

United States District Court  
District of Columbia

<b>Republican National Committee et al.,</b> <i>Plaintiffs,</i>  <b>v.</b>  <b>Federal Election Commission et al.,</b> <i>Defendant.</i>	<b>Case No. 08-1953 (BMK, RJL, RMC)</b>  <b>THREE-JUDGE COURT</b>
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**Plaintiffs' Memorandum in Opposition  
to Defendant FEC's Motion for Summary Judgment**

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**Summary Judgment Opposition**

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Plaintiffs Republican National Committee *et al.* respectfully file this memorandum in opposition to Defendant Federal Election Commission's Motion for Summary Judgment. (Dkt. 56). Rather than reproducing in their entirety arguments made in previous briefing, Plaintiffs incorporate by reference their *Memorandum in Support of Summary Judgment* ("*Pls. ' Mem.*") (Dkt. 21), *Reply Memorandum in Support of Summary Judgment* ("*Pls. ' Reply Mem.*") (Dkt. 50), and *Memorandum in Opposition to Defendant Federal Election Commission's Motion to Dismiss* ("*Pls. ' Op. to FEC Mot. to Dis.*") (Dkt. 27). In those briefs Plaintiffs explained that:

- (a) This as-applied challenge is neither decided nor precluded by the facial upholding of the Federal Funds Restriction in *McConnell v. FEC*, 540 U.S. 93 (2003) (*Pls. ' Mem.* at 18-27; *Pls. ' Op. to FEC Mot. to Dis.* at 5-20);
- (b) Campaign finance laws may only regulate speech that is unambiguously campaign related (*Pls. ' Mem.* at 7-18; *Pls. ' Reply Mem.* at 1-10);
- (c) Plaintiffs' intended activities are not unambiguously campaign related, and furthermore, as-applied to Plaintiffs' intended activities the Federal Funds Restriction is not narrowly tailored or closely drawn to any compelling or important government interest in preventing corruption or its appearance (*Pls. ' Mem.* at 30-45; *Pls. ' Reply Mem.* at 10-25);
- (d) Plaintiffs' intended activities do not directly benefit any federal candidate or officeholder (*Pls. ' Mem.* at 30-45; *Pls. ' Reply Mem.* at 12-18);

- (e) For any gratitude on the part of federal candidates or officeholders to give rise to corruption or its appearance, the candidates or officeholders must receive a direct benefit, which here they do not (*Pls. ' Reply Mem.* at 21-24; *Pls. ' Mem.* at 24-27);
- (f) To the extent *McConnell* found that contributions to national political parties were “suspect,” irrespective of their end use, it premised this conclusion on the historical practice of national parties to provide large donors of non-federal funds with preferential access to federal candidates and officeholders (*Pls. ' Mem.* at 21-24; *Pls. ' Reply Mem.* at 18-21);
- (g) The RNC will not provide donors of non-federal funds or state funds with preferential access to any federal candidate or officeholder and will not involve federal candidates or officeholders in the solicitation of such funds (*Pls. ' Mem.* at 21-23; *Pls. ' Reply Mem.* at 18-21);
- (h) Plaintiffs’ intended activities are too far removed from federal candidates and federal elections to be regulated.

Plaintiffs respond below to the additional arguments raised by the FEC in its memorandum in support of summary judgment (“*FEC Mem.*”). (Dkt. 56).

**I. The Federal Funds Restriction Infringes First Amendment Rights**

Apparently, the FEC presumes to be the arbiter of how much speech is “sufficient for effective advocacy.” *FEC Mem.* at 2. Thus, so long as Plaintiffs are able to engage in what the FEC deems “sufficient” speech, deprivation of Plaintiffs’ First Amendment right to engage in additional speech is unobjectionable. The FEC starts from the premise that all political speech is regulable, unless a speaker can show in a specific case that the regulation of speech is manifestly

undue or unfair. However, this presumption has it exactly backwards. In the United States, persons are free to engage in political speech unless the government can show a sufficient authority and justification to regulate it. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). This burden remains on the FEC in as-applied challenges such as this one. *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2664 (2007) (“*WRTL II*”).<sup>1</sup>

So the relevant issue here is not the cumulative amount of speech that national political parties engaged in prior to BCRA compared to that after. Rather, the relevant issue is the nature of Plaintiffs’ intended First Amendment activities, and whether a sufficient governmental authority or interest exists to regulate them. Plaintiffs’ intended activities are too far removed from federal elections and campaigns to be regulated, i.e. they are not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Nor does the regulation of these activities pass any relevant level of constitutional scrutiny. Thus, the Federal Funds Restriction’s application to these activities is unconstitutional. *Pls.’ Mem.* at 30-45; *Pls.’ Reply Mem.* at 10-25.

Nevertheless, the FEC concludes that “the funds that the RNC has raised since BCRA’s enactment have been sufficient for the RNC to engage in all of the activities it now claims it

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<sup>1</sup> Moreover, the argument that the RNC has engaged in “sufficient” speech is similar to an argument rejected in *WRTL II*. 127 S. Ct. 2652. In response to the dissent’s argument that WRTL could sufficiently speak by simply changing its communications to avoid mentioning candidates, Chief Justice Roberts described this argument as being “akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says ‘I disagree with the draft.’” *Id.* at 2671 n. 9. See also *Buckley*, 424 U.S. at 19 n. 18 (“Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”).

wishes to pursue.” *FEC Mem.* at 5.<sup>2</sup> Even if it were true, this statement is beside the point because the FEC bears the burden of demonstrating why the regulation of such activities is necessary. *See supra.* But moreover, because of the difficulty in raising federal funds, and the need to use federal funds for federal purposes, the RNC has engaged in little, if any, of the activities for which it seeks relief in this action to use non-federal funds and state funds. *Plaintiffs’ Statement of Material Issues* (“SMI”) ¶ 52. And to the extent the RNC has engaged in any of these activities, it has been forced to use federal funds, which by their very nature are raised for federal purposes, for these non-federal activities like supporting state candidates. *Id.* So if it were not limited to federal funds, the RNC could engage in this additional non-federal speech. *Id.*

