United States District Court
District of Columbia

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

Plaintiffs' Reply Supporting Their Amended Application for Three-Judge Court

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Introduction

"Glib," says FEC of plaintiffs' demonstration that this case fits BCRA § 403's stated criteria for § 403's judicial procedures. Opp'n (Doc. 17) at 8. *Fit* doesn't matter, FEC insists, because this case is "frivolous" and "insubstantial." *Id.* But FEC's "frivolous" label addresses the *legal merits* of the *case*, not § 403's requirements. Considering the legal merits in any depth is more appropriate to deciding summary-judgment motions after merits briefing, or to a motion to dismiss before a three-judge court as in *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014). *See infra* at 5-7. To the extent a *minimal* look at the merits is proper at this stage, this case easily clears a "frivolous" hurdle because it raises substantial issues. FEC's "frivolous" label overlooks the rise of wealthy IE-PACs as a result of two *controlling* constitutional holdings:

- *Citizens United v. FEC*, 558 U.S. 310, 357 (2010), held, as a matter of law, that "independent expenditures . . . do not give rise to corruption or the appearance of corruption," and
- *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"), held that "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."[1]

And long ago the Supreme Court held that (a) party-committees could *in fact* make independent expenditures, (b) those independent expenditures could not be *presumed* to be coordinated, and (c) those independent expenditures posed *no* quid-pro-quo-corruption risk. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"). FEC overlooks

[1] Moreover, FEC has already decided that where entities can legally do independent expenditures *separately*, then they necessarily must be allowed to pool their resources for effective advocacy by doing those independent expenditures *together*. *See* FEC, Advisory Opinion ("AO") 2010-11 (Commonsense Ten) at 3. The quid-pro-quo-corruption risk being absent, nothing justifies restricting the expressive association of contributors and a party-committee NCA here.

the applicability of those holdings to party-committees' non-contribution accounts ("NCAs"). FEC overlooks the fact that both *McConnell v. FEC*, 540 U.S. 93, 145 n.45 (2003), and *Citizens United*, 558 U.S. at 360-61, *distinguished* the independent-expenditure line of cases from the soft-money context, so this case raises a new and important issue. This and more make this case very substantial. Crucially, FEC overlooks its burden to *prove* that preventing quid-pro-quo corruption justifies barring party-committee NCAs. *See* Part I.B. Absent that proof, FEC's claim that this case is "insubstantial" cannot succeed in defeating BCRA § 403 jurisdiction.

"Nonsense," says FEC of plaintiffs' assertion that *McConnell* actually said "the Court ha[d] jurisdiction to hear a challenge to § 307," 540 U.S. at 229, though FEC *concedes* that a § 403 court *does* have jurisdiction of a § 307 amendment, nonetheless insisting that *McConnell* means something other than what it plainly says. Opp'n 15. *See infra* at 20-22.

"[R]uminations on the particular metaphysics of resurrecting FECA provisions," Opp'n 15 n.3, is how FEC responds to plaintiffs' analysis of what *McConnell* meant when declining to consider a challenge to a BCRA base-limit increase where the Paul plaintiffs lacked standing for other reasons, though "the Court ha[d] jurisdiction to hear a challenge to § 307," 540 U.S. at 229. *See infra* at 20-22.

"Glib," "nonsense," and "ruminations," along with the labels "frivolous" and "insubstantial," don't satisfy FEC's burden to *prove* that this case is without legal merit under the controlling constitutional analysis applicable to *independent expenditures* and *independent-expenditure entities*. FEC has not proven that political-party independent expenditures pose a quid-pro-quo-corruption risk—which it cannot—and absent such proof, this case is substantial, not frivolous.

I. Plaintiffs Meet the Two Criteria for BCRA § 403's Judicial-Review Provisions.

In their three-judge-court application, plaintiffs established that this case qualifies for the

judicial-review proceedings of BCRA § 403 because it meets § 403's express criteria: (1) a constitutional challenge to (2) BCRA provisions/amendments. Appl. (Doc. 5) 1-4.

Section 403 expressly authorizes challenges to BCRA "amendments." That clear inclusion of challenges to *amendments* governs any question about the scope of § 403 review because the ultimate question is *what does § 403 authorize?*, not what is said in some *non-BCRA* case or some BCRA opinion with multiple possible interpretations. Since a BCRA amendment raising a base contribution limit is a BCRA *amendment*, under § 403 it is subject to § 403 review.

A. FEC's Suggested "Frivolous"/"Insubstantial" Bar Fails, if It Applies.

FEC pronounces the foregoing, necessary application of § 403's plain language "glib" and insists that § 403 procedures are inapplicable here because "plaintiffs' claims are insubstantial," Opp'n 8, citing a non-BCRA case for the proposition that

> "claims may be regarded as insubstantial if they are *obviously without merit*, or if their unsoundness *so clearly results* from the previous decisions of (the Supreme Court) as to foreclose the subject and *leave no room for the inference* that the question sought to be raised can be the subject of controversy."

Id. (quoting *Feinberg v. Fed. Deposit Ins. Corp.*, 522 F.2d 1334, 1338 (D.C. Cir. 1975)) (emphasis added). Based on this proposed bar, FEC alleges that plaintiffs' claims are "frivolous" or "foreclosed." *Id.* FEC's suggested frivolous/insubstantial bar is very problematic in the BCRA context because (a) it is not included in BCRA § 403 (though such language is easy to insert); (b) BCRA deals with core political speech, which is afforded the highest protection by the First Amendment, the Supreme Court, and BCRA § 403; and (c) it turns on the merits *before* full merits briefing.

