United States District Court
District of Columbia

Republican National Committee et al., *Plaintiffs* *v.* **Federal Election Commission**, *Defendant*	**Civil Case No. 14-cv-853 (CRC)** THREE-JUDGE COURT REQUESTED ORAL ARGUMENT REQUESTED

Memorandum in Support of Plaintiffs' Motion for Summary Judgment

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Introduction

This case raises pure questions of law. It is a First Amendment constitutional challenge to provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (Mar. 27, 2002),[1] relating to:

(Count 1)—non-contribution accounts ("NCAs")[2] for party-committees;

(Count 2)—solicitation for such NCAs by national-party committee officers/agents; and

(Count 3)—independent "federal election activity"[3] of state- and local-party committees.

Despite no anticorruption interest in restricting independent activities, the government restricts plaintiffs' intended independent activities. Two controlling holdings forbid such restriction:

(a) "[I]ndependent expenditures ... do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010), and

(b) "[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations," *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"). *See also EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009) (recognizing right to have separate accounts for independent expenditures and for contributions).[4]

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[1] *See* http://www.gpo.gov/fdsys/pkg/PLAW-107publ155/pdf/PLAW-107publ155.pdf).

[2] "Non-contribution account" is an FEC term for an independent-expenditure account that may receive unlimited contributions. *See infra* at 4, 14 (NCAs explained).

[3] *See* 2 U.S.C. 431(20) ("federal election activity" defined, including voter-identification and get-out-the vote activity and public communications supporting/opposing candidates).

[4] Moreover, FEC concedes that, if entities can do independent expenditures *separately*, they must be allowed to pool their resources for effective advocacy by doing them *together*. *See* FEC, Advisory Opinion ("AO") 2010-11 (Commonsense Ten) at 3. FEC publications are at http://fec.gov/info/publications.shtml; AOs through http://saos.fec.gov/saos/searchao.

In an early application of the rule that independent expenditures and independent-expenditure entities pose no corruption risk, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"), held that (i) FEC may not *presume* that party-committee independent expenditures are coordinated with their candidates and (ii) party-committees may make *unlimited* independent expenditures. "[T]he constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617 (Breyer, J., joined by O'Connor & Souter, JJ.). "We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Id.* at 618.

While "nonconnected committees"[5] can have NCAs, party-committees can't. *See* FEC, *FEC Statement on Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account* (Oct. 5, 2011) ("*NCA-Guidance*").[6] And state- and local-party committees must use "federal funds"[7] for independent federal election activity. 2 U.S.C. 441i(b).

An example of the hybrid-PACs (having contribution account and NCA) with which plaintiffs compete is Ready for Hillary, which had been an independent-expenditure PAC ("IE-PAC") promoting Hillary Clinton for President but recently established a contribution account to contribute to candidates. *See* Dave Levinthal, *Ready for Hillary no longer just a super PAC* (May 28, 2014), http://www.publicintegrity.org/2014/05/28/14838/ready-hillary-no-longer-just-super-pac.

[5] "A nonconnected committee is a political committee that is not a party committee, an authorized committee of a candidate or a separate segregated fund established by a corporation or labor organization. 100.5(a) and 106.6(a)." FEC, *Nonconnected Committees* at 1 (2008).

[6] *See* http://www.fec.gov/press/press2011/20111006postcarey.shtml.

[7] "*Federal funds* ... comply with the limitations, prohibitions, and reporting requirements of the Act." 11 C.F.R. 300.2(g). "*Non-Federal funds* ... are not subject to the limitations and prohibitions of the Act." 11 C.F.R. 300.2(k). Federal funds and non-federal funds are sometimes called "hard money" and "soft money," respectively. *See, e.g.*, 2 U.S.C. 441i (titled "Soft money of political parties").

In a political world dominated by IE-PACs, hybrid-PACs, and NCAs, party-committees are at a distinct disadvantage, as Joel Gora, law professor and former ACLU attorney in *Buckley v. Valeo*, 424 U.S. 1, 4 (1976), explains:

> There is only one severe drawback in all of this unlimited political giving and spending, which is, by and large, so beneficial for our democracy. That is that our two most central, important political actors—our candidates and our parties—have to fight their political battles with one hand tied behind their back. While their expenditures cannot be limited, contributions to them can be. As a result, candidates and parties face the prospect of being outspent by independent individuals and groups who are no longer restrained in terms of what they can raise and spend. That is a potential imbalance in our political and electoral speech system that should concern us.

Joel M. Gora, *In Defense of "Super PACs" and of the First Amendment*, 43 Seton Hall L. Rev. 1185, 1206-07 (2013).[8]

Facts

This case raises pure questions of law. The key facts are simple.[9] Regarding Count 1, the Republican National Committee ("RNC") and the Republican Party of Louisiana ("LAGOP") want to create an NCA, under instructions from RNC Chairman Priebus and LAGOP Chairman Villere, to receive unlimited contributions from permissible sources[10] for making only independent expenditures[11] and other independent communications that refer to federal candidates.[12]

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[8] *See* http://scholarship.shu.edu/cgi/viewcontent.cgi?article= 1482&context=shlr.

[9] Facts are set out in greater detail in the Verified Complaint ("VC") and Plaintiffs' Statement of Undisputed Facts ("PSUF").

[10] FEC-approved NCAs may receive corporate/union contributions, *id.*, but plaintiffs don't challenge the corporate/union contribution ban, so corporate/union contributions are not at issue. VC ¶ 44 n.10. No NCAs may receive contributions from foreign nationals, federal contractors, national banks, or federally chartered corporations. 2 U.S.C. 441b(a).

[11] An "independent expenditure" is a non-coordinated communication "expressly advocating the election or defeat of a clearly identified [federal] candidate." 2 U.S.C. 431(17).

[12] NCAs may "financ[e] [1] independent expenditures, [2] other advertisements that refer to a Federal candidate, and [3] generic voter drives." *NCA-Guidance*. Plaintiffs' NCAs will only do the first two, as well as disbursements for administrative and operating expenses. NCAs don't do "electioneering communications," the definition of which excludes "communication[s] ...

PSUF ¶¶ 1–4, 8-12. FEC recognizes NCAs only for "nonconnected political committees" (which excludes political-party committees), as set out in *NCA-Guidance*:

> The Commission will no longer enforce 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3),[13] as well as any implementing regulations, against any nonconnected political committee with regard to contributions from individuals, political committees, corporations, and labor organizations, as long as (1) the committee deposits the contributions into a separate bank account for the purpose of financing independent expenditures, other advertisements that refer to a Federal candidate, and generic voter drives (the "Non-Contribution Account"), (2) the Non-Contribution Account remains segregated from any accounts that receive source-restricted and amount-limited contributions for the purpose of making contributions to candidates, and (3) each account pays a percentage of administrative expenses that closely corresponds to the percentage of activity for that account.

PSUF ¶ 9. Plaintiffs believe the government has no cognizable interest to justify the challenged provisions keeping party-committees from having NCAs as described.

Regarding Count 2, RNC and Chairman Priebus want RNC officers/agents to be able to solicit unlimited contributions for, or direct unlimited contributions to, RNC's NCA—all from permissible sources. Plaintiffs believe the government has no cognizable interest to justify the challenged provision keeping plaintiffs from doing so. PSUF ¶¶ 1-2, 11.

Regarding Count 3, LAGOP and two local-party organizations, Jefferson Parish Republican Parish Executive Committee ("JPGOP") and Orleans Parish Republican Executive Committee ("OPGOP"), want to funds not subject to federal source and amount restrictions (not "federal funds") to raise funds for, and spend on, independent federal election activities. Plaintiffs believe the government has no cognizable interest to justify the challenged provisions keeping plaintiffs

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constitut[ing] an expenditure or an independent expenditure under the [Federal Election Campaign Act ("FECA")]." 2 U.S.C. 434(f)(3)(B)(ii). Political committees report disbursements for communications as independent expenditures or expenditures under 11 C.F.R. 104.3 and 104.4. *See id.* at 104.20(b); AO 2011-24 (StandLouder.com) at 6 n.4.

[13] Section 441a(a)(1) imposes limits on contributions (herein "contribution limits") that *McCutcheon* called "base limits." 134 S.Ct. 1434, 1436 (2014). Section 441a(a)(3) imposed what *McCutcheon* called "aggregate limits, *id.* and held unconstitutional.

from doing so. PSUF ¶¶ 3-6, 13-15.

Argument

Plaintiffs' planned independent-expenditure activity is highly protected under the First Amendment "right to participate in democracy." *McCutcheon*, 134 S.Ct. at 1441 (Roberts, C.J., joined by Scalia, Kennedy & Alito, JJ.) (stating holding, *Marks v. United States*, 430 U.S. 188, 193 (1977)). This "right to participate in electing our political leaders" may be "exercise[d] ... in a variety of ways," from being a candidate, to advocating for a candidate, to making political contributions. *Id.* at 1440-41. "'When the Government restricts *speech*, the Government bears the burden of proving the constitutionality of its actions.'" *Id.* at 1452 (emphasis added).[14] As developed below, FEC cannot meet its burden here because "independent expenditures ... do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. at 357.

