**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| REPUBLICAN NATIONAL COMMITTEE, *et al.*, | ) | |
| Plaintiffs, | ) | Civ. No. 14-853 (CRC) |
| v. | ) | |
| FEDERAL ELECTION COMMISSION, | ) | OPPOSITION |
| Defendant. | ) | |

**DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR A THREE-JUDGE COURT**

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Plaintiffs' request for a three-judge court should be denied because their claims do not qualify for that extraordinary review procedure. First, the Supreme Court has twice rejected similar constitutional claims some of these plaintiffs have raised before. The political party activity permitted to be regulated in those earlier cases was less clearly federal and electoral in nature than plaintiffs' proposed conduct here, which involves independent expenditures expressly advocating for or against the election of federal candidates. Plaintiffs' far more easily dispatched claims are accordingly too insubstantial to merit the use of a special expedited procedure with mandatory Supreme Court jurisdiction. Second, and equally dispositive of plaintiffs' application, plaintiffs are challenging provisions of federal law that are nearly forty years old, not provisions enacted twelve years ago for which Congress created the requested three-judge court procedure. The Supreme Court has squarely held that such claims are not redressable with the review procedure plaintiffs seek to use here.

As explained below, in a 1976 amendment to the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), Congress enacted limits on contributions made to political party committees to influence federal elections. After political parties began to use unlimited donations to fund nominally state and local activity or mixed state/federal activity that influenced federal elections, Congress amended FECA by passing the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). BCRA limited contributions to national parties for all purposes and to state parties when engaged in federal election activities. Through BCRA, Congress also increased the limits on contributions to political party committees and indexed the limit on contributions to national party committees for inflation.

To quickly resolve new constitutional questions raised by BCRA, Congress created a special judicial procedure involving a three-judge district court, expedition, and direct appeal to

the Supreme Court. The ban on unlimited, nominally nonfederal donations was challenged — including by plaintiff Republican National Committee ("RNC") — and facially upheld by the Supreme Court, which found that such donations posed a danger of corruption or its appearance no matter the intended use of the funds. *McConnell v. FEC*, 540 U.S. 93, 142-73 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).

The Supreme Court later refined the types of corruption or its appearance that may permissibly be relied on in defense of campaign finance restrictions. *Citizens United*, 558 U.S. at 359-60. Before *Citizens United* was decided, several political party committees, including the RNC, had filed another challenge to BCRA on the theory that contribution limits were unconstitutional when funds would be used for independent nonfederal activities. *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 154-56 (D.D.C. 2010) ("*RNC*"). Following issuance of the decision in *Citizens United*, a three-judge court rejected the party committees' pending challenge because, *inter alia*, *McConnell* had held that large contributions to political party committees pose a danger of corruption regardless of how the funds are spent, and that holding remained valid under *Citizens United*'s conception of corruption. *Id.* at 157-60. The Supreme Court affirmed the judgment in *RNC*. 130 S. Ct. 3544 (2010).

Having twice tried and failed to accomplish what they want through the back door, the RNC and its co-plaintiffs are now attempting to come through the front door, asking this Court to convene a *third* three-judge court in order to determine whether contribution limits to political party committees are permissible based on the intended use of the contributed funds. In addition to the RNC and its chairman, Reince Priebus, plaintiffs are a state committee of the Republican party, the Republican Party of Louisiana ("LAGOP"), its chairman, Roger Villere, Jr., and two local committees of the Republican party, the Jefferson Parish Republican Executive Committee

("JPGOP") and the Orleans Parish Republican Executive Committee ("OPGOP"). Plaintiffs now seek to invalidate the limits on amounts individuals may contribute to national, state, and local party committees as applied to proposed expenditures that would involve *expressly* advocating for *federal* candidates, including on behalf of the Republican nominee for president in the 2016 election. But this Court need not approve yet another three-judge court to weigh whether those limits are unconstitutional as applied to particular intended uses of contributed funds. Even if the nature of plaintiffs' proposed activities mattered, plaintiffs' claims based on express federal candidate advocacy would be obviously insubstantial and far *easier* to reject than the claims the RNC brought in the two prior cases.

In addition, the Court cannot grant plaintiffs' request to proceed before a three-judge court because they lack standing under the special BCRA review procedure they invoke. Plaintiffs' challenge is a naked attack on FECA contribution limits that existed prior to BCRA. Because the limits on contributions intended to influence federal elections have existed without interruption since the 1970s, and they were only raised or indexed for inflation by BCRA, the Supreme Court in *McConnell* found that standing did not exist under BCRA's special judicial review procedures for a constitutional challenge to those limits. 540 U.S. at 229. Under *McConnell* and its progeny, constitutional challenges to FECA are required to proceed through other procedures, including in some circumstances FECA's own special review provision. *See* 2 U.S.C. § 437h. For that reason, plaintiffs' challenge to the same limits here cannot proceed under BCRA's special judicial review procedures.

Accordingly, the Court should deny plaintiffs' application for a three-judge court. During the Rule 26(f) conference for this matter, the parties can negotiate a proposed schedule for further proceedings, including record development in advance of the Court's determination

regarding the other judicial review procedures available for plaintiffs' claims and likely subsequent ruling on the merits of plaintiffs' claims.