However, even *if* this *Feinberg* bar applies to § 403 proceedings, FEC must prove, not that its broad labels "frivolous" and "insubstantial" apply, but that the claims here are either (1) "*obviously*" meritless or (2) "*clearly*" so unsound under controlling precedent that there is "*no room for the*

inference" that plaintiffs' complaint "state[s] a claim upon which relief can be granted," as Federal Rule of Civil Procedure 12(b)(6) puts it in the merits context. *Feinberg*, 522 F.2d at 1338 (emphasis added). FEC has not proven plaintiffs' claims frivolous or insubstantial, let alone *obviously* frivolous or so *clearly* insubstantial that there is *no room for debate* on the subject.[2]

Before a (necessarily) brief discussion of the legal merits of this challenge, the *nature* of FEC's asserted frivolous/insubstantial bar requires examination to identify its necessary limitation (if it applies). The central issue of the present *three-judge application* is whether this case complies with § 403's two criteria for § 403's judicial procedures, which it does. The central issue of the *proposition* FEC advances is whether some claims—regardless of whether they are claims against BCRA amendments—should be dismissed before a 3-judge court is convened because the claims are deemed (a) obviously frivolous or (b) clearly foreclosed by precedent without room for debate.

While an (a) *obviously frivolous* case might properly be rejected before a § 403 court is convened, this case is not frivolous, let alone *obviously* frivolous. *See* Introduction (holdings controlling present challenge). *See also infra* Part I.B (developing further the controlling legal analysis).

But whether a case is (b) *clearly foreclosed without room for debate* by precedent is complex and requires substantial legal briefing, with three-judge courts often being overturned on appeal by the Supreme Court in the highly protected political-speech realm. Consider three key cases (in which present plaintiffs' counsel Bopp and Coleson were counsel for victorious plaintiffs).

First, Wisconsin Right to Life's as-applied challenge to BCRA's corporate electioneering-communication ban was held, by a three-judge BCRA court, to be foreclosed by *McConnell*, 540 U.S. 93, until the *unanimous* Supreme Court held, in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), that *McConnell* did not foreclose the as-applied challenge. WRTL then won its

[2] "We give the benefit of the doubt to speech." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 482 (2007) (plurality) ("*WRTL-II*").

challenge in *WRTL-II*, 551 U.S. 449. If a judge had deprived WRTL of a three-judge court because WRTL's challenge was erroneously deemed foreclosed, WRTL would have been deprived of the important judicial proceedings that are an essential part of BCRA.

Second, in *Citizens United*, 558 U.S. 310, a BCRA § 403 court was convened and granted summary judgment to FEC in Citizens United's challenge to the corporate electioneering-communications ban at 2 U.S.C. § 441b. Since it was a summary judgment decision, the district court held *as a matter of law* that Citizens United's challenge was foreclosed by precedent. Yet the Supreme Court facially invalidated *both* the corporate electioneering-communication ban *and* the corporate independent-expenditure ban. If a judge had deprived Citizens United of a three-judge court based on the notion that precedent foreclosed the challenge, Citizens United would also have been deprived of the important BCRA proceedings that permitted speedy resolution of that case.

Third, in *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014), where a BCRA § 403 court was convened to review the constitutionality of a BCRA amendment to a FECA aggregate contribution limit, the district court granted FEC's motion to dismiss because the challenge was purportedly foreclosed by precedent: "Plaintiffs raise the troubling possibility that *Citizens United* undermined the entire contribution limits scheme, but whether that case will ultimately spur a new evaluation of *Buckley*[*v. Valeo*, 424 U.S. 1 (1976),] is a question for the Supreme Court, not us." (No. 1:12-cv-01034-JEB-JRB-RLW, Doc. 26 at 13.) On appeal, the Supreme Court reversed and held the aggregate limit unconstitutional. Again, if plaintiffs McCutcheon and RNC had been deprived of a three-judge court because their challenge was deemed foreclosed, they would have been deprived of the valuable judicial procedures that Congress afforded BCRA challengers, including challengers electing § 403 procedures after the initial period when such procedures were mandatory.[3]

[3] Because Congress expressly provided for *later election* of § 403's procedures, those procedures were not just for cases soon after BCRA passage, as FEC implies. Opp'n 6.

The *WRTL*, *Citizens United*, and *McCutcheon* decisions demonstrate decisively that political-speech holdings that prior decisions foreclose legal challenges are regularly overturned on appeal—even when the legal determinations are made *after* a three-judge court has been convened and *after* opportunity for fuller merits briefing. The errors of the three-judge courts were quickly fixed in those cases because of BCRA's judicial-review provisions. The lesson of these cases is that whether challenges are "foreclosed" should not be decided on short memos addressing BCRA § 403 procedures, but on full merits briefs.