I. Under Strict or Closely Drawn Scrutiny, a "Substantial Mismatch" Exists Between the Anticorruption Interest and Independent-Activity Restrictions.

McCutcheon did not revisit the distinction between scrutiny for expenditure restrictions, "strict scrutiny," and the scrutiny for contributions, which it called the "'closely drawn' test." 134 S.Ct. at 1445 (citing *Buckley*, 424 U.S. at 26-27).[15] It not decide the applicable scrutiny

[14] Because *McCutcheon* analyzed the aggregate limit on political *contributions* as "speech," *a fortiori* independent-expenditure restrictions are *speech* restrictions, even though a contribution element is involved as was also true in *McCutcheon*. *See also id.* at 1441, 1446, 1449-52, 1466 (aggregate contribution limits described as "speech" burden).

[15] Under the closely drawn test, "if a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, ...it cannot survive 'rigorous' review." *McCutcheon*, 134 S.Ct. at 1446 (citations omitted). The "fit matters," so that the tailoring must be "reasonable" with "'means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57 (citation omitted). Under either scrutiny, "'the Government bears the burden of proving the constitutionality of its actions,'" *id.* at 1452 (citation omitted), "'mere conjecture ... [cannot] carry a First Amendment burden,'" *id.* (citation omitted), in distinguishing "between *quid pro quo* corruption and general influence .... 'the First Amendment requires us to err on the side protecting speech rather than suppressing it,'"*id.* at 1451 (citation omitted), and no deference is afforded "unconstitutional remed[ies]," *Citizens United*, 558 U.S. at 361.

"[b]ecause [of] ... a substantial mismatch between the ... objective and the means ... to achieve it, [so] the aggregate limits fail even under the 'closely drawn' test." *Id.* at 1446. *SpeechNow* held that, where an IE-PAC sought unlimited contributions, the scrutiny level need not be decided, 599 F.3d at 696:

> [B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, ... government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations. No matter which standard of review governs contribution limits, the limits on contributions to SpeechNow cannot stand.

Here, there is also a substantial mismatch between the anticorruption interest and provisions restricting independent activity, so the challenged provisions are unconstitutional, as applied, under either scrutiny level, *see* Part II, and this Court need not decide the scrutiny level. But if the court selects a scrutiny level, strict scrutiny applies because plaintiffs want an NCA—an expressive association for making independent expenditures—and seek to solicit for the NCA and do independent communications and other federal election activities, all of which involves *speech*, and any contributions involved are for those independent expenditures, communications, and activities. *See supra* at 5 & n.14 (*McCutcheon* treated *contribution* limits as "speech" limits).

II. No Cognizable Interest Justifies Restrictions on Independent Expenditures or Independent-Expenditure Entities.

The only interests FEC may assert to support restrictions on independent expenditures or independent-expenditure-only entities are (1) preventing quid-pro-quo corruption, *see* II.A, and (2) preventing circumvention of contribution limits by conduit-contributions, *see* II.B. Neither suffices, as the IE-PAC line of authorities further establishes. *See* II.C.

A. No *Anticorruption* Interest Justifies Restrictions on Independent Expenditures or Independent-Expenditure Entities.

"Th[e Supreme] Court has identified only one legitimate governmental interest for restricting

campaign finances: preventing corruption or the appearance of corruption." *McCutcheon*, 134 S.Ct. at 1450 (citations omitted). "Any regulation must ... target ... '*quid pro quo*' corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. 'The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.'" *Id.* at 1441-42 (citations omitted). This applies to contributions *to candidates*, *id.* at 1452:

> [T]here is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. See 2 U.S.C. 441a(a)(8); 11 CFR 110.6. The Government admits that if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient's discretion—not the donor's. See Brief for Appellee 37. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of *quid pro quo* corruption is generally applicable only to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder." *McConnell*[*v. FEC*], 540 U.S. [93], 310 (2003)] (opinion of KENNEDY, J.).

Since "independent expenditures ... do not give rise to corruption," *Citizens United*, 558 at 357, no anticorruption interest supports independent-expenditure restrictions. And "because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696.

There is no other cognizable "corruption." In *SpeechNow*, "FEC relied heavily on *McConnell*, arguing that independent expenditures ... benefit candidates ... [who might be] grateful" and that "'preferential access ... and undue influence" might ensue. *Id.* at 694. "Whatever the merits of those arguments before *Citizens United*," the court responded, "they ... have no merit after *Citizens United*." *Id.* "Interests" based on "access," "gratitude," or "influence" are non-cognizable, *Citizens United*, 558 U.S. at 360-61,[16] as is "'equalizing the relative ability ... to influence the

[16] Nor may FEC substitute the notion that candidates and officeholders "value" independent expenditures for rejected gratitude-corruption as it repeatedly does in its preliminary injunction opposition (Doc. 13) in *Rufer v. FEC*, No. 14-837 (CRC) (D.D.C., filed May 21, 2014) at pages

outcome of elections,'" *id.* at 350 (citation omitted). And large contributions don't constitute corruption per se: "Spending large sums of money 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." *McCutcheon*, 134 S.Ct. at 1450. Nor may a court consider challenged provisions "as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis," *id.* at 1444, but must examine the effect of each prophylaxis and the merits of each provision in turn. *Citizens United* was in the *independent-expenditure* context, while *McCutcheon* was in the *contribution-limit* context, 134 S.Ct. at 1450-51. Their interest analyses control here. And *SpeechNow* foreclosed any argument that an IE-PAC/NCA case could turn on the idea "that the analysis of *Citizens United* does not apply because that case involved an expenditure limit while this case involves a contribution limit." 599 F.3d at 695.

B. No *Anticircumvention* Interest Justifies Restrictions on Independent Expenditures or Independent-Expenditures Entities.

"[I]f there is no risk that ... candidates will be corrupted by [direct] donations ... [to them], then the Government must defend [the challenged provisions] by demonstrating that they prevent circumvention of the base limits." *McCutcheon*, 134 S.Ct. at 1452. *McCutcheon* rejected FEC's argument that aggregate contribution limits prevented illegal conduit-contributions.[17] But no anticircumvention interest protects restrictions on independent expenditures or independent-expenditure entities. *Buckley* struck an independent-expenditure ceiling because "[r]ather than preventing

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24-26. In the anticorruption context, "value" equals "gratitude," and neither is cognizable corruption.

[17] "Circumvention" must target only illegal conduit-contributions. *See, e.g.*, *id.* at 1454 n.9 ("'We anticipate seeing fewer cases of conduit contributions ..., because individuals ... who wish to influence elections or officials .... are likely to simply make unlimited contributions to Super PACs or 501(c)s.'" (citation omitted)). Government may prevent conduit-contributions, but not with unconstitutional law. *Id.* at 1452-60. *McCutcheon* found no conduit-contribution risk because of layered prophylaxes. *Id.* at 1458.

circumvention of the contribution limitations, [the ceiling] severely restricts all independent advocacy despite its substantially diminished potential for abuse." 424 U.S. at 47. Any anticircumvention interest would have to based on a conduit-contribution *reaching* a candidate, *see McCutcheon*, 134 S.Ct. at 1460 ("*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate, or officeholder himself."), but that cannot occur with independent *expenditures* (which are not contributions) or for contributions for independent expenditures (which cannot be used for contributions). And *independent* expenditures are by definition not coordinated, so they cannot become contributions by reason of coordination. Thus, independent expenditures and independent-expenditure entities cannot be vehicles for persons seeking to circumvent contribution limits by conduit contributions.

C. The *IE-PAC Line of Authorities* Recognizes that No Interest Justifies Restricting Contributions to Independent-Expenditure Entities.

Because no interests justify restricting contributions to independent-expenditure entities, IE-PACs, hybrid-PACs and NCAs were approved in key cases,[18] FEC advisory opinions,[19] and FEC's *NCA-Guide.* Some of these are discussed next to provide context.

1. *Buckley*. The IE-PAC authorities begin with the mandate that "Congress ... make no law ... abridging the freedom of speech." U.S. Const. amend. I. But *Buckley* held that restrictions may be imposed where the government can prove them properly tailored to sufficiently weighty interests. 424 U.S. at 12-23. Avoiding vagueness and overbreadth problems, *Buckley* construed "ex-

[18] *See, e.g.*, *Republican Party of New Mexico v. King*, 741 F.3d 1089 (10th Cir. 2013); *Texans for Free Enterprise v. Texas Ethics Commission*, 732 F.3d 535 (5th Cir. 2013); *Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Long Beach Chamber of Commerce v. Long Beach*, 603 F.3d 684 (9th Cir. 2010); *SpeechNow*, 599 F.3d 686; *EMILY's List*, 581 F.3d 1; *Thalheimer v. San Diego*, 706 F.Supp.2d 1065 (S.D. Cal. 2010); *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008).