## BACKGROUND

### I. The Federal Election Campaign Act

Since 1974, FECA has limited the amount that individuals can contribute to national, state, and local political party committees. The 1974 amendments to FECA established an overall ceiling of $25,000 on the amount an individual could contribute to federal elections. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 ("FECA 1974 Amendments"). In 1976, Congress revised FECA to include an annual limit of $20,000 on contributions specifically to "political committees established and maintained by a national political party" and a $5,000 limit on contributions to any "other" political committee, including state and local party committees. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 487. A "political committee" is a group that raises or spends more than $1,000 during a calendar year for the purpose of influencing federal elections, 2 U.S.C. § 431(4) (referencing "contributions" and "expenditures" under FECA), and has as its "major purpose . . . the nomination or election of a candidate," *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam). These limits have remained in force since the mid-1970s with only slight modification. In 2002, as part of BCRA, Congress increased the national party contribution limit from $20,000 to $25,000 and indexed it for inflation. BCRA §§ 307(a)(2), (d), 116 Stat. at 102-03 ("Modification of Contribution Limits"). For the current election cycle, the annual limit is $32,400. *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530-32 (Feb. 6, 2013). In BCRA, Congress also increased the limit for state and local party committees from $5,000 to $10,000

but did not index that limit. BCRA § 102, 116 Stat. at 86-87 ("Increased Contribution Limit for State Committees of Political Parties").

## II. Plaintiffs' Claims

Plaintiffs seek declaratory and injunctive relief against these longstanding limits on contributions to political party committees, and related solicitation, spending, and fundraising restrictions. The contribution limits plaintiffs seek to have declared unconstitutional are: (1) FECA's limit on the amount an individual can contribute to national political party committees, 2 U.S.C. § 441a(a)(1)(B); and (2) FECA's limit on the amount an individual can contribute to state and local political party committees, *id.* § 441a(a)(1)(D). (Verified Compl. for Declaratory and Injunctive Relief (Docket No. 1) ("Compl.") ¶ 42, Prayer for Relief, ¶ 3 (third bullet).) Plaintiffs also seek to have declared unconstitutional three additional provisions they believe restrict their ability to collect unlimited funds to use for independent expenditures: (1) FECA's restrictions limiting the amounts the RNC may spend or solicit from individuals, including through its agents, *see* 2 U.S.C. § 441i(a); (2) FECA's requirement that state and local party committees not spend money for federal election activity unless such funds are subject to FECA's requirements and restrictions, *see id.* § 441i(b)(1); and (3) FECA's requirement that fundraising costs for the foregoing activities be drawn from funds subject to FECA's requirements and restrictions, *see id.* § 441i(c). (Compl. ¶¶ 39-40, 43-54.) Plaintiffs have applied to have their claim be adjudicated by a three-judge court pursuant to the special review procedure established in section 403 of BCRA, 116 Stat. at 113-14. (Pls.' Am. Appl. for Three-Judge Court and Mem. in Supp. (Docket No. 5) ("Pls.' Appl.").)

## III. BCRA's Special Judicial Review Procedure

As part of the passage of BCRA in 2002, Congress established special judicial review procedures for the new constitutional questions likely to arise. Section 403 of BCRA permits special procedures for actions brought on constitutional grounds challenging "any provision" of BCRA or "any amendment made by" it. BCRA § 403(a), 116 Stat. at 113-14. Section 403's procedure required that all such actions initiated before December 31, 2006 were to be filed in the United States District Court for the District of Columbia and heard by a three-judge district court convened pursuant to 28 U.S.C. § 2284, which provides that "[a] district court of three judges shall be convened when . . . required by Act of Congress." Section 403 further provides that final decisions of such three-judge courts are reviewable only by direct appeal to the Supreme Court. BCRA § 403(a)(3), 116 Stat. at 114. The special procedural rules do not apply to actions filed after December 31, 2006, "unless the person filing such action elects such provisions to apply to the action." *Id.* § 403(d)(2), 116 Stat. at 114.

BCRA's legislative history suggests that Congress's primary purpose in enacting BCRA § 403 was to ensure that the serious constitutional issues initially raised by BCRA would be resolved promptly. *See* 148 Cong. Rec. S2142 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (BCRA's expedited judicial review rules will "assist [in] an orderly transition from the old system to the new system" of campaign finance through a "prompt and efficient resolution of the litigation"); 147 Cong. Rec. S3189 (daily ed. Apr. 2, 2001) (statement of Sen. Hatch) (BCRA "supporters and opponents alike[] stand to gain by a prompt and definite determination of the constitutionality of many of the bill's controversial provisions"; "it is imperative that we afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible").

## ARGUMENT

### I. STANDARD OF SCRUTINY

The Supreme Court has no discretion to refuse adjudication on the merits in direct appeal cases. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). The Court has thus instructed that courts should employ an "overriding policy . . . of minimizing the mandatory docket of [the Supreme] Court in the interests of sound judicial administration." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket." (internal quotation marks omitted)); *accord MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (per curiam). Consistent with that narrow construction mandate, applications for three-judge courts under 2 U.S.C. § 2284 should not be granted unless plaintiffs present a "substantial claim" and "justiciable controversy." *Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1335, 1338 (D.C. Cir. 1975) (citing *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962)); *see also Rostker v. Goldberg*, 453 U.S. 57, 61 n.2 (1981); *Hassan v. FEC*, 893 F. Supp. 2d 248, 257-58 (D.D.C. 2012) ("A three-judge court is not required . . . when the Court lacks jurisdiction over a plaintiff's claims. As the D.C. Circuit has stated, an individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel." (internal quotation marks omitted)), *aff'd*, No. 12-5335, 2013 WL 1164506 (D.C. Cir. Mar. 11, 2013).