Despite this history of FEC convincing lower courts that restrictions on core political speech are foreclosed by Supreme Court precedents, only to be promptly reversed on appeal by the Supreme Court, FEC tries to convince this Court that plaintiffs' claims are foreclosed. FEC tries this—not in a motion to dismiss or for summary judgment—but in a way that would deprive plaintiffs here of the speedy BCRA procedures that *WRTL*, *Citizens United*, and *McCutcheon* plaintiffs employed, as Congress intended, to quickly gain Supreme Court review. FEC tries to deprive plaintiffs of the valuable procedures to which they are entitled under § 403—all without full merits briefing.[4]

So in a BCRA case, any argument that a non-frivolous challenge is foreclosed by precedent should not be allowed to foreclose BCRA § 403 judicial procedures because determining precedential foreclosure properly requires full briefing of the legal issues (and decision by the three-judge court that BCRA mandated). Any "foreclosure" screening function should be done—*after* a § 403 court is established—by summary judgment or a motion to dismiss. That is exactly what happened in *McCutcheon*, 134 S.Ct. 1434, where a BCRA § 403 court was convened to review the constitutionality of a BCRA *amendment* to a prior aggregate contribution limit. Though that case was about a BCRA amendment to an *existing FECA limit*, FEC did not object to a three-judge court, which was

[4] Appeal of a § 403-court denial would go to the D.C. Circuit because § 403(a)(3) allows appeal of only "[a] final decision" to the Supreme Court, delaying BCRA's speedy resolution.

formed to consider the legal challenge (and the Supreme Court struck the amended FECA contribution limit). Here, the three-judge court should be convened and then, if FEC wishes, it may file a motion to dismiss based on its claim that this case is foreclosed.

Finally, concerning FEC's assertion that this case is so *clearly* insubstantial that there is *no room for debate* on the subject, it is helpful to step back for a *general view* before turning to more specific refutations. In a political world dominated by IE-PACs, hybrid-PACs, and NCAs, political parties are at a distinct disadvantage, as Joel Gora, law professor and former ACLU attorney in *Buckley*, 424 U.S. at 4, 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.[5]

That "imbalance" helps explain why *two* cases have now been filed seeking IE-PAC-type rights for political-parties' independent-expenditure entities. *See Rufer v. FEC*, No. 1:14-cf-00837-CRC (D.D.C., filed May 21, 2014). And former White House Counsel Bob Bauer, a political-speech-law expert, has opined that "th[is] suit does not exploit a 'loophole'; it is not a 'soft money' lawsuit; and the RNC has not previously made this claim:"

> 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 . . . .[6]

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[5] Joel M. Gora, *In Defense of "Super PACs" and of the First Amendment*, 43 Seton Hall L. Rev. 1185, 1206-07 (2013), *available at* http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1482&context=shlr.

[6] Bob Bauer, *Circling Back (a Full 360°) to the RNC and Libertarian Party Lawsuits* (June 2, 2014), www.moresoftmoneyhardlaw.com/2014/05/circling-back-full-360-rnc-libertarian-

This big-picture view, coupled with the controlling holdings set out in the Introduction,[7] readily establish that this case is not so *clearly* insubstantial that there is *no room for debate* on the subject. This big-picture view helps explain why *six* FEC lawyers are on this "insubstantial" case.

B. Plaintiffs' Claims Are Not So *Clearly* Insubstantial that There Is *No Room for Debate.*

In this sub-part, plaintiffs briefly show why their claims are not so *clearly* insubstantial that there is *no room for debate*—and, in fact, are very substantial. Plaintiffs have a *45-page* draft of their memo supporting summary judgment, which is full of extended legal arguments and which they intend to file when the three-judge court is convened. In that context (or under a motion to dismiss), before the three-judge court that BCRA provides, the merits issue of whether any claim is foreclosed should be fought, after which the Supreme Court can quickly, finally resolve the purely legal issues here. But here it suffices that FEC could not show that plaintiffs' claims are so *clearly* insubstantial that there is *no room for debate*. *See supra* at 3-4 (*Feinberg* test).

Missing from FEC's argument is the essential constitutional analysis applying the sole governmental interest—fighting quid-pro-quo corruption—that might justify the restrictions at issue. Briefly considering that analysis will show that there is plenty of room for debate over FEC's proposition that plaintiffs' claims are clearly insubstantial (and reason to believe they *are* substantial). This constitutional analysis focuses primarily on plaintiffs' desire to do independent expenditures[8] through an NCA. From that analysis, the similar analysis for Counts 2-3 follows.

First Amendment Protection. Plaintiffs' planned independent expenditures through an

party-lawsuits/.

[7] "[I]ndependent expenditures . . . do not give rise to corruption or [its] appearance," *Citizens United*, 558 U.S. at 357, and "government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations," *SpeechNow*, 599 F.3d at 696.

[8] Plaintiffs have verified their intent to establish NCAs "to receive unlimited contributions from permissible sources for making only independent expenditures regarding federal candidates and other independent communications that refer to federal candidates." VC ¶ 11.

NCA are 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 the holding, *Marks v. United States*, 430 U.S. 188, 193 (1977)).

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign.

Id. at 1440-41. "'When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'" *Id.* at 1452.[9]

Scrutiny. The level of scrutiny in both *McCutcheon*, 134 S. Ct. at 1445-46, and *SpeechNow*, 599 F.3d at 696, was not decided because the government lost under either (what *McCutcheon* called) "strict scrutiny" or the "'closely drawn' test," 134 S.Ct. at 1445 (citing *Buckley*, 424 U.S. at 26-27).[10] Under either there was "a substantial mismatch between the Government's stated objective and the means selected to achieve it." *Id.* at 1446. As *SpeechNow* put it: "[B]ecause *Citizens United* holds that independent expenditures do not corrupt . . . , then the 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." 599 F.3d at 696.