[19] *See, e.g.*, AO 2010-09 (Club for Growth), AO 2010-11 (Commonsense Ten). (AOs are not "authorities" but provide FEC positions on legal issues that operate as concessions here.)

penditure" definitions to reach communications expressly advocating the election or defeat of a candidate, *id.* at 43-44, 80, which was incorporated into the "independent expenditure" definition at 2 U.S.C. 431(17). *Buckley* also held, 424 U.S. at 47, that

> 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.

2. *Colorado-I*. *Colorado-I* held that FEC may not presume party-committee independent expenditures are coordinated with candidates. 518 U.S. at 619 (plurality) ("The question ...is whether the Court of Appeals erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are 'coordinated.' We believe it did."). *Colorado-I* recognized that neither party-committees nor party-committee's independent-expenditure activity posed a corruption risk: "[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." *Id.* at 618. It recited that "'[a] vigorous party system is vital to American politics" and "'[p]ooling resources from many small contributors is a legitimate function and an integral part of party politics.'" *Id.* (citations omitted). And *Colorado-I* held that party-committees have a constitutional right to make unlimited independent expenditures because the act of party-committees making independent expenditures does not corrupt candidates. *Id.* ("We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.").

3. *McConnell*. *McConnell* held that party-committees couldn't be forced to choose between independent expenditures and contributions to candidates, 540 U.S. at 213-19, so party-commit-

tees may have separate accounts for independent expenditures and contributions. And *McConnell* held that the independent-expenditure line of authorities must be distinguished from the soft-money context because "*Colorado I* addressed an entirely different question—namely, whether Congress could permissibly limit a party's independent expenditures." *Id.* at 145 n.45.

4. *Citizens United*. *Citizens United* also distinguished the two lines of authorities, holding that soft-money authorities (there, *McConnell*) couldn't control an independent-expenditure case, 558 U.S. at 361("This case, however, is about independent expenditures, not soft money.") The Court held that "independent expenditures ... do not give rise to corruption or the appearance of corruption." *Id.* at 357. "[M]ore speech, not less, is the governing rule." *Id.* at 361.

5. *SpeechNow*. In *SpeechNow*, the en-banc D.C. Circuit considered a case brought by a now-IE-PAC wanting to receive unlimited contributions from individuals for making independent expenditures. 599 F.3d at 689. At issue was whether the base and aggregate contribution limits, 2 U.S.C. 441a(a)(1)(C) and(a)(3),[20] were constitutional as applied to contributions to an independent-expenditure entity. 599 F.3d at 690-91. The court noted that such contributions are protected by the First Amendment, and the only cognizable interest is "preventing corruption or the appearance of corruption." *Id.* at 692. But "because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *Id.* at 696.

6. AO 2010-09 (Club for Growth). After *SpeechNow*, FEC considered an advisory opinion request ("AOR") from Club for Growth, Inc. ("CFG") (26 U.S.C. 501(c)(4) nonprofit). CFG had

[20] The aggregate limits were held unconstitutional in *McCutcheon*, 134 S.Ct. 1434.

an IE-PAC. CFG also had a regular PAC ("Club PAC") (an "SSF"[21]) to contribute to candidates. CFG asked three questions (here as restated in the AO), AO 2010-09 at 2-3[22]:

> *1. If [CFG] pays the [IE-PAC's] establishment, administrative, and solicitation expenses, may the [IE-PAC] solicit and accept contributions from the general public?*
> *2. If [CFG] pays the [IE-PAC's] establishment, administrative, and solicitation expenses, may the [IE-PAC] solicit and accept funds earmarked for specific independent expenditures?*
> *3. Do the answers to Questions 1 or 2 change if the [IE-PAC] pays its own establishment, administrative, and solicitation expenses?*[23]

(1) FEC answered the first question affirmatively: "the [IE-PAC] may solicit and accept unlimited contributions from the general public." *Id.* at 3. It noted that *SpeechNow* and other cases found no constitutional basis for imposing limits on contributions to IE-PACs. *Id.*

(2) FEC answered the second question affirmatively: "the [IE-PAC] may solicit and accept funds earmarked for specific independent expenditures." *Id.* at 5. Note FEC's recognition that earmarked contributions to an IE-PAC for the purpose of making independent expenditures pose no risk of corruption. Though 11 C.F.R. 110.1(h)[24] prohibits contributing both to a candidate and

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[21] SSFs ("separate segregated funds") are established by corporations/unions to solicit from a "restricted class" for making contributions and expenditures, *see* 2 U.S.C. 441b, and corporations/unions may pay their SSF's operating and fundraising costs.

[22] These questions concerned the ability of corporations/unions to pay expenses for their SSFs. Whether the IE-PAC would be an SSF and the implications thereof was part of the AOR, but FEC decided the IE-PAC was not an SSF. AO 2010-09 at 5.

[23] Before turning to the answers to the three questions in the AOR, note what the AOR asserted regarding the "affiliation" problem, i.e., the rule that affiliated entities (those created by the same people) must share a contribution limit. *See, e.g.*, 11 C.F.R. 100.5(g) and 110.3(b). CFG asserted that "the receipt limitations and outgoing contribution limitations normally associated with affiliated PACs have no effect on the [IE-PAC] since donations to the [IE-PAC] may not, per *SpeechNow*, be limited and the [IE-PAC] will make no contributions to candidates or other receipt-limited political committees." AOR 2010-09 at 7 n.4. FEC did not dispute this and assumed its truth. So no *affiliation* rule forecloses unlimited contributions to IE-PACs/NCAs.

[24] **§ 110.1 Contributions by persons other than multicandidate political committees (2 U.S.C. 441a(a)(1)).** ...
(h) *Contributions to committees supporting the same candidate*. A person may contribute to a candidate or his or her authorized committee with respect to a particular election and also contribute to a political committee which has supported, or anticipates supporting, the same

a political committee with knowledge that a substantial portion of the latter contribution will be "expended on behalf of[] that candidate," the on-behalf-of language does not include independent expenditures because, the AO says, they pose "no possibility of circumvention." AO 2010-09 at 5. There is no circumvention because "the Commission's earmarking regulation is designed to prevent the circumvention of contribution limits," *id.*, and "the [IE-PAC] will not, itself, make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by [FECA], nor will the [IE-PAC] make any coordinated communications ...," *id.* This means that donors who have maxed out their contributions to a candidate may earmark contributions to an IE-PAC for independent expenditures expressly advocating the election of that candidate.

(3) Regarding the third question, FEC said that neither previous answer would be changed if the IE-PAC paid its own expenses. *Id.* It noted that only corporations/unions with SSFs could pay such expenses of connected SSFs without them being considered either contributions or expenditures. *Id.* So CFG could pay the expenses and the IE-PAC would report those expenditures as contributions to the IE-PAC, or the IE-PAC could pay its own expenses. *Id.*

Thus, CFG's IE-PAC was authorized to receive unlimited contributions from individuals, including contributions earmarked for specific independent expenditures.

7. AO 2010-11 (Commonsense Ten). In AO 2010-11, FEC decided that IE-PACs could also accept contributions from "political committees, corporations, and labor unions for the purpose of making independent expenditures." *Id.* at 2. FEC conceded that since all of these entities could

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candidate in the same election, as long as—

(1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee;

(2) The contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election; and

(3) The contributor does not retain control over the funds.

make their *own* independent expenditures, they necessarily could pool their resources for effective advocacy by doing so *together* through the IE-PAC. *Id.* at 3. Since independent expenditures pose no quid-pro-quo-corruption risk, there was no basis to restrict these sources of contributions to the IE-PAC. *Id.*[25] *See also Texans for Free Enterprise*, 732 F.3d at 537-39.

8. AOR 2012-20 (National Defense PAC) & *Carey v. FEC*. In AOR 2010-20, a nonconnected PAC asked FEC for an advisory opinion allowing it to be a hybrid-committee, i.e., have both a contribution account and a non-contribution account (which could receive unlimited contributions, including from corporations/unions). FEC Commissioners could not muster four votes (required) to approve an AO. FEC later entered into a stipulated order and consent judgment agreeing not to enforce the base and aggregate limits against NDPAC for its NCA, *see* Stipulated Order and Consent Judgment (Doc. 28), *Carey v. FEC*, Civ. No. 11-259-RMC (D.D.C. 2011) (filed Aug. 19, 2011), and FEC issued its *NCA-Guidance* allowing NCAs.[26]

In sum, this independent-expenditure line of authorities holds that, because of their independence, independent expenditure pose no *corruption* risk to candidates or public officials, and there is no risk of *circumvention* of contribution limits because an IE-PAC/NCA makes no contributions (directly or by coordination). There being no governmental interest to justify any restriction, IE-PACs/NCAs receive contributions that may be (1) unlimited in amount, (2) from corporations and unions, and (3) earmarked for specific independent expenditures.

[25] IE-PACs/NCAs may not receive contributions from national banks, corporations organized by act of Congress, foreign nationals, or federal contractors. *Id.* at 2. *See also* 2 U.S.C. 441b(a); *Bluman v. FEC*, 800 F.Supp.2d 281, 286-89 (D.D.C. 2011), *aff'd without op.*, 132 S.Ct. 1087 (2012) (upholding ban on foreign-national contributions).