### II. PLAINTIFFS ARE NOT ENTITLED TO A THREE-JUDGE COURT UNDER SECTION 403

Plaintiffs are not entitled to proceed before a three-judge court pursuant to section 403 of BCRA because their claims are neither substantial nor justiciable. *Feinberg*, 522 F.2d at 1338.

Plaintiffs' claims are too insubstantial because they are foreclosed by precedents that plaintiff RNC itself helped to establish. *See Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011). *McConnell*, 540 U.S. at 142-73, and *RNC*, 698 F. Supp. 2d at 157-60, *aff'd*, 130 S. Ct. 3544 (2010), establish that the underpinnings of plaintiffs' claims have already been rejected twice by the Supreme Court. And even if plaintiffs' claims were not foreclosed, they are non-justiciable before a three-judge court because their challenge is to FECA's longstanding limits on contributions to political parties, not to BCRA's increases and indexes of those limits. A three-judge court would thus have no power to redress plaintiffs' purported injury.

**A. Plaintiffs' Claims Are Insubstantial**

This Court's consideration of whether a three-judge court may be established to hear this case turns on far more than whether plaintiffs are bringing "(a) a constitutional challenge to (b) a BCRA provision/amendment," the glib standard they propose. (Pls.' Appl. at 2 (footnote omitted).) Plaintiffs' challenge must be not merely constitutional but also substantial. *Feinberg*, 522 F.2d at 1338 ("A single district judge need not request that a three-judge court be convened if a case raises no substantial claim or justiciable controversy."); *Schonberg*, 792 F. Supp. 2d at 17. Even "[c]onstitutional claims may be regarded as insubstantial if they are obviously without merit, or if their unsoundness so clearly results from the previous decisions of (the Supreme Court) as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Feinberg*, 522 F.2d at 1339 (internal quotation marks omitted). Therefore, contrary to plaintiffs' suggestion that the Court merely consider *whether* their challenges are constitutional (Pls.' Appl. at 2-4), the D.C. Circuit has recognized that "there may be considerable room for argument over whether particular constitutional claims are so frivolous, or so foreclosed by prior decisions, as to be too insubstantial for jurisdiction. . . .

[T]his determination of substantiality is rarely mechanical and often demands of the district judge an exceedingly close analysis of petitioner's constitutional claims vis-a-vis prior case law." *Feinberg*, 522 F.2d at 1339.

Although plaintiffs make no effort to show that their claims are substantial, no "exceedingly close analysis" is required to determine that their claims fall well short. That is evident both from FECA's forty-year history precluding the relief plaintiffs seek here and the RNC's two failed previous legal challenges, both of which also focused on funds to be used for independent party activity. Congress "has long limited contributions to political parties to the extent the contributions are made for the purpose of influencing federal elections." *RNC*, 698 F. Supp. 2d at 153. Before BCRA was passed, the national parties accepted donations of unlimited amounts for "mixed" activities purportedly affecting both federal and state elections, including advertising that "did not expressly advocate the election or defeat of a federal candidate" but influenced federal elections. *Id.* BCRA was passed to ban use of these funds, referred to as "soft money," by national party committees and by state and local party committees when engaged in federal election activity. *Id.* For activities that met "the express advocacy test that courts used pre-*McConnell*," however, parties had to fund the activity with money raised within FECA's contribution limits, known as "hard money." *Id.* at 157.

The RNC, its then-chairman, several Republican state and local parties, and numerous others challenged the soft money ban immediately after Congress passed it, arguing in part that it failed to serve the government interest in deterring actual and apparent corruption because the funds at issue were ostensibly given for nonfederal purposes and in some cases spent on purely state and local elections. *McConnell*, 540 U.S. at 145, 154. The Supreme Court disagreed, finding 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*." *Id.* at 155 (emphasis added). That was due in part to "the close relationship between federal officeholders and the national parties"; indeed, the national parties were "inextricably intertwined with federal officeholders and candidates." *Id*. at 154-55.

More recently, the RNC, along with state and local Republican parties, advanced another similar challenge, contending that contribution limits were unconstitutional for activities that lacked a "sufficient connection to a *federal* election." *RNC*, 698 F. Supp. 2d at 155. That case, like this one, was brought as an "as-applied" challenge. *Id.* at 153. The plaintiffs also submitted evidence indicating that, as here, the spending would be independent, and they provided assurances that federal candidates and officeholders would not be involved in soliciting contributions for the funds raised. *Id.* at 155; *RNC v. FEC*, No. 08-1953, Compl. for Declaratory and Injunctive Relief, Nov. 13, 2008 (Docket No. 1) ¶¶ 25-26; *RNC v. FEC*, No. 08-1953, Pls.' Mem. in Supp. of Pls.' Mot. for Summ. J., Jan. 26, 2009 (Docket No. 21) at 22-23 (contending that "because no federal officeholders or candidates will solicit, receive, direct, transfer, or spend non-federal/state funds. . . . any potential appearance of the corruption of federal candidates or officeholders is proportionally reduced"). The plaintiffs argued that *Citizens United* narrowed a key governmental interest properly served by campaign finance restrictions to "*quid pro quo* corruption," making the soft money ban unconstitutional as applied to them. *RNC*, 698 F. Supp. 2d at 158. The *RNC* three-judge court rejected that argument. The court held that *McConnell* had already determined that unlimited funds posed a danger of corruption however the recipient party committee may use those funds. *Id.* at 157. Further, it held that *McConnell* had upheld the soft money ban not just on the basis of an interest in deterring preferential access, a theory later rejected by *Citizens United*, but also due to the danger of *quid pro quo* corruption and its