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

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[9] 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* 134 S.Ct. at 1441, 1446, 1449-52, 1466 (aggregate contribution limits described as "speech" burden).

[10] Even under the closely drawn test, *McCutcheon* requires *rigorous* scrutiny and *avoidance of unnecessary abridgement*. 134 S.Ct. at 1446 (citation omitted). Under either scrutiny, no deference is afforded "an unconstitutional remedy." *Citizens United*, 558 U.S. at 361. And "'mere conjecture [is not] adequate to carry a First Amendment burden.'" *McCutcheon*, 134 S.Ct. at 1452 (citation omitted).

restricting campaign finances: preventing corruption or the appearance of corruption."

McCutcheon, 134 S.Ct. at 1450 (citations omitted). This "corruption" is limited:

> Any regulation must . . . target what we have called "*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." Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government "into the debate over who should govern." And those who govern should be the *last* people to help decide who *should* govern.

Id. at 1441-42 (citations omitted) (emphases in original). But this anti-corruption interest applies to only contributions *to a candidate*:

> [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,* 540 U.S., at 310, 124 S.Ct. 619 (opinion of KENNEDY, J.).

Id. at 1452.[11] And "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 at 357. So an anti-corruption interest cannot support independent-expenditure restrictions, including "limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696.[12]

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[11] Asserted anti-corruption interests based on "access," "gratitude," or "influence" are not cognizable, *Citizens United*, 558 U.S. at 360-61, because the only cognizable corruption is quid-pro-quo corruption, *id.* at 359. *Citizens United* made these holdings in the independent-expenditure context, while *McCutcheon* affirmed them in the context of a BCRA amendment to a FECA contribution limit. 134 S.Ct. at 1450-51. That interest analysis applies and controls here.

[12] The *Colorado-I* plurality said, "We are not aware of any special dangers of corruption associated with political parties . . . ." 518 U.S. at 616. "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.). Because limits on contributions to political-party committees are not contributions to *candidates* (the only context in which there *could be* corruption as limited to

Nor does any *anti-circumvention* concern justify independent-expenditure restrictions.[13] In *McCutcheon*, the controlling opinion said that "if 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." 134 S.Ct. at 1452.[14] But that was because the government argued that aggregate limits posed a conduit-contribution risk, which the Court rejected. Here there is no potential anti-circumvention interest at all because no anti-circumvention interest protects limits on independent expenditures: "Rather than preventing circumvention of the contribution limitations, [the expenditure limit] severely restricts all independent advocacy despite its substantially diminished potential for abuse." *Buckley*, 424 U.S. at 47 (holding independent-expenditure ceiling unconstitutional). Moreover, there could be no "circumvention" by reason of "access," "gratitude," or "influence" because there is no cognizable governmental interest in preventing those. *Citizens United*, 558 U.S. at 360-61.[15] So any anti-circumvention interest would have to based on a conduit-contribution reaching a candidate, but that cannot occur with independent *expenditures*, which are not contributions. And *independent* expenditures are by definition not coordinated, *see, e.g.*, *Buckley*, 424 U.S. at 47 ("The ab-

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the quid-pro-quo-corruption risk in *McCutcheon*, 134 S.Ct. at 1434), such contributions are necessarily based on a conduit-contribution circumvention concern. But with political-party committee independent expenditures, no contributions to candidates are involved, eliminating that potential governmental interest.

[13] Government may prevent circumvention but not with otherwise *un*constitutional law, i.e., preventing circumvention cannot justify otherwise *un*constitutional law. *McCutcheon*, 134 S.Ct. at 1452-60. In political-speech law, "there can be no freestanding anti-circumvention interest." *Republican Party of N.M. v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013).

[14] Government may prevent circumvention, rightly defined as illegal conduit-contributions, but not with unconstitutional law. *Id.* at 1452-60. *McCutcheon* found no conduit-contribution risk because of numerous prophylaxes. *Id.*

[15] In *SpeechNow*, "FEC relied heavily on *McConnell*, arguing that independent expenditures . . . benefit candidates . . . [who might be] grateful" and "'preferential access . . . and undue influence" might ensue. 599 F.3d at 694. "Whatever the merits of those arguments before *Citizens United*," the en-banc court responded, "they plainly have no merit after *Citizens United*." *Id.*

sence of . . . coordination of an expenditure with the candidate . . . 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"), so they cannot become contributions by reason of coordination. *See id.* at 47 n.53 ("we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate . . . as contributions "). So because independent expenditures and independent-expenditure entities are independent, the independent-expenditure entity cannot serve as a vehicle for persons seeking to circumvent base limits by conduit contributions.

Nor may *coordination* between party-committees' independent-expenditure entities and candidates be *presumed* because the "independent expenditures" for public communications that political-party committees may make, *see* 11 C.F.R. § 109.30, by definition, may *not* be coordinated with candidates identified in the communication, *see* 11 C.F.R. § 109.37 ("What is a 'party coordinated communication'?"). And *Colorado-I* expressly *rejected* FEC's presumption that political-party committees were incapable of making independent expenditures because FEC presumed that all political-party committee expenditures were coordinated with a political party's candidates. 518 U.S. 604. What the *Colorado-I* decisions said in rejecting presumed coordination extends to the present analysis. For example, 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." 518 U.S. at 614. Instead of such a generalized presumption, which FEC asserted, the plurality held that the coordination analysis examines whether a *particular communication* 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. . . . And we therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

The *Colorado-I* plurality further stated that political-party-committee independent expenditures posed *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; [*FEC v. National Conservative PAC*, 470 U.S. 480,] 498 [(1985)]. 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 the *Colorado-I* plurality expressly rejected the notion that a political-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 political-party committees and their candidates are separate legal entities, as *Colorado-I* and FECA treat them, then political party committees are factually capa-

ble of making expenditures independently of their candidates.