[26] *See supra* at 4 (FEC's NCA requirements).

III. Banning Party-Committee NCAs Is Unconstitutional (Count 1).

In Count 1, RNC and LAGOP challenge provisions, as applied, that prevent them from having NCAs that receive unlimited contributions from permissible sources[27] for making only independent expenditures and other independent communications that refer to federal candidates. Two provisions prevent this for plaintiffs.

(1) FEC interprets the non-federal-funds ban at 2 U.S.C. 441i(a)-(c) as making contributions that are unlimited by contribution limits into non-federal funds. *See* AO 2011-12 (Majority PAC). This ban is unconstitutional as applied to party-committee NCAs. *See* Part III.A.

(2) The contribution limits, 2 U.S.C. 441a(a)(1)(B) and (D), would prevent plaintiffs' NCAs from receiving unlimited contributions, though contribution limits are unconstitutional for NCAs. *See supra* at 4, 14. So if the non-federal-funds ban doesn't prevent plaintiffs from having NCAs, then plaintiffs' NCAs drop into FEC's *existing* mold for permissible NCAs, *see NCA-Guidance*, for whom contribution limits are unconstitutional. Contribution limits are also unconstitutional as applied to party-committee NCAs. *See* Part III.B.

Part III.C shows that nothing about party-committees takes their independent expenditures and NCAs outside the standard constitutional analysis for NCAs: "[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696. Since party-committees may make independent expenditures—because their independent-expenditure activity poses no corruption risk, *Colorado-I*, 518 U.S. 604—no interest justifies banning party-committees from making independent expenditures through NCAs receiving unlimited contributions.

[27] Though other NCAs may receive corporate/union contributions, *see NCA-Guidance*, plaintiffs do not presently seek that relief for their NCAs. *See* VC ¶ 42 n.12.

A. The Non-Federal Funds Ban Is Unconstitutional as Applied.

This not a "soft money" case because both *McConnell*, 540 U.S. at 145 n.45, and *Citizens United*, 558 U.S. at 360-61, distinguished the soft-money context from the here-applicable independent-expenditure context. *See supra* at 10-11.[28] But because FEC interprets the unlimited funds that IE-PACs/NCAs receive as non-federal funds," plaintiffs challenge the non-federal funds ban, 2 U.S.C. 441i(a)-(c),[29] as unconstitutional as applied to their intended NCAs.

The government may not create a substantial mismatch between interests and means. *See* Part I. But there is such a mismatch with the ban as applied to plaintiffs' intended NCAs because, as with other IE-PACs/NCAs, there is neither an anticorruption interest, *see* Part II.A, nor an anticircumvention interest, *see* Part II.B. So the ban is unconstitutional as applied.

B. The Contribution Limits Are Unconstitutional as Applied.

Plaintiffs also challenge the contribution limits on contributions to party-committees at 2 U.S.C. 441a(a)(1)(B) and (D) as unconstitutional as applied to their intended NCAs.[30]

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[28] *See also* Bob Bauer, *Circling Back (a Full 360°) to the RNC and Libertarian Party Lawsuits* (May 29, 2014), www.moresoftmoneyhardlaw.com/2014/05/circling-back-full-360-rnc-libertarian-party-lawsuits/ ("[T]he suit does not exploit a 'loophole'; it is not a 'soft money' lawsuit; and the RNC has not previously made this claim."). Bauer continues, *id.*:

> Political committees can spend independently without limitation, and they can also accept contributions without limit to fund these expenditures. The RNC and Libertarian committees are simply saying: "us, too." These party organizations, looking to regain a measure of competitive parity with super PACs, are acting rationally ....

[29] Section 441i(**a**) mandates that national-party committees (or their officers, agents, or entities) "not solicit, receive, or direct to another person ... anything of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]." Section 441i(**b**) mandates that state-party committees (or their officers, agents, or entities) use federal funds for "an[y] amount that is expended or disbursed for Federal election activity." Section 441i(**c**) mandates that only federal funds may be used to fundraise for federal election activity.

[30] The limit on contributions to national-party committees is currently $32,400 per year, while the limit on contributions to state-party committees is not adjusted for inflation and is set at $10,000 per year. *See* http://fec.gov/pages/brochures/contrib.shtml#Chart.

Contribution limits have already been held unconstitutional as applied to IE-PACs/NCAs. *See supra* at 4, 11-14. "[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696. It is well established that NCAs are independent-expenditure entities equivalent to independent-expenditure organizations. *See* Stipulated Order and Consent Judgment (Doc. 28), *Carey*, Civ. No. 11-259-RMC (*see supra* at 14). *See also* FEC, *NCA-Guidance*.[31] Since the contribution limits serve no cognizable governmental interest as applied to plaintiffs' intended NCAs, *see, e.g.*, *id.* at 689, they are unconstitutional as applied.

In sum, regarding the ban and contribution limits, *SpeechNow*'s analysis controls— "the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations," *id.* at 696, so the ban and limits are unconstitutional as applied.

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

Based on the foregoing constitutional analysis, party-committee status does not justify different treatment of party-committee's NCAs from other NCAs. However, IE-PAC cases have distinguished IE-PACs from party-committees, citing concerns discussed in *Colorado-I*, 518 U.S. 604, *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), and/or *McConnell*, 540 U.S. 93. For example, *SpeechNow* noted that "FEC also argues that we must look to the discussion about the potential for independent expenditures to corrupt in

[31] In addition, a PAC or other such entity is a separate legal entity from any connected organization. *See California Medical Association v. FEC*, 453 U.S. 182, 196 (1981) ("[A]ppellants' claim that CALPAC is merely the mouthpiece of CMA is untenable. CALPAC instead is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy.") (plurality); *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) ("A PAC is a separate association from the corporation. So the PAC exemption from [2 U.S.C.] § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak.").

[*Colorado-I*]," but the court rejected FEC's argument, distinguishing party-committee independent expenditures and holding, in any event, that "a discussion in a 1996 opinion joined by only three justices cannot control our analysis when the more recent opinion of the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption." 599 F.3d at 695. But as shown next, *SpeechNow*'s distinction was nonbinding and unnecessary. And controlling precedents require that party-committees' NCAs be constitutionally protected as are other independent-expenditure entities.

1. IE-PAC Case Statements Distinguishing Party-Committees Are Dicta.

Statements in IE-PAC cases such as *SpeechNow*—distinguishing party-committees—are dicta because they were unnecessary to deciding the cases and the issue of party committees NCAs was not before the courts. Moreover, other circuits' opinions don't control here.

2. Party-Committee Coordination with Candidates May Not Be Presumed.

Distinctions of party-committees from IE-PACs in some court opinions are based on *presumed coordination between party-committees and candidates*. For example, the preliminary injunction opinion in *Republican Party of New Mexico* asserts that party-committees differ regarding IE-PACs because "*McConnell* demonstrates the Court's belief that political parties are so inherently affiliated with candidates to justify a presumption that money a contributor might give to a party will be spent on that candidate, thereby evading the contribution limits." 741 F.3d at 1099. But *Colorado-I* forbids such presumed coordination regarding party-committees' independent expenditures: "The question ...is whether the Court of Appeals erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are 'coordinated.' We believe it did." 518 U.S. at 619 (plurality). The independent-expenditure decision, *Colorado-I*, must control, not the *McConnell* soft-money decision, because "[t]his case ... is about

independent expenditures." *Citizens United*, 558 U.S. at 361.

Nor may the government *presume that political parties pose a corruption risk* per se: "[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." *Colorado-I*, 518 U.S. at 618 (plurality). "'[A] vigorous party system is vital to American politics" and "'[p]ooling resources from many small contributors is a legitimate function and an integral part of party politics.'" *Id.* (citations omitted).[32] "[T]he basic nature of the party system ... [allows] party members [to] join together to further common political beliefs, and citizens can choose to support a party because they share ... beliefs." *McCutcheon*, 134 S.Ct. at 1461. Therefore, the Court adds, "[t]o recast such shared interest ... as an opportunity for ... corruption would dramatically expand government regulation of the political process." *Id.* (citations omitted).[33]

Regarding *corruption* (or *circumvention* by illegal conduit-contributions) from independent-expenditure activity, no presumption is permissible because independent expenditures involve no contributions to candidates. Only contributions to candidates may pose a corruption risk because unless a financial quid *reaches* a candidate, she could not provide a legislative quo.[34] "The hall

[32] "We are not aware of any special dangers of corruption associated with political parties ...." *Id.* at 616 (plurality). "What could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?" *Id.* at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).

[33] In *Rufer v. FEC*, No. 14-837 (CRC), FEC opposes a preliminary injunction, in part, based on a purported history of political "[p]arties [p]laying a [k]ey [r]ole in *[q]uid [p]ro [q]uo* [c]orruption and [i]ts [a]ppearance." Doc. 13 at 14. The *Rufer* plaintiffs ably explain that "FEC [m]isstates the Framers [v]iew [t]oward [p]olitical [p]arties, Doc. 14 at 14, including FEC's conflation of "factions" ("parties of interest") with political parties ("parties of principle"), *id.* at 15. Anyway, FEC's curious effort to find "corruption" based on something other than modern political parties is an implicit concession that FEC can't prove the necessary quid-pro-quo-corruption risk under current Supreme Court holdings recognizing the value of parties as recited in text above.