appearance inherent in the close relationship between federal candidates and officeholders and political party committees. *Id.* at 158-59. The Supreme Court affirmed the three-judge court's judgment. 130 S. Ct. 3544. Both *McConnell* and *RNC* remain controlling on this issue. *McCutcheon*, 134 S. Ct. at 1451 n.6 (expressly noting that "[o]ur holding about the constitutionality of the aggregate limits *clearly* does not overrule *McConnell*'s holding about 'soft money'" (emphasis added)).

The RNC's unsuccessful previous challenges to Congress's closure of the back door (*i.e.*, BCRA's soft money ban) foreclose plaintiffs' new challenge to FECA's longstanding hard money limits on individual contributions to party committees. Throughout the forty-year history of campaign finance jurisprudence, it has been undisputed that the constitutionality of limiting the size of contributions to political parties for expenditures that expressly advocate for or against federal candidates is an easier question than the limits related to nonfederal and less expressly federal spending that have been challenged. *See McConnell*, 540 U.S. at 167 (explaining that the contributions to state and local parties "that pose the greatest risk" of corruption are those "that can be used to benefit federal candidates directly"); *RNC*, 698 F. Supp. 2d at 162 (tying the danger of corruption to "whether the activity would provide a direct benefit to federal candidates"); *cf. FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007) (explaining in the context of a former expenditure ban that advertisements expressly advocating the election or defeat of a candidate were more regulable); *McCutcheon*, 134 S. Ct. at 1442 ("This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combating corruption.").[1] Indeed, the RNC and other plaintiffs

[1] In striking down the aggregate limits on individual contributions, *McCutcheon* expressly relied on the presence of "another layer of base contribution limits" that addressed the risk of *quid pro quo* corruption: the challenged limits on contributions to non-candidate committees

conceded in *McConnell* that contributions to fund party independent expenditures could be corrupting and thus are subject to FECA's contribution limits. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 765 & n.24 (D.D.C. 2003) (Leon, J.) (noting that the RNC's brief conceded "that contributions to a party may be regulated and subjected to a federal contribution limit 'only to the extent the entity uses the contributions for regulable activity,' which includes 'independent expenditures expressly advocating the election or defeat of federal candidates,'" and "that money political parties receive for express advocacy 'may constitutionally be subjected to a federal contribution limit'"). And though he was overruled, Judge Leon struck down all of the soft money restrictions *except* as to contributions to fund independent expenditures and communications that promote, support, attack, or oppose federal candidates. *Id.* at 758-59, 763-68. Plaintiffs thus attack the limits as applied to some of the party committees' most clearly regulable contributions.

Plaintiffs argue that they should be permitted to accept and receive unlimited contributions for independent expenditures in the same way that entities which are not political parties may. (Compl. ¶¶ 18-23.) But limits on contributions to those entities were held unconstitutional precisely because they did not intend to involve candidates *or political party committees* in their activity. *See SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*); *Carey v. FEC*, 791 F. Supp. 2d 121, 125-26 (D.D.C. 2011). Indeed, the D.C. Circuit in *SpeechNow.org* specifically distinguished *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996), by noting that that case concerned expenditures by political parties. 599

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such as party committees. 134 S. Ct. at 1446. Far from suggesting that these limits are unnecessary or fail to serve the government's interests, the *McCutcheon* plurality found that these limits remain integral to FECA's anticorruption purpose, in contrast to the aggregate limits that were invalidated. *Id.* at 1451 (explaining that FECA's "base limits remain the primary means of regulating campaign contributions" in order to combat corruption).

F.3d at 695. Plaintiffs' claims reflect no recognition of the special status of party committees vis-à-vis other committees. *See McConnell*, 540 U.S. at 188 (explaining that parties enjoy special relations with officeholders and that parties' legislative power vastly exceeds that of interest groups, which do not select slates of candidates for election or decide who will serve on legislative committees or in leadership positions).

FECA's contribution limits are thus on even firmer footing in the context of plaintiffs' proposed independent expenditures — involving express advocacy on behalf of federal candidates, including the 2016 Republican nominee for president — than in the contexts of less express advertising and other expenditures at issue in prior court reviews of the soft money ban. The more difficult constitutional question entailed in expenditures of the latter sort has twice been resolved by the Supreme Court with the contribution limits being upheld. Consequently, plaintiffs' claims fail to present a substantial question worthy of convening a three-judge court. *Hassan*, 893 F. Supp. 2d at 258 n.10 ("[T]hat five other district courts have reached the identical conclusion on the merits of [plaintiff's] challenge, based on nearly identical reasoning, persuades the Court that this case does not present issues that are sufficiently substantial or appropriate to occupy the judicial resources of three judges in this jurisdiction."); *Nat'l Comm. of the Reform Party of the U.S. v. Democratic Nat'l Comm.*, 168 F.3d 360, 367 (9th Cir. 1999) ("A single district court judge should not certify to a three-judge panel constitutional questions that have already been resolved because, as with FECA, the district court may dismiss frivolous or non-justiciable claims.").