From the foregoing, it is clear that in deciding whether any *particular* public communication by a political-party committee is possibly coordinated, one must examine the same *conduct* standards employed for other persons. That is a factual question.[16] No presumed coordination is permitted.

IE-PAC cases have distinguished IE-PACs from political parties, 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 [*Colorado-I*]," but *SpeechNow* rejected FEC's argument, distinguishing political party 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 *SpeechNow*'s distinction between independent expenditures by party committees and those by others was unnecessary, both analytically and because the issue of national-party-committees NCAs was not before the court, so the statement is dictum.[17] And the independent expenditures of party-committees and other entities are *alike* for constitutional analysis. *SpeechNow*

[16] 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," VC ¶ 24, factual independence must be assumed. In fact, plaintiffs *already* make independent expenditures in compliance with federal laws, VC ¶ 26, and simply wish to continue that factually legal practice through an NCA.

[17] Decisions from other circuits are not controlling here. Moreover, some of the distinctions in the IE-PAC cases likely presume coordination between party-committees and their candidates, which is impermissible under *Colorado-I*. *See supra* at 12-14.

overstated the situation when it distinguished political-party-committees' independent expenditures, saying 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.

Section 431(17) defines "independent expenditure" as including express advocacy, while the "independent expenditure" at issue in *Colorado-I* lacked express advocacy, *see FEC v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1488, 1451 (D. Col. 1993) (ad criticized candidate on issues). But that minor distinction does not change the constitutional analysis.

The statutory independent-expenditure definition arose from *Buckley*'s imposition of a saving construction on two FECA "expenditure" definitions, 424 U.S. at 44 & n.52, 80, and *Colorado-I* said "that the expenditure in question is what this Court in *Buckley* called an 'independent' expenditure." 518 U.S. at 613 (plurality). So while the ad at issue in *Colorado-I* lacked express advocacy, the common *Buckley* analysis makes "independent" expenditures by political-party committees equivalent to FECA-defined independent expenditures for the relevant constitutional analysis here—which turns on the *independence* of the communications, not the presence or absence of express advocacy. A political-party committees's right to make express-advocacy communications *includes* the right to make independent, non-express-advocacy communications.

Moreover, distinguishing between supposedly different types of independent expenditures is analytically flawed because FEC imposes similar "content" and "conduct" rules for determining whether such communications are coordinated. The *general* "coordinated communication" rule is at 11 C.F.R. § 109.21, while the *specific* "party coordinated communication" rule at 11 C.F.R. § 109.37 governs whether the "independent expenditures" that political-party committees "may make," 11 C.F.R. § 109.30. For a political-party committee, the *content* of a communication subject to the coordination rule essentially includes "public communications" that distribute candi-

date campaign materials, contain express advocacy, refer to House and Senate candidates in the 90 days before an election, or refer to a Presidential and Vice Presidential candidate in the 120 days before an election. The "party coordinated expenditure" rule adopts the same *conduct* standards as in the general rule (with minor modifications), which include such topics as "[r]equest or suggestion," "[m]aterial involvement," "[s]ubstantial discussion," "[c]ommon vendor," "[f]ormer employee or independent contractor," and "[d]issemination, distribution, or republication of campaign material." 11 C.F.R. § 109.21(d). A "safe harbor" is recognized where a "firewall" is erected to prevent the flow of material candidate information to the independent-expenditure entity. 11 C.F.R. § 109.21(h). So the *independence* of independent expenditures is identical, whether an independent expenditure is made by a political-party committee or not.

In sum, no political-party-committee communication may be presumed to be coordinated with a candidate supported by the communication, so that erroneous presumption may not be used to discriminate against party-committees by not recognizing their right to have an NCA. And once that presumption is removed, the distinctions between political-party committees' independent expenditures and those by others are seen to be flawed for purposes of determining the constitutionality of preventing political-party committees from having NCAs. In any event, controlling holdings require that political-party committees NCAs be constitutionally protected to the same extent as other independent-expenditure-only entities:

- *Citizens United*, 558 U.S. at 357, held, as a matter of law, that "independent expenditures . . . do not give rise to corruption or the appearance of corruption," and
- *SpeechNow*, 599 F.3d at 696, held that "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 ex-

penditure-only organizations."

Tailoring. Just as in *McCutcheon*, there is "a substantial mismatch between the Government's stated objective and the means selected to achieve it." 134 S.Ct. at 1446. The government's sole interest is preventing quid-pro-corruption or its appearance, but neither independent expenditures nor unlimited contributions to a party-committee's NCA implicates that interest.