## **II. Plaintiffs’ Intended Activities Pose No Threat of Corruption or Its Appearance**

Just like in its memorandum opposing Plaintiffs’ motion for summary judgment (Dkt. 39), the FEC again worries that federal candidates and officeholders will become aware of the identity of large non-federal donors and that contributions of non-federal funds will thereby “open the doors to the offices of individual and important Members of Congress and the Administration.” *FEC Mem.* at 8 (citation omitted). But again the FEC fails to demonstrate how contributions earmarked for and used for activities that do not directly benefit any federal candidate or officeholder give rise to undue influence. *Pls.’ Reply Mem.* at 21-24. Nor does the FEC explain how an officeholder’s knowledge of a donor’s contribution to a state candidate,

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<sup>2</sup> The FEC also points to the fact that CRP and RPSD have used federal funds to support federal candidates in the past. *FEC Mem.* at 5. The relevance of this statement is unclear and has no bearing on Plaintiffs’ intended activities in this suit, which involve the use of state funds for ballot measure advocacy and state election activities. The FEC also misstates testimony regarding RPSD’s intended future activities. SMI ¶ 56.

state party, or charitable organization of the officeholder's liking would not raise the same concerns. If such attenuated levels of gratitude may give rise to regulation, the breadth of campaign finance regulation would be limitless.

The FEC attempts to stretch the corruption interest recognized in *McConnell* beyond its bounds. To the extent that *McConnell* discussed corruption arising from gratitude on the part of candidates, which "donors would seek to exploit," it did so only in the context of non-federal funds used "for the specific purpose of influencing a particular candidates's federal election." *McConnell*, 540 U.S. at 146. After all, the Federal Funds Restriction was enacted "to address Congress' concerns about the increasing use of soft money . . . to influence federal elections." *Id.* at 132 (emphasis added). The FEC fails to grasp that gratitude or obligation on the part of a federal officeholder or candidate depends on the officeholder or candidate receiving some benefit. Because Plaintiffs' intended activities do not directly benefit federal candidates or officeholders, *Pls. ' Mem.* at 30-45; *Pls. ' Reply Mem.* at 12-18, there is no threat of donors gaining undue influence, and the FEC's worry is for not.

To the extent *McConnell* found that contributions to national political parties were "suspect," irrespective of their end use, it premised this conclusion on the historical practice of national parties to provide large donors of non-federal funds with preferential access to federal candidates and officeholders. *Pls. ' Mem.* at 21-24; *Pls. ' Reply Mem.* at 18-21. Ignoring the facts in favor of its own "logical inferences," the FEC argues that the RNC will grant preferential access to contributors of non-federal funds and state funds. *FEC Mem.* at 9-11. But the RNC has plainly and repeatedly provided sworn testimony that it will not provide non-federal contributors



with preferential access to federal candidates or officeholders. SMI ¶ 11. Nor will the RNC pass along to a federal official a contributor's request to meet with such an official. *Id.*

Furthermore, the FEC's description of benefits provided to donors of federal funds is not supported by the record. *FEC Mem.* at 8. The RNC does not provide its federal funds contributors with individualized one-on-one contact with federal candidates or officeholders. SMI ¶¶ 7-8. The ability of contributors of federal funds and federal candidates to "interact" at RNC donor events consists of the possible opportunity for a donor to ask a question during the question and answer session following the candidate or officeholder's speech. *Id.* at 8; *see also id.* (citing Josefiak Dep. 77:8-11 (noting that donors who attend such events and express their opinions often have divergent positions on the same issue)). And the FEC's conclusory speculation that "the RNC would undoubtedly take into account the amounts of soft-money donations when it determines who would sit with which officeholders at its various functions," *FEC Mem.* at 11, is not supported by the record in this case.

The ever-expanding nature of the FEC's asserted "corruption" interest is illustrated by their own declarants' testimony. FEC Exh. 31, *Declaration of Robert Rozen*; FEC Exh. 30, *Declaration of Gerald Greenwald*. In his declaration submitted in *McConnell*, Mr. Rozen testified that a large non-federal contribution solicited by a federal officeholder is "appreciated more by the [officeholder] who raises it" because the contributor is "doing a favor for somebody" and "people feel inclined to reciprocate favors." *Id.* at 9. In short, when a contribution is given in response to an officeholder's request, "a [officeholder] has received a favor and feels a natural obligation to be helpful in return." *Id.* Furthermore, Rozen testified that "[w]hile hard money contributions [] provide some access, larger soft money contributions get you significantly

greater access” by entitling large non-federal donors to special opportunities for contact with federal officeholders. *Id.* at 8. And finally, Rozen testified that “[d]onors to the national parties understand that if a federal officeholder is raising soft money – supposedly ‘non-federal’ money – they are raising it for federal uses, namely to help that Member or other federal candidates in their elections.” *Id.* at 9.

Yet in the present case where (a) no federal candidates or officeholders will solicit non-federal funds, (b) no “greater access” will be given to non-federal donors, and (c) non-federal contributions will not be used to directly benefit any federal candidate or officeholder, Rozen *now* testifies that, nonetheless, the “pernicious effects of the soft money system” will return if Plaintiffs’ claims are successful. *Id.* at 2.

