one of the quotes Plaintiffs recited, along with *McConnell*'s "close relationship" theory of corruption, as being founded on the old, now-rejected "corruption." (Memo at 14.) Plaintiffs showed that such theories are not based on the *now*-controlling narrow quid-pro-quo (akin-to-bribery) definition of corruption, which *necessarily* excludes *other* theories of corruption such as any mere "indebtedness" or close-relationship theories of "corruption." (Memo at 15-17.) FEC responds by saying that

Buckley rejected an overbreadth challenge based on bribery laws (Opposition at 39), but of course being *akin* to bribery (showing how narrow cognizable corruption now is) differs from *actual* bribery at issue in *Buckley*. And FEC's argument does not solve its failure to acknowledge the nature of the only "corruption" *now* cognizable. Crucially, FEC does not juxtapose *McConnell*'s statement about large contributions with *McCutcheon*'s statement about large contributions or show how the latter does not supersede the former. Consider *McCutcheon*'s comparable statement in the BCRA contribution-restriction context: "Spending large amounts of money [i.e., contributing to committees of political parties] in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties does not give rise to such *quid pro quo* corruption." Coupled with *McCutcheon*'s statement that such corruption "arises when an individual makes large contributions to the candidate or officeholder himself," 134 S.Ct. at 1460, *McCutcheon* holds that *now*-cognizable corruption (for restricting campaign finances) requires (i) a large contribution, (ii) to a candidate/officeholder, (iii) for a quid-pro-quo purpose akin to bribery.[17] That conflict between *McConnell* and *McCutcheon* at a minimum makes this case substantial and non-foreclosed. (*See also* Memo at 16 n.18 (explaining why *RNC-I* does not foreclose this case due to its reliance on close-relationship corruption, which is superseded by *McCutcheon*.) FEC avoided this required constitutional analysis, relying instead on language.

This Court, in *RNC-II*, expressly noted FEC's reliance on *McConnell*'s "regardless of how

[17] As a result of this now-controlling narrow definition of quid-pro-quo corruption, FEC is wrong in its one attempt to show some "corruption" in the BCRA context. (Opposition at 35 n.10.) Though Justices Breyer, Ginsburg, Sotamayor, and Kagan were in dissent, they were correct that the *McConnell* defendants "'identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees.'" *McCutcheon*, 134 S.Ct. at 1469-70 (citation omitted). *McConnell*'s findings of "corruption" do not square with *McCutcheon*'s requirements, inter alia, that there be a contribution *to* a candidate/officeholder *as a result of* a quid-pro-quo agreement. Crucially, no cited evidence of "corruption" resulted from the sort of independent communications at issue here.

those funds are ultimately used" language (*RNC-II* Doc. 20 at 9), but held that such language did not foreclose a challenge (*id.* at 10) because of the "confluence of two currents of First Amendment jurisprudence" (*id.* at 5) and because the Supreme Court had not ruled on "the specific factual and legal arguments" at issue (*id.* at 10). Here *McConnell* language does not foreclose this case because the Supreme Court has not considered the precise factual and legal arguments at issue that involve a confluence of *McConnell* with *both* the independent-advocacy case line and *McCutcheon*'s holdings in the context of contributions to political parties.

5. Party-Committee Status Does Not Justify Different Treatment.

Plaintiffs explained that party-committee status does not justify different treatment, despite language that might be so read in certain opinions, such as *SpeechNow*. (Memo at 17-27.)

FEC mentions *SpeechNow*, *see supra* at 14, but fails to address Plaintiffs' extended demonstration that *SpeechNow* does not control here, including because its distinction of party-committees was dicta. Dicta "language" is definitely treated differently than holdings. *SpeechNow*'s non-dicta analysis of the logical implications of the independent-advocacy case line supports Plaintiffs' arguments as do the holdings in relevant portions of *McConnell* and in *Colorado-I*. (Memo at 17-27.) Moreover, in FEC's fleeting references to cases that Plaintiffs addressed, it again fails to join issue on the fact that *McCutcheon* is the latest word on constitutional analysis regarding BCRA in the context of contributions to political parties. So having failed to show how the present challenge is not supported by *McCutcheon*, FEC should not be heard to claim this case is insubstantial/foreclosed by some glancing reference to some case that does not now control.