Two Distinct Lines of Cases. FEC consistently relies on citations to the soft-money line of cases. *See, e.g.*, Opp'n 9-12 (relying on the soft-money cases *McConnell*, 540 U.S. 93, and *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), as "controlling"). But soft-money cases don't control here because this case is based on the IE-PAC line of cases and thus is not a soft-money case. Both *McConnell*, 540 U.S. at 145 n.45, and *Citizens United*, 558 U.S. at 360-61, expressly distinguished the soft-money context from the independent-expenditure context. As stated in *Citizens United*: "This case, however, is about independent expenditures, not soft money." *Id.* at 361. So the *McConnell* record and its (now-rejected) theories of corruption based on access, gratitude, and influence are all inapplicable to an independent-expenditure case. *Id.* at 360-61. The present case, too, is an independent-expenditure case and governed by the independent-expenditure line of cases.[18] Because FEC interprets the unlimited funds that IE-PACs/NCAs may receive as not being "federal funds,"[19] RNC and LAGOP do challenge the ban on using non-federal funds at 2

[18] *Cf.* Bob Bauer, *Circling Back (a Full 360°) to the RNC and Libertarian Party Lawsuits*, 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.").

[19] In AO 2011-12 (Majority PAC), FEC decided that the non-federal funds bans—which prohibits "funds[] that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]," 2 U.S.C. § 441i(a)(1), (b)(1), (c), and (e)(1)(A)—exclude from "federal funds" any money given to IE-PACs beyond the base limit on contributions to PACs. Thus, the AO decided that a federal officeholder or candidate can only solicit up to $5,000/year, under § 441i(e), for an IE-PAC (for whom the base limits are unconstitutional).

U.S.C. § 441i(a)-(c)[20] as unconstitutional as applied to their intended NCAs. But that does not make this a soft-money case. Plaintiffs' core claim is that they should be able to have NCAs, just as other entities may have NCAs, based on the IE-PAC/NCA line of cases—so whatever provisions stand in the way of that are unconstitutional, whether they are a soft-money ban or a BCRA-amended contribution limit. Because this case depends on, and arises within, the IE-PAC line of cases, FEC's arguments about the interrelated nature of political parties and candidates, corruption based on now-rejected gratitude-corruption, and the like are simply inapplicable. Applying this distinction between lines of cases to FEC's arguments leaves FEC with none applicable to this case.[21]

A Red Herring. FEC argues that express-advocacy independent expenditures are "clearly regulable," Opp'n 12, so that this is an easy case to decide against plaintiffs, *id.* at 13. This cannot succeed. *Buckley* imposed the "express advocacy" construction on two "expenditure" provisions to avoid constitutional problems of vagueness and overbreadth, 424 U.S. at 39-44, 79-80, by restricting them to expenditures that are "unambiguously related to the campaign of a particular federal candidate," *id.* at 80. So as a result, express-advocacy independent expenditures were subject to reporting requirements and the corporate ban at 2 U.S.C. § 441b, while issue-advocacy

[20] 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.

[21] For example, FEC cites soft-money cases for the proposition that there is a "danger of *quid pro quo* corruption and its appearance inherent in the close relationship between federal candidates and officeholders and political party committees." Opp'n 10-11. FEC insists that this soft-money-context proposition "remains controlling." *Id.* at 11. But that proposition was *rejected* in *Colorado-I* in the independent-expenditure context. 518 U.S. 604. So even if FEC's "close-relationship" proposition survived *Citizens United* and *McCutcheon*, it doesn't *apply* here.

communications were not. But then *Citizens United* held, as a matter of law, that independent expenditures pose no quid-pro-quo-corruption risk and overturned the ban on corporate independent expenditures. 558 U.S. at 336-66. Independent expenditures remain subject to reporting requirements, but that does not alter the IE-PAC line of authorities, which hold that when both potential contributors and independent-expenditure entities can do independent expenditures *separately*, there is no reason to prevent them from *pooling* their resources to amplify their speech in expressive association. *See supra* footnote 1. Absent any quid-pro-quo-corruption risk, there is no constitutional justification to limit contributions to independent-expenditure entities. And FEC's argument that hard money has *always* paid for party-committee independent expenditures, Opp'n 11, does not make it constitutional to require it now after recent Supreme Court decisions and FEC's inability to show a constitutional justification for requiring it.

In sum, FEC has not met its burden of showing that the claims of this case are *clearly foreclosed without room for debate* by precedent, if indeed that threshold test is even required for BCRA § 403 judicial proceedings. Rather, plaintiffs claims are substantial, as FEC's all-out effort to derail this case at the beginning implicitly acknowledges.

C. Plaintiffs' Claims Challenge *BCRA* Provisions/Amendments.

Plaintiffs demonstrated that: (**a**) the challenged provisions all fit the BCRA "provision" or "amendment" criterion, Appl. 3-4: (**b**) BCRA §§ 101 and 307 (at issue here) were addressed by BCRA courts in *McConnell* and *McCutcheon*, *id.* at 4-6; (**c**) plaintiffs' claims qualify for BCRA procedures under *McConnell*, *id.* at 6-9; and (**d**) *Schonberg v. FEC*, 792 F. Supp. 2d 14 (D.D.C. 2011) (per curiam), is distinguishable (or incorrect, if wrongly interpreted), *id.* at 9-14.

In opposition, FEC turns to its "nonsense" and "ruminations" arguments. Opp'n 15. FEC argues that plaintiffs' challenges to BCRA amendments to FECA contribution limits are not "jus-

ticiable" under BCRA § 403, Opp'n 13, though there is no dispute that those amendments are, in fact, BCRA "amendments" as specified in § 403's criteria for BCRA judicial proceedings. Section 403's clear "amendments" language should govern wherever there is doubt about whether § 403 judicial proceedings should apply—BCRA "amendments" of any kind must be presumed to be subject to § 403 procedures with the burden on FEC to prove that this is not so.