Similarly, Gerald Greenwald provided testimony in *McConnell* that the “soft money loophole” had “created a deeply cynical environment of real and perceived corruption. . . .” FEC Exh. 30, *Greenwald Decl.* at 4. Greenwald testified that when federal officeholders solicited non-federal funds contributors felt pressure to give “because experience had taught that the consequences of failing to contribute (or failing to contribute enough) may be very negative.” *Id.* at 3. For example, “the [federal officeholders] who solicited large corporate contributions [often] sat on committees that directly affect[ed] the corporation’s business.” *Id.* at 2; *McConnell v. FEC*, 251 F. Supp. 2d 176, 420 (D.D.C. 2003) (Henderson, J.) (citing Gerald Greenwald Decl.). Furthermore, Greenwald pointed to large non-federal donors receiving “preferred access to governmental officials.” FEC Exh. 30, *Greenwald Decl.* at 2; *McConnell*, 251 F. Supp. at 859 (Leon, J.) (citing Gerald Greenwald Decl.). But in the present case where no federal officeholders will solicit funds and the RNC will not provide preferential access to non-federal donors,

Greenwald *now* asserts, nonetheless, that a “similar” appearance of corruption would again occur. *Id.* at 3.

This ever-expanding corruption interest asserted by the FEC would justify *federal* regulation of contributions to state and local candidates, nearly all state and local election activities, and even contributions to charitable organizations. *Pls.’ Reply Mem.* at 11-18, 21-24. “Enough is enough.” *WRTL II*, 127 S.Ct. at 2672.

Plaintiffs’ intended activities pose no threat of corruption or its appearance. Gratitude on the part of candidates and officeholders, which contributors might try to exploit to gain undue influence, can only exist where a direct benefit is conferred on the candidate or officeholder. Absent a direct benefit, any gratitude on the part of candidates and officeholders is too attenuated to pass constitutional muster. To the extent that *McConnell* found contributions to national parties posed a threat of corruption, *irrespective of their end use*, it did so based on the historical practice of national parties to facilitate large donors with preferential access to federal candidates and officeholders. *Pls.’ Reply Mem.* at 18-21. Here, the RNC will not provide non-federal donors with preferential access to any federal candidate or officeholder. SMF ¶ 11.

### **III. Plaintiffs’ Intended Activities Do Not Directly Benefit Federal Candidates**

#### **A. Grassroots Lobbying**

The FEC continues to argue that the RNC will use its proposed Grassroots Lobbying Account for “sham issue advertising,” *FEC Mem.* 12, while ignoring the advertisements that the RNC intends to broadcast. SMI ¶ 63. As set out in its previous briefing, *Pls.’ Mem.* at 35-37, the Supreme Court in *WRTL II*, found that WRTL’s grassroots lobbying ads were genuine issue advocacy because:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

*WRTL II*, 127 S. Ct. at 2667. Both the “Card Check” and “Freedom of Speech” ads that the RNC intends to broadcast with non-federal funds, SMI ¶ 63, undisputedly contain these same characteristics. *Pls.’ Mem.* at 36 (applying *WRTL II* to the RNC’s ads). And the RNC has stated its intention to broadcast materially similar advertisements in the future. SMI ¶ 63. So the RNC intends to use the Grassroots Lobbying Account to broadcast advertisements consistent with the above characteristics of genuine grassroots lobbying ads set out by the Supreme Court. Grassroots lobbying ads do not directly benefit any federal candidate. Such ads’ “impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions.” *WRTL II*, 127 S. Ct. at 2667.

### **B. State Election Activity**

As a preliminary matter, Plaintiffs have not stated that the support of non-federal candidates where no federal candidates appear on the ballot has an effect on federal candidates or elections. *FEC Mem.* at 15. The FEC’s own expert in *McConnell* noted that contributions to state candidates in such elections do not affect federal elections. *See* 251 F. Supp. at 830 (Leon, J.) (*citing* Cross Exam. of Defense Expert Mann at 71).

Nonetheless, the FEC argues that voter registration efforts in elections where no federal candidates appear on the ballot affect federal elections and warrant federal regulation. *FEC Mem.* at 15. But such an argument would justify federal regulation of *all* voter

identification and voter registration efforts, in *any* state or local election, by *any* person or party. *Pls. Reply Mem.* at 12-13. Surely the *federal* government may not regulate a local party's voter identification and voter registration efforts for a local mayoral race in an election where no federal candidate is on the ballot. *Cf. Buckley*, 424 U.S. at 13 & n.16.

Moreover, any voter information obtained by the RNC in these state and local elections is “worthless” for use in future federal elections absent a continuing enhancement process on the part of the RNC. SMI ¶ 60. Voter registration lists must be constantly updated as people move into and out of the relevant jurisdiction. *Id.* And “just because you register [to vote] once doesn't mean you can vote in every election after that if your circumstances change.” *Id.* (*quoting* Josefiak Dep. 248:14-16). In short, voter registration and voter identification activities in elections where no federal candidate appear on the ballot do not directly benefit any federal candidate. *See McConnell*, 251 F. Supp.2d at 831 (Leon, J.).

To the extent that voter registration and voter identification efforts occur in elections where *both* state and federal candidates appear on the ballot, Plaintiffs' have noted that such activities might have the “collateral” effect of benefitting federal candidates who appear on the ballot. However, when such activities are generic in nature, or targeted to specific state candidates or races, this collateral effect is too remote and attenuated to warrant federal regulation. *Pls. ' Mem.* at 38-39; *Pls. ' Reply Mem.* at 17-18.

The FEC starts from the false premise that the only possible explanation for RNC involvement in state and local elections is to use those elections as a practice field for future federal elections, or to benefit federal candidates in some other way. *FEC Mem.* at 15-16. But the

“RNC is a *national* party, and not just a *federal* party.” SMI ¶ 1 (citing Josefiak Dep. 138:11-18) (emphasis added). Indeed,

[a]s a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the *federal, state and local levels*. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views *at the federal, state and local levels*.