6. This Case Is Not Insubstantial/Foreclosed Due to Justiciability Issues.

Rather than joining issue on the required interest-tailoring analysis under now-controlling holdings on the narrow nature of cognizable corruption, FEC relies primarily on various

justiciability arguments. FEC's approach seems an acknowledgment that it loses under the interest-tailoring analysis. But FEC's various justiciability arguments are self-evidently erroneous given the foregoing refutation of FEC's flawed arguments that (i) Plaintiffs really challenge the $10,000 base limit (they do not), (ii) Plaintiffs really challenge FEC regulations (they do not), and (iii) some opinion language from *McConnell* or other cases controls in place of the required interest-tailoring analysis (it does not). With these foundations gone, FEC's arguments collapse.

Some specific examples illustrate this. First, FEC claims Plaintiffs "are collaterally estopped from relitigating whether a BCRA three-judge court possess the power to invalidate FECA's $10,000 limit on individual contributions to state and local committees." (Opposition at 21.)

This rests on FEC's error that Plaintiffs challenge FECA's $10,000 limit, which they chose *not* to do here. *See supra* at 3-4. Since *RNC-II* plaintiffs challenged base limits, this Court held that doing so took them outside of BCRA § 403 and so certified questions involving base-limit challenges. (*See RNC-II* Doc. 26 at 1-2.)[18] And for plaintiffs not qualifying for the certification procedure (*id.* at 2), "the Court ... stay[ed] the claims of those parties pending the decision of the circuit on the certified questions." (*RNC-II* Doc. 26 at 2.) By certifying questions for eligible plaintiffs and staying the present Plaintiffs' claims, this Court did not decide that the present constitutional challenges to BCRA provisions are somehow foreclosed from BCRA § 403. A decision to stay is not a decision on anything else. It just puts things on hold. And in *RNC-II*, LAGOP

[18] This Court certified two questions relevant here (Nos. 1 & 3). The first challenged base limits *and BCRA provisions* as applied to "political-party committees ... establishing accounts that accept contributions in excess of FECA contribution limits to fund 'independent expenditures' ...." (*RNC-II* Doc. 26 at 2.) The second challenged the $10,000 limit on contributions to state committees *and BCRA provisions* "as applied to independent federal election activity ...." (*id.*). The Plaintiff who had standing to raise the BCRA provisions governing FEA, was Roger Villere, Jr., LAGOP's Chairman, who wanted to solicit the funds that LAGOP sought to receive without the base limit and BCRA's FEA provisions. Both certified questions have corollaries in the present case—though without any base-limit challenge—meaning that both are substantial/non-foreclosed (since they had to be in order to be certified).

Chairman Villere had standing to raise the constitutional challenge to both the $10,000 base contribution limit *and the BCRA provisions* "as applied to independent federal election activity" that was the subject of certified question 2 (*RNC-II* Doc. 26 at 2), so a resolution of his challenge would have guided resolution of the state and local committees' claims. None of that estops a three-judge court here, where only BCRA provisions are challenged.

Second, FEC argues that Plaintiffs "remain unable to satisfy the requirement of redressability" because three-judge courts "lack[] the power to invalidate FECA's base limit." (Opposition at 24.) FEC admits that Plaintiffs "reframe[] their challenge" to not challenge the base limit (*id.*), which refutes FEC's own argument. Nonetheless, FEC argues that this non-challenge to the base limit "only underscores plaintiffs' redressability problem, especially in light of their express concession that state contribution limits still apply," says FEC. (*Id.*) "Plaintiffs fail to explain why ... their proposed activities would remain subject to general state and federal contribution restrictions, including state laws limits on the amount of those contributions," FEC continues, "but not the federal limits on the amount of those contributions." (*Id.*)

This argument seems based on FEC's erroneous belief that Plaintiffs here seek the remedy of *unlimited* contributions for making non-individualized, independent communications. That is not this case, which challenges the Ban.[19] The Ban only prohibits state and local committees from using nonfederal funds (which they lawfully *have*[20] and routinely raise) for federal election activity. 52 U.S.C. 30125(b)(1). So if the Ban is held unconstitutional, Plaintiffs will be able to use

[19] For present purposes, Plaintiffs focus on the Ban (Compl. ¶¶ 32-33) in particular. Of course they also challenge the Fundraising Requirement (Compl. ¶ 34) and the Reporting Requirement (Compl. ¶ 35), but if the Ban is unconstitutional, so are the other provisions that are interrelated and also rely on a now-rejected theory of "corruption." (*See* Memo at 29; Opposition at 41 n.12.) *See infra* at 23 (further discussion to same effect).