[34] "*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 134 S.Ct. at 1460 (citation

mark of corruption is the financial *quid pro quo*: dollars for political favors." *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985) ("*NCPAC*"). *See also McCutcheon*, 134 S.Ct. at 1441 (same). But "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. at 357. And "[s]pending large sums of money 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." *McCutcheon*, 134 S.Ct. at 1450. *See supra* Parts II and III.A-B (corruption and circumvention risks inapplicable to independent expenditures). No alternate "corruption" theories are constitutionally permissible, *McCutcheon*, 134 S.Ct. at 1441, because "Congress may target only a specific type of corruption—'*quid pro quo*' corruption," *id.* at 1450. *See supra* Part II.A-B.[35]

Regarding *coordination* of political-party-committee independent expenditures with candidates, no presumption is constitutionally permissible because the "independent expenditure" a party committees may make, 11 C.F.R. 109.30, may *not* be coordinated with a candidate identified in the communication, 11 C.F.R. 109.37 ("What is a 'party coordinated communication'?").

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omitted). *McCutcheon* recognized that for the corruption risk to arise "money [must] flow[] ... to a candidate," 134 S.Ct. at 1452. *See also supra* at 7 (*McCutcheon* quote).

[35] *Colorado-II* cited a practice of the Democratic Senatorial Campaign Committee ("DSCC") called tallying, whereby a candidate might receive increased aid from DSCC in proportion to contributions raised by the candidate for DSCC. 533 U.S. at 459. The Court considered this totally legal practice in the independent spending context, *id.* at 459 & n.22, some indication of circumvention problems if party-committees were allowed unlimited, coordinated spending. *Colorado-II* is inapplicable here because it involved coordinated spending, but even the tally-system argument is non-viable after FEC's 2012 decision that the Democratic Senatorial Campaign Committee ("DSCC") fulfilled conciliation-agreement obligations regarding its ongoing tallying. In Matter Under Review 3620 (DSCC), *available through* http://fec.gov/em/mur.shtml, FEC decided that: (a) absent earmarking, party-committees may do what they want with contributions tallied to particular candidate's credit; (b) tallied contributions are not implicitly earmarked; and (c) tallied contributions trigger no quid-pro-quo or conduit-contribution risk. *Id.* Under FEC's decision, "attribution" to a contributor occurs only when there is *earmarking*, not mere tallying of credit to a candidate. *Id.* So tallying doesn't change any independent-expenditure analysis here.

And *Colorado-I* expressly *rejected* FEC's presumption that party-committees can't make independent expenditures because, as FEC presumed, *all* political-party committee expenditures were coordinated with a political party's candidates. 518 U.S. at 614-22. What the *Colorado-I* opinions said in rejecting presumed coordination controls here. The *Colorado-I* plurality held that in examining alleged coordination, one may not look to "general descriptions of Party practice, such as a "statement that it was the practice of the Party to 'coordinat[e] with the candidate' campaign strategy" or for a Party official "to be 'as involved as [he] could be' with the individuals seeking the Republican nomination ... by making available to them 'all of the asserts of the party." *Id.* at 614. Rather, the coordination analysis examines the *particular communication* and whether it is, *in fact*, coordinated, *id.*:

> These latter statements, however, are general descriptions of Party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate.... [W]e therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

Moreover, party-committee independent expenditures pose *less* corruption threat than those by individuals (which pose *none*), *id.* at 617-18:

> If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See *Buckley*, [424 U.S.] at 45-46; *NCPAC*, [470 U.S.] at 498. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

And *Colorado-I* rejected the notion that a party committee "expenditure is 'coordinated' because a party and its candidate are identical, *i.e.*, the party, in a sense, 'is' its candidates." 518 U.S. at 622. "We cannot assume, however, that this is so," the plurality continued, *id.*, and such "a metaphysical

identity would ... arguabl[y] ... eliminate[] any potential for corruption ...," *id.* at 623, *citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("where there is no risk of 'corruption' of a candidate, the Government may not limit even contributions"). So in the independent-expenditure context, if the government argues that political parties and candidates have "an absolute identity of views and interests," *id.*, then there is no corruption potential and, consequently, no constitutional justification for any limit even on their *coordinated* expenditures (making any coordination presumption meaningless, even if permitted). But if party-committees and their candidates are separate legal entities, as *Colorado-I* and FECA treat them, then party-committees are factually capable of making expenditures independently of their candidates. Whether any *particular* party-committee communication is coordinated, depends on the same *conduct* standards employed for other persons.[36] That is a factual question.[37]

So party-committee status doesn't change the controlling constitutional analysis here regarding corruption, circumvention, and coordination. As a result, no governmental interest constitutionally prevents party-committees from having NCAs.

Nonetheless, *SpeechNow* said that "[*Colorado-I*] concerned expenditures by political parties, which are wholly distinct from 'independent expenditures' as defined in 2 U.S.C. 431(17)." 599 F.3d at 695. Comparison shows that this dictum states a distinction without constitutional significance:

- An "independent expenditure" *under 2 U.S.C. 431(17)* is a public communication that is not

[36] *Compare* 11 C.F.R. 109.21(d) (coordination "conduct standards" for general "coordinated communication") *with* 109.37(a)(3) (virtually identical coordination "conduct standards" for "party coordinated communication").

[37] Because plaintiffs verified their intent to make independent expenditures "subject to all applicable federal laws and regulations and pursuant to the standards of *Colorado-I*, 518 U.S. 604," PSUF ¶ 8, factual independence must be assumed. In fact, plaintiffs *already* make independent expenditures in compliance with federal laws, PSUF ¶ 10, and simply wish to continue that factually legal practice through an NCA.

factually coordinated (under FEC "conduct standards," *see* 11 C.F.R. 109.21(d)), and "expressly advocate[es] the election or defeat of a clearly identified candidate."[38]

- The "independent expenditure" that the party-committee in *Colorado-I* had a First Amendment right to make was also a non-coordinated public communication, but it criticized a Democratic candidate on the issues without express advocacy. *See FEC v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1488, 1451 (D. Col. 1993).[39]

In the present case, plaintiffs want their NCAs "to receive unlimited contributions from permissible sources for making only *independent expenditures* and *other independent communications that refer to federal candidates*," PSUF ¶¶ 1-4 (emphasis added), with "independent expenditure" having the express-advocacy meaning of 2 U.S.C. 431(17) and "other independent expenditures" having the

[38] Section 431(17) requires that the communication not be coordinated with either federal candidates or party-committees. The requirement of non-coordination with party-committees has not been interpreted to prevent party-committees from running their own independent-expenditure programs (otherwise it would be unconstitutional as applied), so there is no problem under this provision with party-committees having NCAs. Note, however, that *Buckley* recognized that coordination with *candidates* constituted an in-kind contribution. *See* 424 U.S. at 46 n.53. *Buckley* made no mention of coordination with party-committees creating an in-kind contribution. So the requirement that an independent expenditure not be coordinated with *party-committees* in § 431(17) seems a resurrection of the presumption of party-candidate coordination that *Colorado-I* expressly rejected. *See supra* at 20-22. This analysis is supported by the fact that—though contributions to PACs, and party-committees are limited by contribution limits, 2 U.S.C. 441a(a)(1)—an expenditure coordinated with a non-party political committee (a *PAC*) is neither deemed coordinated under § 431(17) nor an in-kind contribution under 2 U.S.C. 441a(7)(B) (treating expenditures coordinated with candidates and party-committees, but not PACs, as contributions to candidates and party-committees). For present analytical purposes, the requirement that independent expenditure be independent from party-committees is an additional prophylaxes layered atop the "*base limits*[, which] themselves are a prophylactic measure" in a "prophylaxis-on-prophylaxis approach'" to preventing any possible cognizable corruption. *McCutcheon*, 134 S.Ct. at 1458 (emphasis in original) (citation omitted). But such prophylaxes are not constitutionally justified for independent-expenditure activity and entities, where no corruption exists.

[39] The district court applied an express-advocacy construction to the relevant provision and dismissed FEC's enforcement proceeding because there was no express advocacy. *Colorado-I*, 518 U.S. at 612-13. The Supreme Court held that "the expenditure in question is what this Court in *Buckley* called an 'independent' expenditure, not a 'coordinated' expenditure." *Id.* at 613.

meaning of "independent expenditure" in *Colorado-I*. However, the constitutionally significant feature of "independent expenditure" in 431(17) and *Colorado-I* is the *independence* of the public communication naming a candidate, not the presence or absence of express advocacy. This is so because both uses of "independent expenditure" are rooted *Buckley*'s holding that "[t]he 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." 424 U.S. at 47. *See Colorado-I*, at 615 (quoting *Buckley*, 424 U.S. at 47). Now, *Buckley also* imposed *express-advocacy* constructions on two "expenditure" definitions to avoid vagueness and overbreadth. 424 U.S. at 44 n.52, 80. *That* is the source of the express-advocacy independent-expenditure definition at 2 U.S.C. 431(17). But the right of party-committees to make "independent expenditures" under *Colorado-I* turns on *independence*, not the presence or absence of express advocacy. So *SpeechNow*'s distinction is not constitutionally significant.