*McConnell*, 251 F. Supp.2d at 335 (citations omitted) (Henderson, J.) (emphasis added). “[T]he RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities.” *Id.* at 336. These activities in state and local elections “are substantial [] in their importance. . .” to the RNC. *Id.* at 335. So in its role as a *national* party, the RNC seeks to assist state and local candidates, not just federal candidates.

### **C. Litigation Activities**

The RNC has stated that it intends to use its Litigation Account for the purposes of paying the fees and expenses attributable to this case and costs associated with other litigation not involving federal elections. SMI ¶ 70. Such litigation might include trademark issues, personnel issues, recount issues in state and local candidate elections, and state legal issues regarding voter fraud or voter registration. *Id.* (citing Josefiak Dep. 172:13-173:11). None of these activities directly affect federal elections. Nor does the FEC mount an argument otherwise as to most of these activities. *FEC Mem.* 16-17.

However, in regard to funding the costs associated with this lawsuit, the FEC alleges that such activity “affects federal elections for the same reasons discussed previously regarding soft money in general and Plaintiffs’ activities in particular.” *FEC Mem.* 16. While one cannot be

sure what this statement means, its appears to offer the argument that (a) because Plaintiffs' intended activities in this suit will affect federal elections, (b) so to the present litigation affects federal elections. However, because Plaintiffs' intended activities *do not* directly affect federal elections, *Pls. ' Reply Mem.* at 12-18, this argument fails.

Similarly, the FEC argues (a) that litigation involving state "voter registration and similar issues" affects federal elections because (b) state voter registration affects federal elections. *FEC Mem.* at 16. But as explained above, voter registration activities in elections where no federal candidate appears on the ballot do not directly affect federal elections. *Supra* at 7-8. Thus, the FEC's argument fails here as well. In short, the Litigation Account will not directly benefit any federal candidate or officeholder.

#### **D. Get-Out-The-Vote Activity**

The FEC next argues that Plaintiffs' support of GOTV activity benefits all Republican candidates that appear on the ballot. *FEC Mem.* at 17. And, it is asserted, "any argument that Plaintiffs' GOTV activity does not influence federal elections is contrary to Plaintiffs own admissions and the record in this case." *Id.*

First, as noted *supra* at 7, GOTV activity in elections where no federal candidates appear on the ballot does not directly affect federal elections and nothing in the record suggests otherwise. *See McConnell*, 251 F. Supp.2d at 831 (Leon, J.). Second, to the extent that GOTV efforts occur in elections where both state and federal candidates appear on the ballot, but which do not reference any federal candidate or campaign, such activities might have the "collateral" affect of benefitting federal candidates also appearing on the ballot. SMI ¶ 72. However, a

indirect collateral effect does not give rise to any appearance of corruption. *Pls. ' Mem.* at 38-39; *Pls. ' Reply Mem.* at 17-18.

As discussed above, the RNC is a national party that actively supports the election of candidates at the state and local level. The fact that the RNC intends to support GOTV activities in elections where both state and federal candidates appear on the ballot should not have the effect of federalizing all such activities, particularly when the activities are targeted to state candidates and campaigns or are generic in nature (do not reference any state, local, or federal candidate but promote the Republican party generally).

The FEC also points out that CRP currently uses federal funds, to finance GOTV calls and doorhangers that reference all Republican candidates. *FEC Mem.* at 17. However, this fact is entirely irrelevant to the present inquiry. Relevant here is CRP's intended use of state funds for GOTV efforts that do not reference or depict any federal candidate, which activity the BCRA prohibits.

### **Conclusion**

For the reasons stated, the FEC's motion for summary judgment should be denied.



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**United States District Court  
District of Columbia**

<b>Republican National Committee et al.,</b> <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;">v.</p> <b>Federal Election Commission et al.,</b> <p style="text-align: right;"><i>Defendant.</i></p>	<p style="text-align: center;">Case No. 08-1953 (BMK, RJL, RMC)</p> <p style="text-align: center;">THREE-JUDGE COURT</p>
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**Plaintiffs’ Statement of Material Issues and  
Objections to Defendant’s Statement of Undisputed Facts**

Plaintiffs’ RNC *et al.* submit the following statement of material issues in opposition to the Federal Election Commission’s (“FEC”) statement of undisputed material facts. LCvR 7(h).

The following numbered paragraphs correspond with the FEC’s numbered paragraphs.<sup>1</sup>

1. **Response:** “The RNC is a *national* party, and not just a *federal* party.” *Pls. Reply Mem. Exh. 1, Josefiak Dep.* at 138:11-18 (emphasis added).

As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the federal, state and local levels. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views at the federal, state and local levels.

*McConnell*, 251 F. Supp.2d at 335 (Henderson, J.) (citations omitted). These activities in state and local elections “are substantial both in their importance to the RNC’s mission and in their

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<sup>1</sup> Plaintiffs’ Exhibits 1-5 were attached to Plaintiffs’ motion for summary judgment (Dkt. 21). Plaintiffs Exhibits 6-7 are attached hereto. Plaintiffs’ exhibit attached to their reply memorandum in support of summary judgment (Dkt. 50) is herein referred to as *Pls. Reply Mem. Exh. 1*. Defendant FEC’s Exhibits 1-25 were attached to its memorandum in opposition to Plaintiffs’ motion for summary judgment, (Dkt. 39), and Defendant FEC’s Exhibits 26-41 were attached to the FEC’s motion for summary judgment. (Dkt. 56).