[20] So there is no merit to FEC's argument that Plaintiffs have not pleaded that someone wants to give them nonfederal funds. (Opposition at 27.) State and local committees *have* such funds.

their nonfederal funds for federal election activity. That is all there is to it. Their nonfederal funds remain subject to state contribution limits because, as FEC says in describing nonfederal funds, "[t]hese funds are subject to state law ...." FEC, *Campaign Guide for Political Party Committees* at 2 (2013).[21] If Louisiana had no contribution limits, there would be none. It does, so there are. And Plaintiffs have now explained why their nonfederal funds remain subject to state contribution limits and that they don't challenge the $10,000 base limit, so FEC is simply wrong to argue that this "case is in essence a challenge to the federal contribution limits." (Opposition at 24.)

FEC's next effort to prove non-redressability responds to Plaintiffs' assertion that this case is like prior BCRA cases. (Opposition at 25.) Plaintiffs refuted that argument above, addressing FEC's confused constitutional analysis. *See supra* at 5-7.

FEC next claims that LAGOP could not receive nonfederal funds into its nonfederal account at the Louisiana contribution limit because it is a federal political committee and federal law prohibits anyone from contributing over $10,000 to a federal political committee. (Opposition at 26.) Preliminarily, note FEC's continued erroneous reliance on its flawed notion that Plaintiffs challenge the $10,000 base limit. Beyond that, as FEC knows, state committees (unlike national committees) may have both *federal* accounts (which register, act, and report as federal political committees) that contain federal funds and *nonfederal* accounts that contain nonfederal funds (subject only to state law and not registered as federal political committees). Plaintiffs want to use nonfederal funds from an account that may have and receive them, i.e., its nonfederal account (or alternatively an ICA). And the local committees do not want to have to use federal funds, in part, because they do not want to *set up* such a federal account and bear the burden of federal political-committee compliance. No federal law forbids a donor from contributing over $10,000 to a state

[21] *Available at* http://fec.gov/pdf/partygui.pdf.

and local committee's nonfederal account. State and local committees legally *have* and routinely raise nonfederal funds (given without regard to any federal $10,000 limit) that may be used for making non-individualized, independent communications.

FEC then argues that "Plaintiffs are wrong in assuming that the campaign finance regime created by FEC's pre-BCRA interpretations of FECA permitting soft money to be used for 'mixed' activities springs back into existence" if Plaintiffs' challenge succeeds. (Opposition at 26.) Plaintiffs have already addressed this. *See supra* at 4 & n.8. Plaintiffs simply predict what the FEC commissioners would do, which Plaintiffs believe would be to reimpose the allocation scheme for federal election activity (which was wholly an FEC creation). But if FEC does *not* reimpose its allocation scheme, state and local committees could pay for the activities at issue *entirely* with nonfederal funds, which would be fine. But that has nothing to do with the fact that the challenged provisions are unconstitutional as challenged or with redressability.

FEC then turns to claims that plaintiffs fail to establish injury or causation. (Opposition at 27-29.) FEC claims that Plaintiffs have failed to show that someone "wants to give them such significant sums," and only one contributor gave more than $10,000, and the local plaintiffs raise little money so "[a]ny failure ... to raise contributions in excess of federal limits is hardly traceable to BCRA." (*Id.* at 27-28.) FEC is wrong at multiple levels. It continues to rely on its flawed foundation that Plaintiffs challenge the $10,000 base limit. They don't, so these arguments on that basis are meaningless. If state and local committees want to spend $1 on federal election activity they must open a federal account with the serious burdens of registering and reporting as a federal political committee. (Compl. ¶¶ 36-39.) FEC ignores that severe burden entirely. State and local committees legally *have*, and routinely raise, nonfederal funds, which FEC acknowledges. And Plaintiffs' challenge is to use nonfederal funds, *per se*, for federal election activity. Their claim

thus does not turn on whether someone wants to contribute over $10,000 (a flawed foundation in any event). If someone has *already* contributed just *$1* (or if a local committee has received $1 in fees), Plaintiffs want to be able to use that $1 for federal election activity, which they cannot under the Ban. The injury is clear.

FEC argues that "plaintiffs have not shown that they need the excess individual contributions they seek to fund their intended activities," and suggests that some might be funded with Levin funds. (Opposition at 28.) FEC relies on the flawed foundation that Plaintiffs challenge the $10,000 limit. Plaintiffs need not prove their "need" for *any* level of funds in order to challenge the Ban, which bans them from using *any* amount of nonfederal funds for federal election activity. They choose not to use Levin funds "due to complexity, burdens, and restrictions," (Compl. at 5 n.4 and ¶ 76) and are not required to prove that Levin funds would not suffice.[22] Plaintiffs are not required to assume the burdens of *another* layer of complex federal law in an effort to free themselves from the burdens of the challenged provisions.[23] And constitutionally, FEC's suggestion is like its suggestion that the plaintiffs in *WRTL-II* just do something different than what they wanted to do, which was forcefully repudiated. 551 U.S. at 447 n.9 (controlling opinion).