**B. Plaintiffs' Claims Do Not Present a Justiciable Controversy**

Plaintiffs are not entitled to a three-judge court under BCRA § 403 for the separate reason that the Supreme Court's decision in *McConnell* squarely forecloses their request. In

*McConnell*, certain plaintiffs challenged BCRA § 307 on the grounds that the FECA contribution limits Congress updated through BCRA violated the Freedom of the Press Clause of the First Amendment. 540 U.S. at 228-29. On direct appeal from a three-judge court, the Supreme Court observed that BCRA § 307 "merely increased and indexed for inflation certain FECA contribution limits." 540 U.S. at 229. Citing 2 U.S.C. § 437h, FECA's special review provision, the Court further explained that it had "no power to adjudicate" a challenge to FECA's contribution limits because challenges to FECA's pre-existing provisions, including the challenged contribution limits, were not subject to review pursuant to BCRA § 403's three-judge district court procedure with direct appeal to the Supreme Court. *Id*. The Court thus held that it could not redress plaintiffs' alleged injuries even if it were to rule on the amendments BCRA § 307 made to the pre-existing contribution limits. "[I]f the Court were to strike down the increases and indexes established by BCRA § 307," the Court reasoned, it would not remedy the plaintiffs' alleged injury because the limits imposed by FECA "would remain unchanged." *Id*. "A ruling in the . . . plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing." *Id*.; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (irreducible constitutional minimum of standing requires (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision).[2]

[2] Certain of the plaintiffs in *McConnell* also challenged the increases to the state and local party contribution limit effected by BCRA § 102. *McConnell*, 251 F. Supp. 2d at 293 & n.52 (Henderson, J., concurring in the judgment in part and dissenting in part). The district court's finding that plaintiffs' challenges to BCRA § 307 were non-justiciable, which the Supreme Court affirmed, evidently encompassed the similar challenges to § 102. *Id.* at 186 (per curiam) (citing Judge Henderson's opinion explaining why "plaintiffs do not have standing to challenge Section 307, which increases and indexes contribution limits"); *id.* at 429-31 (Henderson, J.) (finding no standing for challenges to Sections 102 and 307).

For the same reasons, any three-judge court convened here could not redress plaintiffs' alleged injuries, because that court would have no authority to address FECA's pre-BCRA limitations on the amounts individuals may contribute to national, state, and local party committees. Plaintiffs seem to acknowledge the controlling nature of the analysis in *McConnell* by devoting several pages to arguing — precisely to the contrary of the Supreme Court's actual holding — that the decision should be understood to establish that a three-judge court *would* have jurisdiction to consider their challenge to the contribution limits that BCRA updated. (Pls.' Appl. at 6-9.) This is nonsense. Although plaintiffs quote *McConnell*'s statement that "the Court has jurisdiction to hear a challenge to § 307" no less than five times (*id.* at 3 n.3, 8, 9, 11, 13 (quoting 540 U.S. at 229)), they ignore the fact that the limited scope of that jurisdiction *causes* the redressability problem that is fatal to their application.

*McConnell* held that, even if the Court had jurisdiction to hear a challenge to BCRA's "increases and indexes," invalidating those changes to the statute "would not remedy the . . . alleged injury" caused by the contribution limits themselves. 540 U.S. at 229. There, as here, if plaintiffs were to succeed (and regardless of whether their challenge is "as applied" or not), the individual contribution limit for national party committees would *decrease* from the current amount of $32,400 to the pre-BCRA amount of $20,000, and the state and local party committee limit would drop from $10,000 to the pre-BCRA amount of $5,000.[3] Thus, even if plaintiffs were to obtain a favorable ruling on their challenges to the BCRA provisions, the contribution limits about which they complain would remain in place — and at lower levels — and plaintiffs'

[3] That plaintiffs characterize their challenge as "as applied" does not change the analysis. Plaintiffs' ruminations on the particular metaphysics of resurrecting FECA provisions (*e.g.*, Pls.' Appl. at 6-7 n.6, 11-14) are irrelevant for the simple reason that, to the extent a three-judge court would have jurisdiction to hear their claims, that jurisdiction would be limited to considering a challenge — whether facial or as applied — to BCRA's increases and indexes of the contribution limits, not to the underlying limits themselves. *McConnell*, 540 U.S. at 229.

alleged injuries would not be redressed. Plaintiffs therefore would "lack standing" in a three-judge court. *McConnell*, 540 U.S. at 229.

The activity plaintiffs seek to engage in was simply not permitted before the passage of BCRA. As described in their complaint, plaintiffs' contemplated "non-contribution accounts" would exist to receive contributions and make independent expenditures, including in upcoming federal presidential and congressional races. (Compl. ¶¶ 1, 24, 26-30.) FECA defines independent expenditures to mean expenditures "expressly advocating the election or defeat of a clearly identified candidate" and which are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). Put another way, plaintiffs seek permission to fund express advocacy without regard to FECA's hard money contribution limits. But as the Supreme Court explained in *McConnell*, *Buckley* established that "[e]xpress advocacy was subject to FECA's limitations and could be financed only using hard money. The political parties, in other words, could not use soft money to sponsor ads that used any magic words . . . ." *McConnell*, 540 U.S. at 126.