**Plaintiffs’ Statement of Material Issues**

resource commitment.” *Id.* “Even for elections in which there is no federal candidate on the ballot, the RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities.” *Id.* at 336. Furthermore, a political “party has its own traditions and principles that transcend the interests of individual candidates and campaigns . . . .” *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 629 (1996) (“*Colorado I*”) (Kennedy, J., concurring in the judgment and dissenting in part). Parties have a “unique role in serving” First Amendment principles. *Id.* “[P]olitical parties are unique; they are neither super multicandidate political committees formed entirely to support candidates for federal office nor political associations completely uninvolved in candidate advocacy.” *McConnell*, 251 F. Supp.2d at 766 (Leon, J.). “[P]arties encourage ‘democratic nationalism’ by nominating and electing candidates and by engaging in dialogues concerning public policy issues of national importance.” *Id.* at 820-21.

2. **Response:** *See supra* Response ¶ 1.

3. **Response:** *See supra* Response ¶ 1.

4. **Response:** *See supra* Response ¶ 1.

5. **Response:** When the President of the United States is a Republican, he will offer a suggestion of a chairperson to the RNC. This person must then receive an independent majority vote of the 168 members of the RNC in order to become the chairperson. The members may choose not to accept the President’s suggestion. FEC Exh. 1, *Josefiak Dep.* 193:2-194:5. When the President is a Republican, the White House cooperates with the RNC, but the President

maintains no control over the RNC and the RNC alone decides how it will spend its resources. *Id.* at 194:6-12.

6. **Response:** The RNC has, on occasion, entered into name-for-name list exchanges with campaigns, which may include voter preference information and/or donor information. *See* FEC Exh. 1, *Josefiak Dep.* 98:8-14.

7. **Response:** The RNC provides its contributors of federal funds with certain opportunities and invitations to events not offered to the public at large. FEC Exh. 4, *RNC Discovery Responses* at 7. These opportunities involve nothing more than attending events at which federal candidates and officeholders sometimes speak, and do not involve any one-on-one contact or other special access. FEC Exh. 1, *Josefiak Dep.* at 73:3-77:4 (describing RNC fundraising events for federal funds contributors). The RNC does not facilitate individualized one-on-one contact between federal funds contributors and federal officeholders or candidates. FEC Exh. 4, *RNC Discovery Responses* at 7, FEC Exh. 1, *Josefiak Dep.* at 73:3-77:4, 126:20-130:3. The RNC does not encourage federal officeholders to meet with contributors of federal funds. FEC Exh. 4, *RNC Discovery Responses* at 7. Nor does the RNC pass on to candidates or officeholders requests from donors to meet with such candidates or officeholders. FEC Exh. 1, *Josefiak Dep.* at 127:1-128:1.

8. **Response:** *See supra* Response ¶ 7. To the extent “an attending donor has an opportunity to inform the federal candidate or officeholder about the donor’s opinion on legislation or other issues,” it would occur by the possible opportunity to ask the candidate a question during the question and answer session following a candidate or officeholder’s speech.

FEC Exh. 1, *Josefiak Dep.* 75:22-77:8-11 (noting that donors who attend such events and express their opinions often have divergent positions on the same issue).

9. **Response:** No response.

10. **Response:** *See infra* Response ¶¶ 11, 16.

11. **Response:** *See supra* Response ¶ 7. The RNC will not provide non-federal donors with preferential access to any federal candidate or officeholder. Pls.’ Exh. 1, *Beeson Affidavit* ¶ 19, 30; *FEC Mem.* Exh. 4 at 7; FEC Exh. 1, *Josefiak Dep.* 126:20-130:3. Regardless of the amount of non-federal funds or state funds a contributor may give to any of the RNC’s accounts, they will receive no preferential access to any federal candidate or officeholder in return. FEC Exh. 1, *Josefiak Dep.* 126:20-130:3. The record from *McConnell* does not support the statement that “trading of soft money for access to federal officeholders was rampant” at the RNC prior to BCRA’s enactment.

12. **Response:** Donors contribute to the RNC “because they want to assist the Republican National Committee.” FEC Exh. 1, *Josefiak Dep.* 74:18-75:2.

13. **Response:** No response.

14. **Response:** The FEC points to no evidence that prior to the enactment of the BCRA federal officeholders solicited funds on behalf of the RNC. As for the RNC’s intended activities in this case, no federal candidate or officeholder will solicit funds to any of the RNC’s intended accounts. Pls.’ Exh. 1, *Beeson Aff.* ¶ 19.

15. **Response:** The RNC does not distribute donor lists or donor information to federal candidates or officeholders, Pls.’ Exh. 6, *Josefiak Dep.* 95:6-96:13, with the exception of the exchanges referenced in Response ¶ 6.

16. **Response:** Gratitude on the part of candidates and officeholders, which contributors might try to exploit to gain undue influence, can only exist where a direct benefit is conferred on the candidate officeholder. Absent a direct benefit, any gratitude on the part of candidates and officeholders is too attenuated to pass constitutional muster. Plaintiffs' intended activities do not directly benefit any federal candidate or officeholder and thereby pose no threat of corruption or its appearance. To the extent that *McConnell* discussed corruption arising from gratitude on the part of candidates, which "donors would seek to exploit," it did so only in the context of non-federal funds used "for the specific purpose of influencing a particular candidates's federal election." *McConnell*, 540 U.S. at 146. After all, the Federal Funds Restriction was enacted "to address Congress' concerns about the increasing use of soft money . . . to influence federal elections." *Id.* at 132 (emphasis added).

17. **Response:** *See supra* Response ¶¶ 7, 16. To the extent donors inform federal candidates or officeholders of contributions to the RNC's intended Accounts, it would be no different than if they informed the officeholder of their contribution to a state candidate, state party, or charitable organization of the officeholder's liking.

18. **Response:** *See supra* Response ¶¶ 7, 11-12,16.

19. **Response:** No response.

20. **Response:** No response.

21. **Response:** There is regular communication between the RNC and all its members because the members "make up the Republican National Committee." FEC Exh. 1, *Josefiak Dep.* 200:20-201:1. There is no "near-constant strategic communication between state parties and the RNC." *Id.* 200:13-201:16.