FEC argues that Plaintiffs' harm is self-inflicted because they could use Levin funds for some of their activity. (Opposition at 28.) FEC's error was just shown in the preceding paragraph. Plaintiffs simply add that FEC's use-Levin-funds argument is also like its argument in *Citizens*

[22] Levin funds require extensive recordkeeping and are limited in how they may be raised, how much may be raised, and how they may be used—they cannot be used, inter alia, for the sort of broadcast activities Plaintiffs wish to do and for any FEA identifying a federal candidate. *See, e.g.*, *Campaign Guide for Political Party Committees* at 58.

[23] State and local committees do not use Levin funds due to these problems, as FEC knows from its 2014 forum. (Compl. ¶ 73 ("'The Levin Amendment is too complicated to administer and several state parties have decide to just federalize their get-out-the-vote programs due to the complexity of administering and complying with the Levin Amendment.'" (citation omitted)).)

United, where FEC argued that Citizens United didn't have any real harm because it could do other things, including using a *PAC* for its electioneering communications and independent expenditures, but the Court held that PACs impose onerous burdens and Citizens United was not required to endure such burdens to engage in its independent speech. 558 U.S. 337. Plaintiffs here need not endure FEC's proposed onerous burden.[24]

Plaintiffs' Memo and the foregoing prove this action self-evidently substantial/non-foreclosed. But a brief comment on each count follows, for which the criterion is whether this count is *obviously* frivolous or *clearly* foreclosed *beyond debate*. (Memo at 5.) *See supra* at 7.

C. Count I Presents Substantial, Non-Foreclosed Claims.

Count I challenges BCRA provisions as applied to (a) non-individualized, independent communications exhorting registering/voting and (b) non-individualized, independent communications by Internet. (Memo at 27-34.) On either ground, the provisions are unconstitutional as applied to such communications, exemplified by the communication ("Register & Vote") merely exhorting registering/voting on LAGOP's website. (*Id.* at 27-28.)[25] And this count clearly presents the confluence of *McConnell* with both the independent-communication case line and *McCutcheon*'s constitutional analysis regarding restrictions on contributions to political parties.

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[24] FEC suggests that the local committees may not be local committees of a political party. (Opposition 16 n.4.) FEC errs. The Verified Complaint plainly states that "JPGOP is a 'local committee,' i.e., 'part of the official party structure'" (Compl. ¶ 7) and that OPGOP "is also a parish executive committee and local committee" (Compl. ¶ 8).

[25] As Plaintiffs argued in their Memorandum Supporting Motion to Expedite (Doc. 9-1), some non-individualized, independent communications that LAGOP wants to make (without complying with challenged provisions) so readily qualify for BCRA § 403's special rules that this whole action should be expedited now. (Doc. 9-1 at 1-8.) The challenges as applied to "Register & Vote," "African-American Outreach," and "Celebrating Jindal" are plainly substantial, non-foreclosed, constitutional challenges to BCRA provisions that present factual and legal arguments not decided by *McConnell*, 540 U.S. 93. (Doc. 9-1 at 1-8.) FEC responds here that PASO ads such as "Celebrating Jindal" motivated BCRA (Opposition at 43-44), but that does not alter the controlling fact that independent communications are non-corrupting.

FEC responds that Plaintiffs really challenge regulatory definitions. This has been refuted. *See supra* at 4-5. FEC does *not* show that either such exhorting registering/voting or independent Internet communications are corrupting or that any court has ruled on these facts and constitutional arguments. Nor does FEC refute that this count presents the cited confluences. So FEC does not show that Count I is *obviously* frivolous or *clearly* foreclosed *beyond debate*.