In sum, party-committee communications may not be presumed to be coordinated, so nothing justifies distinguishing the independent-expenditure activity of party-committees and others.[40]

3. What the *Colorado* Cases and *McConnell* Really Said Does Not Help FEC.

Though, as discussed, some IE-PAC cases distinguish in dictum political-party committees as different in kind based on the *Colorado* cases and *McConnell*, *see, e.g.*, *Republican Party of New*

[40] So *Republican Party of New Mexico*, 741 F.3d 1089, is wrong in saying that party-committees differ regarding IE-PACs because "*McConnell* demonstrates the Court's belief that political parties are so inherently affiliated with candidates to justify a presumption that money a contributor might give to a party will be spent on that candidate, thereby evading the contribution limits," *id.* at 1099. This was dictum because no contribution to *political parties* or *a political party's NCA* was at issue. *See, e.g.*, *id.* at 1097. This dictum impermissibly *presumes* coordination of party-committee independent expenditures, *id.* at 1098, and erroneously follows a soft-money case instead of the controlling independent-expenditure authorities, *id.* at 1098-99. This decision doesn't bind this Court (as dictum from another circuit), it is not a decision on the merits (it was a preliminary injunction appeal), and it lacks persuasive authority due to fundamental errors.

Mexico, 741 F.3d 1089, what those Supreme Court cases actually said doesn't help FEC here.

Colorado-I decided political parties's independent-expenditure activity does *not* pose corruption problems because of the absence of coordination. The principal opinion said: "We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." 518 U.S. at 616. This three-member opinion then said what *SpeechNow* noted (set out here as stated in *SpeechNow*):

> It is true that the opinion of Justice Breyer did discuss the potential for corruption or the appearance of corruption potentially arising from independent expenditures, saying that "[t]he greatest danger of corruption ... appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate," thus evading the limits on direct contributions to candidates. *Id.* at 617....

SpeechNow, 599 F.3d at 695 (citation omitted).[41] But as context, the *Colorado-I* plurality said that

> [c]ontributors seeking to avoid the effect of the $1,000 contribution limit indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See *Buckley*, [424 U.S.] at 44-48 (risk of corruption by individuals' independent expenditures is insufficient to justify limits on such spending). If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor.

518 U.S. at 617 (citations omitted). Since both contributors and party-committees may do their own independent expenditures, as FEC has acknowledged, contributors and party-committee have an expressive-association right to do them together in an NCA. *See* AO 2010-11 (Commonsense Ten). So *Colorado-I* does not establish that large contributions that may be used for independent expenditures create either corruption or circumvention, and the analysis that is employed points to the right of individuals to associate as desired to fund independent expenditures. Rather, *Colorado-I* established that political-party committees' independent expenditures may not be presumed to be coordi-

[41] *SpeechNow* quickly rejected this statement in *Colorado-I* as controlling: "[A] discussion in a 1996 opinion joined by only three Justice cannot control our analysis when the more recent opinion of the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption." 599 F.3d at 695.

nated. *See supra* Part III.C.2.

Colorado-I was remanded to decide whether the Party Expenditure Provision limits were unconstitutional facially, i.e., whether the government could limit *coordinated* expenditures. In *Colorado-II*, 533 U.S. 431, the Supreme Court decided that the Party Expenditure Provision limits were not facially unconstitutional, i.e., there could be limits on political-party expenditures that were *coordinated* with candidates. Plaintiffs' intended NCAs would not involve coordinated expenditures, so *Colorado-II* does not control or inform the present analysis. But note some things said in *Colorado-II*. The Court justified the Party Expenditure Provision limits as a means to prevent *circumvention* of contribution limits, not quid-pro-quo corruption directly. 533 U.S. at 465 ("We hold that a party's coordinated expenditures ... may be restricted to minimize circumvention ....").[42] It said that party-committees "act as agents for spending on behalf of those who seek ... obligated officeholders." 533 U.S. at 452. This statement is in the general context of *coordinated*, not *independent*, expenditures, and the next sentence clarifies the specific context to which it is directed: "It is this party role, which functionally unites parties with other self-interested political actors, that the Party Expenditure Provision targets." What the Provision "targets" in *Colorado-II* is solely *coordinated* spending because independent expenditures were removed from the analysis in *Colorado-I*. That *coordinated*

[42] As to other alleged "corruption," the Court found it unnecessary to reach FEC's arguments based on "*quid pro quo* arrangements and similar corrupting relationships between candidates and parties themselves." *Id.* at 456 n.18. However, the Tenth Circuit had rejected FEC's arguments not reached, *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1229-31 (10th Cir. 2000), as it had rejected the circumvention argument, *id.* at 1231-32. And the district court found no factual evidence of quid-pro-quo corruption between contributors, parties, and candidates. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F.Supp.2d 1197, 1211-12 (D. Colo. 1999) (no evidence of corruption in the form of contributors "forc[ing] the party committee to compel a candidate to take a particular position"); *id.* at 1212-13 (no "corruption" from political parties' influence over candidates because "decision to support a candidate who adheres to the parties' beliefs is not corruption"); *id.* at 1213 ("FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof.").

expenditures are the focus is made clear by the Court, 533 U.S. 457:

> Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open.

An example of the evidence on which the Court relied in *Colorado-II* is the Democratic Party's practice of "tallying," by which candidates helped the DSCC raise funds with the understanding that the candidate's campaigns might be helped in proportion by the DSCC.[43] The Court noted that the key to *Colorado-I*'s holding that independent expenditures posed no corruption was their being "independent and therefore functionally true expenditures." *Id.* at 463. "Here," said the Court, "just the opposite is true. There is no significant difference between a party's coordinated expenditure and a direct party contribution to the candidate ...." *Id.* at 464. So *Colorado-II* has no analytical applicability to NCAs making expenditures for *independent* communications.

McConnell justified the soft-money ban based on the ideas that officeholders might be grateful to soft-money donors and more responsive to them, *see* 540 U.S. at 145, 168, and donors might be motivated by gaining access to officeholders to take advantage of the gratitude, *see id.* at 119 & n.5, 124-25 & n.13, 155. "The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 126. *See also id.* at 145 ("widespread circumvention of FECA's limits on contributions" due to likelihood "that candidates would feel grateful for such [soft-money] donations and that donors would seek to exploit that gratitude"). The Court said such access, gratitude, and consequent "circumvention" constituted "corruption" or "the appearance of corruption." *Id.* at 119 n.5, 142, 145. *McConnell* also relied on the fact that "[t]he national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates. Indeed,

[43] Even as to DSCC, that analytical underpinning is gone. *See* footnote 35.

of the six national committees of the two major parties, four are composed entirely of federal officeholders." *Id.* at 155. It continued: "Given this close connection and alignment of interests, 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.*

However, *McConnell* doesn't control the present analysis because (1) "corruption" based on gratitude, access, and influence was rejected in *Citizens United*, 558 U.S. at 359-61 (expenditure context), and *McCutcheon*, 134 S.Ct. at 1441 (contribution context), and (2) the independent-expenditure line of authorities controls here, as the Court has twice noted in distinguishing soft money and independent expenditures—in *McConnell* and *Citizens United*.

First, in *McConnell* the Court distinguished soft-money restrictions from the independent-expenditure line of authorities, 540 U.S. at 145 n.45 (citations omitted):

> Justice Kennedy contends that the plurality's observation in *Colorado I* that large soft-money donations to a political party pose little threat of corruption "establish[es] that" such contributions are not corrupting.... The cited dictum has no bearing on the present case. *Colorado I* addressed an entirely different question—namely, whether Congress could permissibly limit a party's independent expenditures—and did so on an entirely different set of facts.[44]

The majority's distinction of *Colorado-I*'s independent-expenditure context from *McConnell*'s soft-money context cuts both ways; here it cuts against the notion that the soft-money context has anything to do with the controlling independent-expenditure line of authorities.

Second, in *Citizens United* the Court again distinguished the two lines of cases, holding that the soft-money case (*McConnell*) did not control the independent-expenditure line of authorities, 558 U.S. at 360-61 (citations omitted):

> The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials.... This case, however, is about independent expen-

[44] Whether any "set of facts" could prove cognizable corruption from independent expenditures was settled in *Citizens United*, which held, *as a matter of law*, that "independent expenditures ... do not give rise to corruption or the appearance of corruption." 558 U.S. at 357.

> ditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule.

Citizens United made the distinction based on whether the cases involved "independent expenditures," not on the basis that *McConnell* involved party-committees, so the controlling fact here is that this case involves independent expenditures.