22. **Response:** A political “party has its own traditions and principles that transcend the interests of individual candidates and campaigns . . . .” *See Colorado I*, 518 U.S. at 629 (Kennedy, J., concurring in the judgment and dissenting in part). Parties have a “unique role in serving” First Amendment principles. *Id.* “[P]olitical parties are unique; they are neither super multicandidate political committees formed entirely to support candidates for federal office nor political associations completely uninvolved in candidate advocacy.” *McConnell*, 251 F. Supp.2d at 766 (Leon, J.). “[P]arties encourage ‘democratic nationalism’ by nominating and electing candidates and by engaging in dialogues concerning public policy issues of national importance.” *Id.* at 820-21.

23. **Response:** No response.

24. **Response:** No response.

25. **Response:** No response.

26. **Response:** *See supra* Response ¶ 22.

27. **Response:** No response.

28. **Response:** No response.

29. **Response:** In regard to state and local party committees, which are required to use federal funds only for “federal election activity,” *McConnell* facially upheld the Federal Funds Restriction because it was narrowly focused on regulating “those contributions to state and local parties that can be used to *benefit federal candidates directly*.” 540 U.S. at 167 (emphasis added). To the extent the Court discussed such parties’ relationships with federal candidates and officeholders as justifying regulation, it did so only *in addition* to the fact that the activities directly benefitted federal candidates. *Id.* at 156 n. 51 (“Thus, in upholding § 323(b) . . . we rely

not only on the fact that [it] regulate[s] contributions used to fund activities influencing federal elections, but also that [it] regulate[s] contributions to or at the behest of entities uniquely positioned to serve as conduits for corruption”). Because CRP’s intended activities do not directly benefit federal candidates, evidence regarding CRP’s relationship with federal candidates and officeholders is irrelevant.

30. **Response:** *See supra* Response ¶ 29.

31. **Response:** *See supra* Response ¶ 29.

32. **Response:** *See supra* Response ¶ 29.

33. **Response:** *See supra* Response ¶ 29.

34. **Response:** *See supra* Response ¶ 29.

35. **Response:** *See supra* Response ¶ 29.

36. **Response:** *See supra* Response ¶ 16. No federal candidates will directly benefit from Plaintiffs’ intended activities and so this statement is irrelevant. To the extent that *McConnell* discussed corruption arising from gratitude on the part of candidates, which “donors would seek to exploit,” it did so only in the context of non-federal funds used “for the specific purpose of influencing a particular candidates’s federal election.” *McConnell*, 540 U.S. at 146.

37-45. **Response:** No response.

46. **Response:** Expenditures by committees and organizations not parties to this suit are irrelevant.

47-50. **Response:** No response.



51. **Response:** The Federal Funds Restriction prohibits national committees of a political party and its officials from soliciting or using *any* non-federal funds,<sup>2</sup> regardless of their purpose. They may solicit and use only federal funds. 2 U.S.C. § 441i(a). The Federal Funds Restriction prohibits state and local committees of a political party from using non-federal funds for “federal election activity.” *Id.* § 441i(b). “Federal election activity” includes: (1) voter registration activity in the 120 days before a federal election; (2) “voter identification, get-out-the-vote activity or generic campaign activity” in connection with elections for federal office; and (3) public communications<sup>3</sup> that clearly identify and “promote,” “attack,” “support,” or “oppose” (“PASO”) a federal candidate. *Id.* § 431(20). The Supreme Court has noted that limiting the amount of contributions “in turn” limits expenditures. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (“*CARC*”). In *CARC*, the Supreme Court employed “exacting scrutiny,” 454 U.S. at 294, to strike down a limit on contributions to ballot-measure committees, noting that “[a]part from the impermissible restraint on freedom of association, but virtually inseparable from it in this context, [the limit] imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees.” *Id.* at 298. *CARC* noted that, as with the present case, individuals could “make expenditures without limit” on a ballot measure “but may not contribute beyond the \$250 limit when joining with others to

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<sup>2</sup> “Federal funds” are those complying with federal limits, bans, and reporting requirements. 11 C.F.R. § 300.2(g). “Non-federal funds” are those that do not comply with federal limits and bans. *Id.* § 300.2(k). Depending on how a state’s law compares with federal law, money raised under state law may or may not be “non-federal.” As used in this brief, however, the term “state funds” – which, unlike “federal funds” and “non-federal funds,” is not a term of art – means *non-federal funds that comply with the law of the state in question*.

<sup>3</sup> *Defined in* 2 U.S.C. § 431(22) *and* 11 C.F.R. § 100.26.

advocate common views.” *Id.* The Court concluded that “[p]lacing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.” *Id.*

52. **Response:** Even if it were true, this statement is irrelevant because the FEC bears the burden of demonstrating why the regulation of such activities is necessary and justified. But moreover, because of the difficulty in raising federal funds, and the need to use federal funds for federal purposes, the RNC has engaged in little, if any, of the activities for which it seeks relief in this action to use non-federal funds and state funds. FEC Exh. 4, *Pls.’ Discovery Responses* at 4-5; FEC Exh. 1, *Josefiak Dep.* 141:13-144:14, 160:12-20. And to the extent the RNC has engaged in any of these activities, it has been forced to use federal funds, which by their very nature are raised for federal purposes, for these non-federal activities like supporting state candidates. *Id.* If it were not limited to federal funds, the RNC could engage in additional speech. *Id.*

53. **Response:** *See supra* Response ¶ 52.

54. **Response:** This statement is irrelevant. The fact that CRP has used federal funds to support federal candidates in the past has no bearing on this case. What is relevant in this case is CRP’s intended use of state funds for ballot measure advocacy and state election activities, which activity is prohibited by the Federal Funds Prohibition. Pls.’ Exh. 3, *Christiansen Dec.* ¶¶ 16, 19.