Absent any cognizable risk of narrow quid-pro-quo corruption, Count I is substantial, non-foreclosed as to each challenged provision as applied. The Ban and Fundraising Requirement require an anti-corruption interest to justify them, but there is none. Absent a cognizable anti-corruption risk, there is no constitutional justification for the Reporting Requirement, requiring that such activity be done from a federal account that is treated, and reports *monthly*, as a federal political committee. And the local committees should be able, for example, to email "Register & Vote" without having to comply with a Reporting Requirement built on now-non-cognizable "corruption." FEC says "Plaintiffs make no independent showing that their challenge to [the Reporting Requirement] is substantial." But Plaintiffs argued that the Reporting Requirement was based on a now-rejected theory of "corruption." (Memo at 29.) FEC agrees that the constitutionality of the Reporting Requirement derives from, and depends on, the constitutionality of the Ban, which turns on the presence of an anti-corruption interest. (Opposition at 41 n.12.) Because *Citizens United* and *McCutcheon* rejected *McConnell*'s broad "corruption," in both expenditure and contribution contexts, *McConnell*'s justification for the Reporting Requirement is also gone. Anyway, there is no narrow, quid-pro-quo corruption to justify the Reporting Requirement (or the Ban or Fundraising Requirement) as applied here.[26] More can be said in merits briefing, but

[26] FEC's notion that the Reporting Requirement is constitutional because "Plaintiffs offer no reason to suggest that they cannot comply with such reporting resulting" (Memo at 45) is erroneous because a requirement's constitutionality turns on the interest-tailoring analysis, not whether plaintiffs *can* do the required activity, such as reporting.

this suffices to show that challenges to the Reporting Requirement are substantial.

D. Count II Presents Substantial, Non-Foreclosed Claims.

Count II challenges the Ban and Fundraising Restriction as applied to (a) non-individualized, independent communications and (b) such communications from an ICA. (Memo at 34.) On either ground, the provisions are unconstitutional as applied because no cognizable anti-corruption interest justifies them. This is so because such independent communications pose no quid-pro-quo corruption risk and so neither do independent-communication-only accounts. This count presents the confluence of *McConnell* with both the independent-communication case line and *McCutcheon*'s constitutional analysis regarding restrictions on contributions to political parties.

FEC's primary response is to argue that, by not challenging the $10,000 base limit so as to receive unlimited contributions to an independent-expenditure-only account, Plaintiffs have been "too clever by half" because they "have navigated away from the 'confluence' ... [making] their previous challenge substantial." (Opposition at 31.) That has already been refuted. *See supra* at 10-12. That argument failing, FEC has not shown how any cognizable anti-corruption interest justifies the challenged provisions as applied to such independent communications, including from an ICA. And FEC has not shown why a case challenging BCRA's provisions as applied to non-individualized, independent communications from an ICA is not as easily substantial (if not more so because of the lesser remedy sought) as the *RNC-II* challenge to BCRA's provisions (and the base limit) as applied to independent expenditures from an NCA that this Court has already held substantial. (*RNC-II* Doc. 26 at 2.)

E. Count III Presents Substantial, Non-Foreclosed Claims.

Count III argues that the Ban, Fundraising Requirement, and Reporting Requirement are unconstitutional as applied to all independent federal election activity because the independence of

the activities eliminates the potential for cognizable corruption, which now requires, inter alia, a contribution to an officeholder/candidate. (Memo at 35-38.) In *RNC-II*, this Court held this issue substantial, and certified a question thereon. (*RNC-II* Doc. 26 at 2). The absence of a base-limit challenge here does not constitutionally alter the issue so at to make it any less substantial.

F. Count IV Presents Substantial, Non-Foreclosed Claims.

Count IV argues that the Ban, Fundraising Requirement, and Reporting Requirement are unconstitutional facially because the now-required anti-quid-pro-quo-corruption interest under *Citizens United* and *McCutcheon* was not present in *McConnell* and is not present now. (Memo at 38-39.) As Plaintiffs noted, *for purposes of a three-judge court application*, this count is substantial and non-foreclosed (Memo at 43), which is true whether or not this Court feels it may grant requested relief *on the merits*. And as Plaintiffs noted, *Citizens United* established, that in First Amendment cases such as this, facial challenges to prior holdings may even be raised on appeal. (Memo at 39 (citation omitted).) FEC responds that "Plaintiffs bizarrely assert that ... 'facial challenges ... may even be raised' for the first time 'on appeal.'" (Opposition at 35 n.10 (citations omitted).) But calling Plaintiffs' statement of what actually happened in *Citizens United* "bizarre[]" does not alter the fact that *Citizens United* allowed just that. 558 U.S. at 328-36. So FEC has failed to show that this is *obviously* frivolous or *clearly* foreclosed *beyond debate*.

Conclusion

Plaintiffs showed this action substantial and non-foreclosed, FEC has failed to show that any count is *obviously* frivolous or *clearly* foreclosed *beyond debate*. So the Application for Three-Judge Court (Doc. 3) should be granted and this action should proceed under BCRA § 403.

Respectfully submitted,
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Certificate of Service

I certify that on September 23, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will notify:

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