McConnell involved neither party-committees' right to make independent expenditures nor contributions to political party's NCAs. The situations are legally different. Independent expenditures pose no corruption risk. As FEC has acknowledged, if citizens can independently do independent expenditures, they may associate to do them together. *See* AO 2010-11 (Commonsense Ten) at 3. The independent-expenditure cases address what plaintiffs' NCAs want to do and so control. And as *Colorado-I* decided, there is no cognizable corruption when people do independent expenditures through a political-party committee in which they associate. 518 U.S. at 617-18.[45]

[45] The *Colorado-I* plurality recognized the *expressive-association* nature of political parties' independent expenditures for "'core' First Amendment activity":

> Given these established principles [concerning the high constitutional protection for, and noncorrupting nature of, independent expenditures], we do not see how a provision that limits a political party's independent expenditures can escape their controlling effect. A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.

Id. at 615-16. So plaintiffs' intended NCAs would also speak for contributors to those NCAs.

4. Rejection of Gratitude-Style "Corruption" Eliminates "Corruption" Concerns.

Citizens United's holding that cognizable corruption involves only quid-pro-quo (dollars for votes) activity and not gratitude, access, and influence, 558 U.S. at 359-61, which was reaffirmed in *McCutcheon*, 134 S.Ct. at 1441,[46] eliminates the concerns of some Justices in the *Colorado* cases and *McConnell* that independent expenditures might pose some cognizable corruption.

For example, the *Colorado-I* plurality noted that while political parties could not serve as conduits for contributors to get contributions to candidates because of earmarking laws and contribution limits, 518 U.S. at 616-17, "the greatest danger" was that a contribution "may be used for *independent expenditures for the benefit of a particular candidate*," *id.* at 617 (emphasis added). The notion that an independent expenditure might "benefit" was precluded by *Buckley*: "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."424 U.S. at 47.[47] And even if an independent expenditure could cognizably "benefit" a candidate, there is no money flowing to a candidate from an independent expenditure so there can be no quid-pro-quo corruption. Rather,

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[46] Where citizens pool their resources in a political party "to further common beliefs," gratitude flowing therefrom is not corruption, *McCutcheon*, 134 S.Ct. at 1461 (citations omitted):

> [G]ratitude stems from the basic nature of the party system, in which party members join together to further common political beliefs, and citizens can choose to support a party because they share some, most, or all of those beliefs. To recast such shared interest, standing alone, as an opportunity for *quid pro quo* corruption would dramatically expand government regulation of the political process.

[47] *Buckley* not only rejected the notion that an independent expenditure could cognizably *benefit* a candidate, 424 U.S. at 47, but it also construed the statutory language "on behalf of any candidate," defined to include expenditures "authorized or requested by the candidate," to mean "expenditures placed in cooperation with or with the consent of a candidate," i.e., as contributions by reason of coordination in contrast to independent expenditures, 424 U.S. at 46 n.53, 192. Since the *Colorado-I* expenditures were independent, "for the benefit of a particular candidate" could not have meant "on behalf of any candidate" as interpreted by *Buckley*.

the plurality's "corruption" is based on some notion of candidate gratitude for independent expenditures, which is now foreclosed as cognizable corruption. In any event, *Colorado-I* decided that people associating and doing independent expenditures through a political party pose no corruption risk. That controls here.

SpeechNow implemented the Supreme Court's holding that "only one interest [is] sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption." 599 F.3d at 692. The D.C. Circuit said *Citizens United* "held that the government has *no* anti-corruption interest in limiting independent expenditures." *Id.* at 693. "Given this analysis from *Citizens United*," the court continued, "the government has no anti-corruption interest in limiting contributions to an independent expenditure group ...." *Id.* at 695. Political-party committee status does not alter this.

In sum, regarding Count 1, the challenged provisions are unconstitutional as applied to party-committees' NCAs. In the alternative, the non-federal-funds prohibitions at 2 U.S.C. § 441i(a)-(c) are unconstitutional facially. *McConnell*, 540 U.S. 93, upheld the non-federal-fund prohibitions on their face despite the fact that the *McConnell* defendants, including FEC, "ha[d] identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees." *McConnell v. FEC*, 251 F.Supp.2d 176, 395 (D.D.C. 2003) (opinion of Henderson, J.). *Accord McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, dissenting) (quoting and citing *McConnell*, 251 F.Supp.2d at 395) (opinion of Henderson, J.)). However the U.S. Supreme Court, in *Citizens United*, 558 U.S. at 359-60, and *McCutcheon*, 134 S.Ct. at 1450-51 (controlling opinion), requires evidence of quid-pro-quo corruption to uphold such restrictions. So the non-federal-funds prohibitions are unconstitutional on their face.

IV. Banning Political-Party Solicitation for Political-Parties' NCAs Is Unconstitutional (Count 2).

Plaintiff Priebus wants to solicit unlimited contributions for, or direct contributions to, RNC's intended NCA, but he is prohibited by the solicitation/direction ban at 2 U.S.C. 441i(a), which mandates that RNC, its "officers or agents," and created entities "may not solicit, receive, or direct" non-federal funds. RNC wants its Chairman and other RNC officers and agents to be able to do so. Count 2 challenges that ban as unconstitutional under the First Amendment guarantees of free speech and association as applied to national-party committee officers/agents soliciting unlimited contributions for, or directing unlimited contributions to, a national-party committee's NCA. VC ¶ 46.

The constitutional analysis is straightforward. Fundraising for RNC's NCA is part of "[t]he right to participate in democracy through political contributions [that is] is protected by the First Amendment," subject to "regulat[ion] ... to protect against corruption or the appearance of corruption." *McCutcheon*, 134 S.Ct. at 1441 (controlling opinion). The cognizable corruption is "'quid pro quo' corruption or its appearance," i.e., "a direct exchange of an official act for money." *Id.* (citations omitted). "Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." *Id.* (citations omitted). "[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. 'Ingratiation and access ... are not corruption.'" *Id.* (citations omitted). "[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *Speech Now*, 599 at

696. Political-party-committee status does not justify different treatment of party-committees' NCAs. *See supra* Part III.C. So no interest justifies banning RNC officers/agents from soliciting non-corrupting funds for (or directing them to) RNC's non-corrupting NCA for use in making non-corrupting independent expenditures.

Put another way, no cognizable interest justifies banning RNC officers/agents from soliciting funds for RNC's NCA—neither (1) quid-pro-quo corruption, nor (2) conduit-contribution circumvention, nor (3) coordination. (1) "*Buckley* made clear that the risk of [quid-pro-quo] corruption arises when an individual makes large contributions *to the candidate or officeholder himself*, *McCutcheon*, 134 S.Ct. at 1460 (emphasis added), which does not happen with contributions to, or independent expenditures by, NCAs. (2) Because NCA's make no contributions, there can be no illegal conduit-contribution circumventing limits on contributions to candidates. And (3) because an *independent* expenditure cannot be coordinated, there can be no in-kind contribution by reason of coordination.[48] Therefore, no governmental interest justifies banning RNC officers/agents from soliciting non-corrupting funds for (or directing them to) RNC's non-corrupting NCA for use in making non-corrupting independent expenditures.

If, as in *McCutcheon*, "the Government suggests that it is the *solicitation* of large contributions that poses the danger of corruption," 134 S.Ct. at 1461 (emphasis in original), that argument fails under *McCutcheon*'s reason for rejecting it. *McCutcheon* noted that "the aggregate limits are not limited to any direct solicitation *by an officeholder or candidate*," *id.* (emphasis added). The *McCutcheon* cite "compared" *McConnell*, 540 U.S. at 298-99, 308 (Kennedy, J., opinion) ("rejecting a ban on 'soft money' contributions to national parties, but approving a ban

[48] Since this case is controlled by the independent-expenditure line of authorities, *McConnell* doesn't control, *see supra* at 10-11 (*McConnell* and *Citizens United* distinguished the two lines), nor does *McConnell*'s gratitude-corruption, which is non-cognizable. *See supra* at 6-7.

on the solicitation of such contributions as 'a direct and necessary regulation *of federal candidates' and officeholders'* receipt of *quids*'" (emphasis added)). In the italicized quotes, *McCutcheon* limits any solicitation-corruption interest to solicitation by *federal candidates and officeholders*, i.e., if there is any danger in solicitation, it is not in solicitation per se but in solicitation by candidates and officeholders. So there is no potential solicitation-corruption involving *party-committees and their officers/agents*, such as RNC and Priebus. In his *McConnell* opinion referenced by *McCutcheon*, Justice Kennedy said the ban on soliciting non-federal funds by national-party committees was unconstitutional "[o]n its face" because it "does not regulate federal candidates' or officeholders' receipt of *quids* because it does not regulate contributions to, or conduct by, candidates or officeholders." 540 U.S. at 299. Only the partial ban on solicitation of non-federal funds by *federal candidates and officeholders* "govern[ed] their receipt of *quids*." *Id.* at 308. So no solicitation-corruption interest may be recognized here.