Thus, although plaintiffs attempt to disguise their challenge as falling within BCRA § 403 by including ancillary challenges to certain of BCRA's soft money provisions (*e.g.*, Compl. ¶¶ 43-54 (Counts 2-3)), the activity they seek to engage in was prohibited by FECA as it existed prior to BCRA. Plaintiffs' challenge to BCRA's solicitation ban codified in § 441i(a) (Count 2), like their challenge to the requirement that state and local committee funds expended for federal election activity be subject to FECA's restrictions, codified in § 441i(b)(1) (Count 3), is dependent upon their foundational contribution limits challenge. Their challenge to those provisions is accordingly a challenge to prohibitions predating BCRA, which BCRA's soft

money prohibitions incidentally "reinforce[d]" as a byproduct of expanding the statute's reach. *Cf. McConnell*, 540 U.S. at 133.

In contrast to *McConnell* and *RNC*, which actually challenged *BCRA's* soft money provisions, the core of plaintiffs' suit is their request to invalidate *FECA's* limits on contributions to party committees. Without relief from the contribution limits of §§ 441a(a)(1)(B) and (D) plaintiffs will gain nothing, because even if a three-judge court were to invalidate §§ 441i(a), (b)(1), and (c), plaintiffs would still be limited in the contributions they could receive and what they could do with those contributions. Critically, plaintiffs are seeking to raise unlimited funds to be used on express advocacy. *McConnell*, 540 U.S. at 126 (express advocacy is subject to FECA's hard money limitations). As a consequence, the only way plaintiffs can succeed is by having the party committee contribution limits invalidated as to their contemplated party-independent-expenditure accounts. Accordingly, allowing plaintiffs to proceed under BCRA § 403 on the basis of their challenges to §§ 441i(a), (b)(1), or (c) would be to let the tail wag the dog.

*McConnell*'s progeny confirm the Commission's position. In *Schonberg v. FEC*, 792 F. Supp. 2d 14 (D.D.C. 2011) (per curiam), a three-judge court convened pursuant to BCRA § 403 granted the Commission's motion to dissolve itself because it found that the plaintiff's challenges were analogous to the BCRA § 307 challenges the Supreme Court had earlier addressed. Although plaintiffs spend several pages ostensibly discussing this decision (Pls.' Appl. at 9-14), this discussion focuses on plaintiffs' irrelevant notions of how FECA provisions might or might not "spring" back to life. *Id.* at 11-14; *see supra* p. 15 n.3. The relevance of *Schonberg* is hardly so subtle. The plaintiff there challenged provisions of BCRA § 301, which set forth the permissible and impermissible uses of campaign contributions accepted by

successful candidates for federal office. *Id.* at 15-16, 18. Although section 301 had replaced an earlier FECA provision regulating the same conduct, the court concluded that "the change effected by BCRA § 301 is not materially greater than that effected by BCRA § 307's raising and indexing the contribution limits at issue in *McConnell*." *Id.* at 19. For that reason, *Schonberg* held that the claim "that BCRA § 301 is unconstitutional [was] actually a challenge to FECA, which falls outside the jurisdiction of a three-judge district court under BCRA § 403(a)(1) and must instead be adjudicated by the Court of Appeals sitting en banc pursuant to 2 U.S.C. § 437h." *Id.*

Plaintiffs observe that *McCutcheon* proceeded pursuant to BCRA's § 403 procedure. (Pls.' Appl. at 5-6.) But *McCutcheon* is of no help to their application because the BCRA aggregate limits at issue in *McCutcheon* were quite different from the original FECA provision they replaced. When Congress updated the individual contribution limits through BCRA, what it changed was nothing more than the *dollar amounts* individuals could contribute to these committees. The limit on contributions to national committees that had been $20,000 was raised to $25,000 and indexed. BCRA § 307(a)(2), (d), 116 Stat. at 102-03. The limit on contributions to state and local committees that had been $5,000 was raised to $10,000. BCRA § 102, 116 Stat. at 86-87. That is all.

In contrast, whereas the pre-BCRA $25,000 FECA aggregate limit was a single aggregate amount that governed any configuration of individuals' contributions, which could all be of the same type, *see* FECA 1974 Amendments, § 101(b)(3), 88 Stat. 1263 (adding $25,000 aggregate limit applying simply to "contributions"), BCRA created a more complex series of aggregate limits and sub-limits that applied to particular categories of contributions, BCRA § 307(b), 116 Stat. at 102-03. Indeed, one of Congress's changes to the structure of the aggregate limits in

BCRA was expressly for the purpose of directing contributions to the national party committees like the RNC. *See id.* § 307(b)(3)(B) (setting aside a portion of one sub-limit for sole receipt by the national party committees). So, for example, in the pre-BCRA regime a contributor could use all of her aggregate limit on contributions to candidates. BCRA changed that by requiring her to give to the national parties in order to similarly maximize her total contributions. Thus, in contrast to BCRA's changes to the base contribution limits, which the Supreme Court has found to be modest, *McConnell*, 540 U.S. at 228-29, BCRA's revision of the aggregate limit created a "different statutory regime," *McCutcheon*, 134 S. Ct. at 1446. Accordingly, the challenge in *McCutcheon* was appropriate for a three-judge court, unlike plaintiffs' challenge here.