55. **Response:** This statement is irrelevant. The fact that RPSD has used federal funds to support federal candidates in the past has no bearing on this case. What is relevant in this case is RPSD’s intended use of state funds for ballot measure advocacy and state election activities, which activity is prohibited by the Federal Funds Prohibition. Pls.’ Exh. 5, *Tetlow Dec.* ¶¶ 5-6.

56. **Response:** If RPSD's obtains the judicial relief sought in this action, RPSD will undertake its intended activities using state funds. If RPSD does not obtain the requested judicial relief, it will continue to use federal funds for its activities that qualify as "federal election activity" to the extent federal funds are available. FEC Exh. 3, *Buettner Dep.* 76:2-12.

57. **Response:** *See supra* Response ¶ 52.

58. **Response:** *See supra* Response ¶ 52.

59. **Response:** *See supra* Response ¶ 1.

60. **Response:** The RNC's intended activities in state and local elections where no federal candidates appear on the ballot do not directly benefit any federal candidate. The FEC's own expert in *McConnell* noted that contributions to state candidates in odd-numbered years do not affect federal elections. *See* 251 F. Supp. at 830 (Leon, J.) (*citing* Cross Exam. of Defense Expert Mann at 71). Nor does voter registration, voter identification, or GOTV activities in elections where no federal candidates appear on the ballot directly benefit any federal candidate. *See McConnell*, 251 F. Supp.2d at 831 (Leon, J.). Any voter information obtained by the RNC in these state and local elections is "worthless" for use in future federal elections absent a continuing enhancement process on the part of the RNC. *Defendant Van Hollen's Opposition to Plaintiffs' Motion for Summary Judgment*, Exh. 11, *Josefiak Dep.* 246:2-13, 19-22 (Dkt. 41). Voter registration lists must be constantly updated as people move into and out of the relevant jurisdiction. Pls.' Exh. 6, *Josefiak Dep.* 247:10-17. And "just because you register [to vote] once doesn't mean you can vote in every election after that if your circumstances change." *Id.* at 248:14-16. The RNC's involvement in state and local elections is not to use those elections as a 'practice field' for future federal elections, or to benefit federal candidates in some other way.

The “RNC is a *national* party, and not just a *federal* party.” *Pls. Reply Mem. Exh. 1, Josefiak Dep.*138:11-18 (emphasis added).

As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the *federal, state and local levels*. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord *with Republican views at the federal, state and local levels*.

*McConnell*, 251 F. Supp.2d at 335 (citations omitted) (Henderson, J.) (emphasis added). “[T]he RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages in get-out-the-vote activities.” *Id.* at 336. These activities in state and local elections “are substantial [] in their importance. . .” to the RNC. *Id.* at 335. In its role as a *national* party, the RNC seeks assist state and local candidates, not just federal candidates.

61. **Response:** *See supra* Response ¶ 60.

62. **Response:** *See supra* Response ¶ 1.

63. **Response:** The RNC intends to use the Grassroots Lobbying Account to pay for radio, television, and internet grassroots lobbying advertisements on relevant public-policy issues. *Pls.’ Exh. 1, Beeson Affidavit* ¶ 11. The first two issues the RNC would like to address are issues being debated by the 111th Congress: (1) “card check” legislation, which allows unionization without secret-ballot elections for workers; and (2) legislation to revive the “Fairness Doctrine,” which would require radio station owners to provide equal time on matters of public importance or risk losing their broadcast licenses. *Id.* The RNC has provided true and correct copies of two ads that the RNC intends to broadcast: “Card Check” and “Freedom of Speech.” The Supreme Court in *WRTL II* provided the means to distinguish alleged bogus issue

ads from genuine issue advocacy. The court found that WRTL's grassroots lobbying ads were genuine issue advocacy because:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

*Id.* at 2667. Both the "Card Check" and "Freedom of Speech" ads that the RNC intends to broadcast with non-federal funds undisputedly contain these same characteristics. Under *WRTL II*, ads such as "Card Check" and "Freedom of Speech" are genuine issue ads, not "electioneering" advertising, "campaign speech," or sham issue ads. *See* 127 S. Ct. at 2559, 2667, 2669 n. 7. And the RNC has stated its intention to broadcast materially similar advertisements in the future. Pls.' Exh. 1, *Beeson Affidavit* ¶ 18. So the RNC intends to use the Grassroots Lobbying Account to broadcast advertisements consistent with the above characteristics of genuine grassroots lobbying ads set out by the Supreme Court. Grassroots lobbying ads do not directly benefit any federal candidate. Such ads' "impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions." *Id.* at 2667. Plaintiffs' objected to the FEC's definition of grassroots lobbying because it encompassed *any* "radio, television, and internet. . . advertisements on relevant public-policy issues" and was not limited to the type of grassroots lobbying advertisements described in *WRTL II* that the RNC intends to engage in. Pls.' Exh. 7, *FEC Discovery Requests* at 4.

64. **Response:** No response.

65. **Response:** *See supra* Response ¶ 63. Moreover, the “More” and “Taxed too Much” ads previously identified by this Court as “electioneering,” fit the description of what the Supreme Court has subsequently described as “genuine issue advocacy.” *WRTL II*, 127 S. Ct. at 2667.

66. **Response:** This statement is irrelevant as a speaker's intent has no bearing on whether speech is regulable or not. *WRTL II*, 127 S. Ct. at 2665. What is relevant is the substance of the speech. *Id.*

67. **Response:** The Democratic National Committee's activities are not at issue in this case and are entirely irrelevant. Notably, however, the FEC does recognize the existence of a “genuine grassroots lobbying advertisement.”