In sum, there is no constitutional justification for prohibiting a national-party committee's officers/agents from soliciting for the national-party committee's NCA. The challenged ban is unconstitutional as applied. In the alternative, the non-federal-funds prohibitions at 2 U.S.C. § 441i(a) are unconstitutional facially. *McConnell*, 540 U.S. 93, upheld the non-federal-fund prohibitions on their face despite the fact that the *McConnell* defendants, including FEC, "ha[d] identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees." *McConnell*, 251 F.Supp.2d at 395 (opinion of Henderson, J.). *Accord McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, dissenting) (quoting and citing *McConnell*, 251 F.Supp.2d at 395) (opinion of Henderson, J.)). However the U.S. Supreme Court, in *Citizens United*, 558 U.S. at 359-60, and *McCutcheon*, 134 S.Ct. at 1450-51 (controlling opinion), requires evidence of quid-pro-quo cor-

ruption to uphold such restrictions. So the non-federal-funds prohibitions are unconstitutional on their face.

V. Requiring Federal Funds for Independent Federal Election Activity Is Unconstitutional (Count 3).

LAGOP, JPGOP, and OPGOP each wants to solicit and spend funds for independent federal election activity that is not restricted by federal source and amount limitations.[49] However, the non-federal-funds ban at 2 U.S.C. 441i(b)-(c) requires plaintiffs to use federal funds, with source and amount limitations, for fundraising and spending for their independent communications and other federal election activity.[50] In Count 3, plaintiffs challenge the nonfederal-funds ban as unconstitutional, under the First Amendment, as applied to their fundraising and expenditures for independent communications and other federal election activity.

An example of the independent communications plaintiffs wish to make with funds not limited by source and amount restrictions is LAGOP's plan to make independent communications to support the Republican opponent of Senator Mary Landrieu, up for election in November 2014,

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[49] "Federal election activity" includes, 2 U.S.C. 431(20)(A):

> (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
>
> (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);
>
> (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposed a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
>
> (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more that 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

[50] The federal-funds requirement means that a contributor to LAGOP, JPGOP, and OPGOP is limited by a federal contribution limit of $10,000/year, which state-, district-, and local-party committees must share. 2 U.S.C. 441a(a)(1)(D).

criticizing her support for certain government policies, such as Obamacare, without expressly advocating her defeat. These independent communications would be federal election activity because each would be

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).

2 U.S.C. 431(20)(A)(iv). PSUF ¶ 14 Plaintiffs also want to use funds not limited by federal source and amount restrictions for other independent federal election activity, such as voter registration, voter identification, get-out-the-vote, and generic campaign activities. PSUF ¶ 15.

The constitutional analysis showing that no cognizable government interest justifies the challenged ban follows the analyses above. Fundraising and expenditures for independent communications and other independent federal election activity are part of "[t]he right to participate in democracy," subject to "regulat[ion] ... to protect against corruption." *McCutcheon*, 134 S.Ct. at 1441 (controlling opinion). Cognizable corruption is "'quid pro quo' corruption or its appearance," i.e., "a direct exchange of an official act for money." *Id.* (citations omitted). Equalizing, gratitude, influence, and access are not cognizable corruption theories. *Id.* FEC must prove that fundraising and expenditures for *independent* communications and other federal election activities pose a corruption risk, without reimposing its presumption that all party communications and activities are coordinated with candidates that was rejected in *Colorado-I*. *See supra* Part III.C. FEC can't prove this. Because the communications and activities will be *independent*,[51] the government lacks the required anticorruption interest to restrict them. *See supra* Part II.

[51] If communications mentioning Senator Landrieu were *coordinated*, expenditures therefor would be contributions, but plaintiffs' activity will be independent. And party-committee coordination with candidates can't be presumed. *See supra* Part III.C. So FEC must prove that the challenged non-federal funds prohibitions are constitutional as applied to *independent* communications and other federal election activity.

In *McConnell*, all challenges were facial, so the challenged provisions were upheld *facially*. *See, e.g.*, 540 U.S. at 134 ("a facial First Amendment challenge"); *id.* at 169 n.62 ("this facial challenge"). So this as-applied challenge was not decided in *McConnell*. Moreover, *McConnell distinguished* the independent-expenditure line of authorities from what it considered, *id.* at 145 n.45 (as would *Citizens United* later, 134 S.Ct. at 361), so the analysis of the independent-expenditure line of authorities was neither argued nor decided regarding the challenged provisions. *McConnell* upheld the provisions based on the ideas that: (1) communications and other federal election activities "benefit" candidates, 540 U.S. at 167, 170; (2) therefore candidates would be "grateful," *id.* at 168, constituting corruption, *id.* at 169-70): and (3) it was predictable that such benefit-gratitude activity would shift to state- and local-party committees, constituting circumvention. *Id.* at 165-66. None of that applies here.

(1) No *benefit* is cognizable for independent activities, and even it were there could be no corruption unless the benefit were given as a quid for a quo. Three holdings control here under the independent-expenditure line of authorities. First, *Buckley* held that the *independence* of independent communications means they offer no cognizable benefit to candidates. 424 U.S. at 47. That controls *all* independent *communications*[52] and logically extends to other independent federal election activity (e.g., independent get-out-the-vote activity might backfire for a variety of reasons, including failed communication themes). Second, when *Citizens United* held that "independent expenditures ... do not give rise to corruption or the appearance of corruption," 558 U.S. at 357, it settled, as a matter of law, whether facts might prove a benefit from an independent ex-

[52] *Buckley* imposed the saving express-advocacy construction on an "expenditure" definition (in a statute limiting expenditures to $1,000/year), 424 U.S. at 44 n.52, but then held that the *independence* of expenditures eliminated cognizable benefit to candidates, *id.* at 47. So that holding turned on *independence*, not express advocacy. *Colorado-I* held that party-committees could make "independent expenditures" *without* express advocacy. *See supra* at 23 & n. 39.

penditure that could give rise to corruption. That also applies to all independent communications and logically extends to other independent federal election activity. Third, even if independent activity *could* cognizably benefit candidates, no anticorruption interest exists because, by definition, *independent* activities can't be given as a quid for an illegal quo, which is necessary for cognizable corruption.[53]

(2) No *gratitude-corruption* is cognizable after *Citizens United*, 558 U.S. 310, and *McCutcheon*, 134 S.Ct. 1434, because the Supreme Court now recognizes only quid-pro-quo corruption. And since "independent expenditures ... do not give rise to corruption or the appearance of corruption," *Citizens United*, 558 U.S. at 357, neither can independent communications or other independent federal election activity.

(3) Regarding *McConnell*'s *prediction* that such benefit-gratitude activity would shift to state- and local-party committees, constituting *circumvention*, such "circumvention" is not cognizable, inter alia, because gratitude-corruption is non-cognizable (and never was in the independent-expenditure line of authorities) and because cognizable circumvention must be aimed at illegal conduit-contributions, which cannot exist with independent expenditures. *See supra* Part II.B. "The anticircumvention interests the Government offers in defense of [2 U.S.C. 441i](b), (d), and (f) must also fall with the interests asserted to justify [441i](a). Any anticircumvention interest can be only as compelling as the interest justifying the underlying regulation." 540 U.S. at 303-04 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).

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[53] In his *McConnell* dissent, Justice Kennedy argued that only quid-pro-quo corruption is cognizable and there was no evidence that "*all* moneys the party receives (not just candidate solicited-soft money donations, or donations used in coordinated activity) represents *quids* for all the party's candidates and officeholders." *Id.* at 300 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J.) (emphasis in original). Justice Kennedy's views on cognizable corruption prevailed in *Citizens United*, 558 U.S. 310, and *McCutcheon*, 134 S.Ct. 1434, and this case brings a challenge as applied to the *independent* activities to which Justice Kennedy alluded.

So *McConnell*'s facial holding and analysis have no controlling or persuasive authority here. As a matter of law, FEC can't show that the challenged provisions, as applied, are supported by the anticorruption interest. Like other independent-expenditure entities, state- and local-party committees should be able to raise and spend funds without federal source and amount limits for their independent *communications* and *other* independent federal election activities. Absent the anticorruption interest, restricting funds state- and local-party committees may use for independent activities is not tailored to any cognizable interest, and the non-federal funds prohibitions at 2 U.S.C. 441i(b)-(c) is unconstitutional as applied.

In the alternative, since *McConnell* upheld these provisions based on a *prediction*, not evidence of actual corruption, and because there was no quid-pro-quo corruption evidence, these provisions should be held unconstitutional facially. *McConnell*, 540 U.S. 93, upheld the non-federal-fund prohibitions on their face despite the fact that the *McConnell* defendants, including FEC, "ha[d] identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees." *McConnell*, 251 F.Supp.2d at 395 (opinion of Henderson, J.). *Accord McCutcheon*, 134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, dissenting) (quoting and citing *McConnell*, 251 F.Supp.2d at 395 (opinion of Henderson, J.)). However the U.S. Supreme Court, in *Citizens United*, 558 U.S. at 359-60, and *McCutcheon*, 134 S.Ct. at 1450-51 (controlling opinion), requires evidence of quid-pro-quo corruption to uphold such restrictions. The non-federal-funds prohibitions are unconstitutional on their face.

Conclusion

For the reasons shown, this Court should grant summary judgment to plaintiffs.

Respectfully submitted,

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Certificate of Service

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July 14, 2014

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