FEC argues that "*McConnell* squarely forecloses [plaintiffs'] request." Opp'n 13. Plaintiffs have already noted that *McConnell* made an unmistakable statement of its jurisdiction over BCRA § 307 in that § 403 proceeding: "the Court has jurisdiction to hear a challenge to § 307." 540 U.S. at 229. Plaintiffs devoted four pages to explaining why that clear *McConnell* statement of jurisdiction over § 307 ("striking" old, and "inserting" new, contribution limits, 116 Stat. 102) means exactly what it says—that a BCRA amendment striking and inserting base limits is subject to § 403 judicial procedures. That clear statement (like the clear "amendments" criterion of § 403), must control over any debatable interpretations of other language in opinions.

"Nonsense," says FEC. Opp'n 15. Yet FEC *concedes* "that jurisdiction," i.e., that § 307 amendments *are* subject to § 403 proceedings. *Id.*[22] But, FEC insists, "that jurisdiction" doesn't matter because "the limited scope of that jurisdiction *causes* the redressability problem that is fatal to their application." *Id.* (emphasis in original). According to FEC, there would be no redressability here, as there was none in *McConnell*, because "if plaintiffs were to succeed . . . the individual contribution limit would *decrease* to pre-amendment base-limit amounts, leaving plaintiffs' NCAs yet subject to base limits and without redress. Opp'n 15-16.[23] FEC's argument fails for at least three obvious reasons.

[22] With that necessary concession, FEC's opposition logically collapses, as shall be shown.

[23] The lack of redressability in *McConnell* was for other reasons than FEC suggests, and does not apply here, as plaintiffs have already explained. *See* Appl. 6-9.

First, if, as FEC properly conceded, a § 307 amendment *is* subject to § 403 jurisdiction, then the question for *this three-judge court application* is resolved, i.e., since the challenged amendments *are* subject to § 403 proceedings, a three-judge court should be convened. Then, it is up to that three-judge court to decide whether plaintiffs have Article III standing. This is exactly what happened in *McConnell* where the § 403 court decided that the Paul plaintiffs lacked Article III standing, not the judge deciding whether to convene a § 403 court. *See* 540 U.S. at 229.

Second, *McCutcheon* shows what *actually* happens when a § 403 court declares a BCRA amendment to a FECA contribution limit unconstitutional, and it is not as FEC suggests. In *McCutcheon*, RNC challenged the aggregate contribution limit, which the Court held unconstitutional under the First Amendment. 134 S.Ct. at 1442. There was a preexisting FECA $25,000 aggregate contribution limit, upheld in *Buckley*, 424 U.S. at 38, which BCRA § 307 amended.[24] Under FEC's argument, if the BCRA aggregate limit is held unconstitutional, then the old FECA limit takes its place. That didn't happen. No one, including FEC, even suggested it. Once the amended limit was held unconstitutional, there was *no* limit. In the present case, if any BCRA-amended contribution limit is held unconstitutional by a § 403 court, no FECA limit will spring. But this *as-applied* case is even easier.

Third, because this is an as-applied challenge, the base limits go nowhere if plaintiffs succeed. For example, when *SpeechNow*, 599 F.3d 686, held contribution limits unconstitutional as applied to IE-PACs, those BCRA-amended base and aggregate contribution limits remained in place, just as they had been, for those who were not IE-PACs. No old FECA limits leaped into the BCRA limits' place. And SpeechNow didn't have to challenge *both* the BCRA and the FECA base and aggregate limits to get as-applied relief, just as McCutcheon and RNC had not been re-

[24] The new aggregate limits were subdivided by category, which is irrelevant to this analysis.

quired to do in *McCutcheon*. No one, not even FEC, even suggested such a thing.

Of course FEC dismisses this as "irrelevant" "ruminations on the particular metaphysics of resurrected FECA provisions." Opp'n 15 n.3. But the foregoing shows that FEC is simply wrong.

FEC next argues that "plaintiffs seek permission to fund express advocacy without regard to *FECA*'s hard money contribution limits." Opp'n 16. Plaintiffs do seek to fund independent expenditures without regard to "hard money contribution limits," just like SpeechNow sought to do. But *FECA* base and aggregate limits became *BCRA* "amendments" when BCRA amended them, as FEC conceded by acknowledging that BCRA § 307 amendments are subject to § 403 jurisdiction. *See supra* at 20. And since it has just been shown that FECA limits don't spring into place when BCRA limits are struck, especially in as-applied cases, FEC's argument fails.

FEC then very briefly points to *Schonberg*, 792 F. Supp. 2d 14, apparently for the proposition that a challenge to a BCRA provision is really a challenge to the FECA provision underlying it because replaced FECA provisions really do spring into place when BCRA amendments are struck, though FEC declares plaintiffs' extended discussion of *Schonberg* and possibly springing FECA provisions (Appl. 9-14) an "irrelevant notion." Opp'n 17. But as shown before, Appl. 9-14, *Schonberg* is clearly distinguishable (and incorrect, if wrongly interpreted), and simply has no bearing in this as-applied context. In any event, as just shown above, binding Supreme Court precedent such as *McCutcheon* demonstrates that challenges to BCRA provisions do not cause FECA provisions to spring into their place, And this is especially so in as-applied cases.