Although plaintiffs cite *Bluman v. FEC*, 766 F. Supp. 2d 1 (D.D.C. 2011), that case actually supports the Commission. In *Bluman*, a single judge of this Court granted an application to have a three-judge court hear plaintiffs' challenge to BCRA § 303, prohibiting contributions by foreign nationals. The court explained that, "[u]nlike *McConnell*, if a three-judge court were to strike down § 303 as unconstitutional, then no other law (or at least none which the defendant has identified) would prohibit the plaintiffs from engaging in their desired conduct." *Id.* at 4. However, the *Bluman* court expressly contrasted the challenged provision in that case, BCRA § 303, with one challenged here, BCRA § 307, explaining that "although § 307 of the BCRA increased and indexed for inflation certain FECA contribution limits, *it was the FECA provisions that actually imposed the contested contribution limits*." *Id.* at 3 (internal quotation marks omitted) (emphasis added).

As explained above, a successful challenge to BCRA § 307 (*i.e.*, to its increases and indexes) would reduce the individual contribution limit to national party committees by reinstating the pre-BCRA lower contribution limit. Striking BCRA § 102 would likewise

remove the specific, higher contribution limit for state and local party committees as well as the parenthetical reference to party committees added to 2 U.S.C. § 441a(a)(1)(C), returning the applicable limit to the lower "other" political committee limit. 2 U.S.C. § 441a(a)(1)(C). Although plaintiffs characterize § 102 of BCRA as adding "an entirely new base contribution limit" to FECA's regulatory scheme (Pls.' Appl. at 3 n.3), that is just not so. The "increased contribution limit" for state and local parties provided in § 102 is in both form and substance precisely the "*increased*" special limit § 102's heading describes. 116 Stat. at 86 (emphasis added). That is because, prior to BCRA, state and local party committees were limited to the $5,000 "other" political committee limit. To the extent plaintiffs suggest that previously state and local party committees could have received unlimited contributions, or that striking that provision would create a void in which these committees could receive unlimited contributions in the future, due to the absence of any "older FECA provision that could spring into effect" (Pls.' Appl. at 11), these arguments fare no better than plaintiffs' meritless suggestion that the Court rewrite *McConnell*'s redressability holding by turning it on its head.

In sum, if a three-judge court were to invalidate the provisions plaintiffs challenge pursuant to its limited grant of authority, FECA as it existed before BCRA would still proscribe all of plaintiffs' intended activities. This Court thus should not approve a three-judge court because any such court would not be able to redress plaintiffs' alleged injuries. *McConnell*, 540 U.S. at 229; *Schonberg*, 792 F. Supp. 2d at 19.

## III. A THREE-JUDGE COURT COULD NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER ANY OF PLAINTIFFS' CLAIMS

Plaintiffs amended their application for a three-judge court to add an argument that, should the Court find that any aspect of their challenge does not qualify for BCRA's special review provisions, those portions of the case may still be heard by the three-judge court pursuant

to its supplemental jurisdiction authority, 28 U.S.C. § 1367. (Pls.' Appl. at 14-16.) Whether a three-judge court would have supplemental jurisdiction is an unnecessary consideration, however, since a three-judge court would not have jurisdiction over *any* part of this case, as the foregoing analyses of substantiality and justiciability demonstrate. *See supra* pp. 7-20.

But even if plaintiffs had asserted some claims that could be brought before a three-judge court pursuant to BCRA § 403, the exercise of supplemental jurisdiction would be contrary to *McConnell*. In *McConnell*, the plaintiffs challenging the unredressable contribution limits also brought other, redressable challenges to BCRA that were ruled on. *Compare, e.g.*, *McConnell*, 251 F. Supp. 2d at 293 n.52 (Henderson, J., concurring in the judgment in part and dissenting in part) (noting that these plaintiffs challenged BCRA's failure "'to raise . . . and to index [contribution] limits with respect to political committees functioning independently from candidates, their authorized campaign committees, or political parties,'"), *with, e.g.*, *id.* at 291 n.47 (noting that these same plaintiffs also claimed that section 101 of BCRA, restricting use of non-federal funds, "abridge[d] their freedom of the press 'by exercising editorial control of their press activities'"). Although these plaintiffs' redressable challenges to BCRA provisions were heard and decided, *id.* at 265 (per curiam) (finding these plaintiffs' challenges "without merit"), neither the three-judge district court nor the Supreme Court exercised supplemental jurisdiction in order to reach their challenge to the FECA hard money contribution limits, *id.* at 186-87 (finding plaintiffs' challenges to contribution limits non-justiciable); 540 U.S. at 229 (same).

And to the extent any portion of this case presents a constitutional challenge to FECA by a national party committee or individual eligible to vote in presidential elections, not only must it *not* proceed under BCRA § 403 but controlling Circuit law provides that it *must* proceed according to FECA's own special review provision, as discussed in the next section. *See infra*

pp. 22-24. Thus, even if supplemental jurisdiction might otherwise be properly exercised before any three-judge court, this Circuit has foreclosed any such jurisdiction by providing that challenges to FECA be brought pursuant to section 437h exclusively.