68. **Response:** Supporting redistricting does not “directly” benefit federal candidates. *See McConnell*, 251 F. Supp.2d at 831-32 (Leon, J.). Redistricting is the province of state legislators. While this state activity involves congressional districts, any effect on federal candidates or officeholders is far too attenuated to be deemed *unambiguously*-campaign-related. *McConnell* stated that only those *activities* that “*directly* benefit” federal candidates pose a risk of corruption sufficient to justify regulation. 540 U.S. at 168-70 (emphasis added). Thus, state parties, as well as corporations and unions, remain free to use non-federal funds to support state redistricting.

69. **Response:** *See supra* Response ¶ 68.

70. **Response:** The RNC has stated that it intends to use its Litigation Account for the purposes of paying the fees and expenses attributable to this case and costs associated with other litigation not involving federal elections. Pls.' Exh. 1, *Beeson Affidavit* ¶ 15. Such litigation

might include trademark issues, personnel issues, recount issues in state and local candidate elections, and state legal issues regarding voter fraud or voter registration. FEC Exh. 1, *Josefiak Dep.* 172:13-173:11. None of these activities directly affect federal elections.

71. **Response:** *See supra* Response ¶¶ 60, 70.

72. **Response:** Plaintiffs' GOTV activities in elections where both state and federal candidates are on the ballot, but which will not be targeted to any federal candidate or federal race, Pls.' Exh. 3, *Christiansen Dec.* ¶ 16, do not *directly* benefit federal candidates. Such activities may take two different forms. First are GOTV efforts that are targeted to only state candidates or to specific state races and which do not name or reference any federal candidate. Second are GOTV efforts that are generic in nature, *i.e.* they do not target any state or federal race and do not mention any state or federal candidates, but rather target Republican voters generally. Neither category of activities is unambiguously campaign related, *Buckley*, 424 U.S. at 80, because they do not directly benefit any federal candidate. Any effect on federal candidates and officeholders would be indirect and tangential.

73. **Response:** *See supra* Response ¶ 72. The "RNC is a *national* party, and not just a *federal* party." *Pls. Reply Mem.* Exh. 1, *Josefiak Dep.* 138:11-18 (emphasis added).

As a national political party committee, the RNC has historically participated and participates today in electoral and political activities at the *federal, state and local levels*. The RNC seeks to advance its core principles by advocating Republican positions, electing Republican candidates and encouraging governance in accord with Republican views *at the federal, state and local levels*.

*McConnell*, 251 F. Supp.2d at 335 (citations omitted) (Henderson, J.) (emphasis added). "[T]he RNC trains state and local candidates, donates to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates and engages

in get-out-the-vote activities.” *Id.* at 336. These activities in state and local elections “are substantial [] in their importance. . .” to the RNC. *Id.* at 335. In its role as a *national* party, the RNC seeks assist state and local candidates, not just federal candidates.

74. **Response:** *See supra* Response ¶¶ 72-73.

75. **Response:** That CRP has previously identified federal candidates in its GOTV activities is irrelevant to this case. At issue in this case is CRP’s desire to use state funds for GOTV activities that will not “be targeted to any federal candidate, *i.e.*, it would not reference, describe, or otherwise depict any federal candidate.” Pls.’ Exh. 3, *Christiansen Dec.* ¶¶ 16.

76. **Response:** RPSD’s past use of federal funds for GOTV activities referencing federal candidates is irrelevant to this case. At issue in this case is RPSD’s desire to use state funds for GOTV activities that will not “be targeted to any federal candidate, *i.e.*, it would not reference, describe, or otherwise depict any federal candidate.” Pls.’ Exh. 5, *Tetlow Dec.* ¶ 5.

77. **Response:** CRP’s voter registration efforts in elections where both state and federal candidates appear on the ballot is intended “to elect more Republicans at both [the state and federal] levels.” FEC Exh. 2, *Christiansen Dep.* 123:12-13. CRP intends to use state funds for voter registration activity that will not “be targeted to any federal candidate, *i.e.*, it would not reference, describe, or otherwise depict any federal candidate.” Pls.’ Exh. 3, *Christiansen Dec.* ¶ 16. These activities do not directly benefit any federal candidate.

78. **Response:** To the extent this paragraph refers to voter registration efforts in elections where no federal candidate appears on the ballot, *see supra* Response ¶ 60. To the extent this paragraph refers to voter registration efforts in elections where both state and federal candidates appear on the ballot, *see supra* Response ¶ 77.



79. **Response:** In facially upholding § 431(20)(A)(iii)'s definition of PASO communications, *McConnell* stated that the “overwhelming tendency” of such ads was “to benefit directly federal candidates. . . .” 540 U.S. at 170. However, the Court pointed to evidence concerning “bogus issue advertising” to support that facial holding. *Id.* While this finding was sufficient to uphold the law facially, it is not sufficient to uphold the law in every application, *i.e.* when the activity does not directly benefit federal candidates. Simply because PASO communications might have the “overwhelming tendency” to directly benefit federal candidates, does not mean that every PASO communication poses a risk of corruption. *Cf. WRTL I*, 546 U.S. at 412. In the wake of *WRTL II*, 127 S. Ct. 2652, it is apparent that CRP and RPSD’s public communication, Pls.’ Exh. 3, *Christiansen Dec.* ¶ 19; Pls.’ Exh. 5, *Tetlow Dec.* ¶ 6, is not “bogus issue advertising,” but is instead genuine issue advocacy. As such, it does not directly benefit any federal candidate. Such ads’ “impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions.” *WRTL II*, 127 S. Ct. at 2667.

80. **Response:** No response.

81. **Response:** *See supra* Response ¶¶ 72,77.

82. **Response:** *See supra* Response ¶¶ 72,77.

83. **Response:** *See supra* Response ¶¶ 72-73.

Respectfully submitted,

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