FEC acknowledges that *McCutcheon* was a § 403 procedure against a BCRA § 307 amendment to a FECA aggregate limit. Opp'n 18. That should be the end of the matter, because as already discussed, *see supra* at 21-22, *McCutcheon* proves that (a) a BCRA § 403 challenge to a BCRA § 307 amendment really is to the BCRA amendment, not the underlying FECA provision,

(b) no springing FECA provisions replaces a struck BCRA provision, and (c), as relevant here, a § 307 amendment is *subject to § 403 jurisdiction*.

But FEC argues that *McCutcheon* "is of no help to [plaintiffs'] application because the BCRA aggregate limits . . . were quite different from the . . . FECA provision." Opp'n 18. That argument depends on the degree of change in an amendment, which is nowhere stated in § 403's clear criterion that a BCRA "amendment" is subject to § 403 judicial proceedings. Such a matter-of-degree line provides no guidance as to how much change entitles plaintiffs to their statutory right to § 403 proceedings. And crucially, FEC's argument that too little change in an acknowledged BCRA § 307 amendment makes it unsuitable for § 403 review is inconsistent with FEC's core argument, as stated in its summation, that "FECA as it existed before BCRA would still proscribe all of plaintiffs' intended activities." Opp'n 20. That is a springing FECA argument that has *nothing* to do with *how much change* an amendment made to a FECA provision. But as shown above, *McCutcheon* and other cases have shown that FECA provisions don't spring to replace struck BCRA provisions, especially in as-applied challenges.

Even under FEC's degree-of-change analysis, LAGOP's challenge to BCRA § 102 is a "true" BCRA provision because there was *no* such provision in FECA before BCRA § 102. Appl. 3 n.3. BCRA § 102 created a totally *new* provision (codified at 2 U.S.C. § 441a(a)(1)(D)) where none existed before. That new provision created a *separate* base limit for state-party committees of $10,000. Before, FECA contained only a *catch-all* base limit ($5,000) on contributions "to any other political committee." 2 U.S.C. § 441a(a)(1)(C). FEC does not, can not, show why the increase of the *aggregate* limit (with subdivisions) in § 307 *was* sufficient for § 403 judicial proceedings while the creation of a brand-new provision in § 102 (with a limit, language, and citation (§ 441a(a)(1)(D) that did not exist before) is *not* sufficient for § 403 proceedings.

In sum, there is no doubt that all of plaintiffs challenges are to BCRA "provisions" or "amendments," under which criterion § 403 provides them BCRA's special judicial proceedings. And a holding in favor of plaintiffs on their challenges will give them full redress. They will receive declaratory judgment that the government has no cognizable anti-corruption interest to prevent party-committees from receiving unlimited contributions to fund their independent expenditures through NCAs. No BCRA-amended base limit and no BCRA soft-money provision will prevent it, which is full redress. FEC has shown no reason why plaintiffs' three-judge court application should not be granted, with the three-judge court having jurisdiction over all claims.

II. Supplemental Jurisdiction Is Available, if Required.

Plaintiffs believe that all of their claims are against BCRA "provisions" and "amendments" so that § 403 judicial proceedings are proper as to all claims, but they invoked supplemental jurisdiction under 28 U.S.C. § 1367 in the event this court disagreed on any claim. Appl. 14-16.

FEC argues that there could be no supplemental jurisdiction because its "analysis of substantiality and justiciability" establishes that "a three-judge court would not have jurisdiction over *any* part of this case." Opp'n 21 (emphasis in original). As discussed at length above, FEC's analysis established no such thing, so supplemental jurisdiction is not precluded on that basis.

FEC says "supplemental jurisdiction would be contrary to *McConnell*," Opp'n 21, but is unable cite any evidence that supplemental jurisdiction was invoked there, let alone ruled on as precluded, so that argument fails. And FEC's argument that *McConnell* treated BCRA amendments as FECA provisions has been refuted at length. Appl. 6-9. *See also supra* Part I.C.

FEC argues that to the extent any provision is really a FECA challenge it must be brought under 2 U.S.C. § 437h. Of course, plaintiffs believe no challenge here is to FECA, but even so FEA cites no authority, not even *Wagner v. FEC*, 717 F.3d 1007 (D.C. Cir. 2013), that *precludes*

supplemental jurisdiction where a court has proper jurisdiction under BCRA § 403, as a three-judge court in this case would. So supplemental jurisdiction remains available and invoked, if this Court deems it is necessary.[25]

Conclusion

This Court should grant plaintiffs' Amended Application for Three-Judge Court.

Respectfully submitted,

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[25] In Part IV of its Opposition, FEC argues about proceedings under 2 U.S.C. § *437h*, not *BCRA § 403*. (FEC believes that plaintiffs' claims do not qualify for BCRA § 403's judicial procedures, so that those plaintiffs who qualify under § 437h must proceed under that provision.) But Plaintiffs filed a motion for *BCRA § 403* proceedings. FEC addresses a motion that plaintiffs did not make, i.e., plaintiffs made *no* motion to certify questions under § 437h. So FEC's arguments about § 437h are not germane to the present motion. Therefore, Plaintiffs do not address FEC's arguments about § 437h and do not waive their arguments against FEC's assertions if those assertions become germane to a current motion.

Certificate of Service

I certify that today I electronically filed the foregoing with the clerk of court using the CM/ECF system, which will notify:

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