## IV. THE FACTFINDING AND SUBSTANTIALITY SCREENING PROCEDURES OF 2 U.S.C. § 437h APPLY TO SOME OF PLAINTIFFS' CLAIMS

Plaintiffs' application fails to address whether FECA's special judicial review provision, 2 U.S.C. § 437h, applies to any of their claims. Because a Court must make findings of fact and determine whether certain plaintiffs' constitutional challenges to provisions of FECA are insubstantial, the Commission addresses that provision here.

Section 437h of FECA provides that the FEC, "the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions . . . , including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act." 2 U.S.C. § 437h. "The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." *Id.* In *Wagner v. FEC*, a panel of the Court of Appeals concluded that the text and legislative purpose of section 437h make clear that "the parties therein enumerated" — the Commission, the national party committees, and individuals eligible to vote in any election for the office of President — "may bring actions challenging FECA's constitutionality only under that section." 717 F.3d 1007, 1016 (D.C. Cir. 2013) (per curiam). Thus, *Wagner* held that section 437h mandates that any substantial constitutional challenges to FECA brought by the enumerated parties "must" be heard by the court of appeals sitting *en banc*. *Id.* at 1015. Because plaintiffs RNC, Priebus, and Villere are enumerated parties (Compl. ¶¶ 11-12, 14), any constitutional challenges to FECA they raise must proceed under the section 437h procedure.

Section 437h was originally enacted as part of the 1974 Amendments to FECA. FECA 1974 Amendments, § 208(a), 88 Stat. 1263, 1285-86. It was added by an amendment offered by Senator Buckley to ensure that the constitutional questions he raised could be expeditiously resolved. *See* 120 Cong. Rec. 10,562 (1974) (statement of Sen. Buckley). As originally enacted, the provision contained two additional subsections: "Subsection (b) provided for direct appeal to the Supreme Court. . . . Subsection (c) required both the courts of appeals and the Supreme Court 'to advance on the docket and to expedite to the greatest possible extent' any matter certified under section 437h.'" *Wagner*, 717 F.3d at 1010 (citations omitted). Congress deleted these subsections in 1988 and 1984, however. *See id.* (citing Pub. L. No. 98-620, § 402(1)(B), 98 Stat. 3335, 3357 (1984); Pub. L. No. 100-352, § 6(a), 102 Stat. 662, 663 (1988)). Thus, while actions challenging the constitutionality of FECA that are instituted by the FEC, the national party committees, or individuals eligible to vote in presidential elections are required to follow the certification and *en banc* procedures of section 437h, Congress no longer requires such actions to proceed with heightened speed.

It is well-established that, "[u]nder section 437h, a district court should perform three functions. First, it must develop a record for appellate review by making findings of fact." *Wagner*, 717 F.3d at 1009. Gathering and presenting the factual record is a well-established part of the section 437h review procedure. *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154 (D.D.C. 2013) (preparing factual record and certifying question to *en banc* court of appeals), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014); *In re Cao*, 619 F.3d 410, 414 (5th Cir. 2010) (*en banc*) ("The district court, abiding by its proper role in addressing a 2 U.S.C. § 437h challenge, identified the constitutional issues in the complaint, held evidentiary hearings concerning those issues, and made necessary findings of fact." (footnote omitted)). "Second, the

district court must determine whether the constitutional challenges are frivolous or involve settled legal questions." *Wagner*, 717 F.3d at 1009. Only once it has performed these important threshold tasks is the district court to "certify the record and all non-frivolous constitutional questions to the en banc court of appeals." *Id.*

Here, the Commission plans to argue at the conclusion of discovery, as contemplated by the section 437h procedure, that any constitutional questions plaintiffs may offer pursuant to § 437h are too insubstantial to be certified to the *en banc* court of appeals for the same reason that they are too insubstantial for a three-judge court to be convened. *See supra* pp. 8-13; *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990) ("[N]ot every sophistic twist that arguably presents a 'new' question should be certified. Once the statute has been thoroughly reviewed by the Court, questions arising under 'blessed' provisions understandably should meet a higher threshold."). Those legal arguments should occur at the certification stage after discovery, however. It is possible that appellate courts may revisit existing precedent, *see McCutcheon*, 134 S. Ct. at 1446-47, and any appellate review should be decided on a full record.

Finally, in contrast with plaintiffs RNC, Priebus, and Villere, plaintiffs LAGOP, JPGOP, and OPGOP, *state* and *local* party committees, are not among the entities subject to the special procedures of section 437h. 2 U.S.C. § 437h; *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 581 (1982) (jurisdiction under section 437h is explicitly limited to the three classes of plaintiffs enumerated in the statute). All of these committees' claims must be reviewed by a single-judge district court pursuant to regular federal question jurisdiction, 28 U.S.C. § 1331.[4]

[4] The parties' Rule 26(f) report can set forth the product of negotiations regarding (1) a schedule for discovery and record development, (2) a briefing schedule following discovery on the substantiality of claims by plaintiffs RNC, Priebus, and Villere, and (3) a dispositive briefing schedule for the claims of the other plaintiffs.

## CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' application and decline to convene a three-judge court pursuant to BCRA § 403.

Respectfully submitted,

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