UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS RUFER, *et al.*,	)	
Plaintiffs,	)	Civ. No. 14-837 (CRC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs' claims do not warrant the extraordinary remedy of a preliminary injunction as requested here. Plaintiffs are unlikely to succeed on the merits of their constitutional challenge to longstanding limits on contributions to political parties. The government has strong interests in preventing *quid pro quo* corruption and its appearance, and the contribution limits to parties are closely drawn to serve those interests. The Supreme Court has twice rejected claims similar to those plaintiffs make, and their challenge is thus foreclosed. Plaintiffs rely upon recent cases establishing that nonconnected political committees (commonly referred to as "PACs") can accept unlimited contributions to fund independent expenditures advocating the election of federal candidates, but those very cases state that PACs can do so specifically because they are *not political parties*. Furthermore, plaintiffs have made no real effort to demonstrate any irreparable harm, and the relief they seek would harm the public interest by upsetting the *status quo* in the months leading up to a Congressional election. Plaintiffs' motion should be denied.

BACKGROUND

A. The Parties

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-57. The Commission is specifically empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce the Act, 2 U.S.C. § 437g.

Plaintiffs are the Libertarian National Congressional Committee, Inc. ("LNCC"), a national committee of the Libertarian Party, the Libertarian Party of Indiana ("LPIN"), a state committee of the Libertarian Party, and Chris Rufer, a contributor to Libertarian Party

committees. Both party plaintiffs want to be able to accept unlimited contributions for the purpose of making independent expenditures in federal elections. Rufer wants to be able to make contributions to the two party plaintiffs in excess of the statutory limits, for the purpose of funding those independent expenditures.

B. Relevant Statutory and Regulatory Provisions

Individuals are not permitted to make contributions to "political committees established and maintained by a national political party" in excess of $32,400 in a calendar year. 2 U.S.C. 441a(a)(1)(B); *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530-32 (Feb. 6, 2013). National party committees like LNCC may not solicit, receive, direct, or spend funds that have been raised in excess of the national-party contribution limit. 2 U.S.C. § 441i(a).

Contributions to state and local party committees may not exceed $10,000 per year. 2 U.S.C. § 441a(a)(1)(D). With certain exceptions not at issue here, that contribution limit represents the annual amount that such committees, including LPIN, can receive from an individual donor in a calendar year in order to make federal contributions or expenditures, 2 U.S.C. § 431(4), or pay for "Federal election activity." 2 U.S.C. § 441i(b). As relevant here, federal election activity includes any "public communication" that promotes, supports, attacks, or opposes a clearly identified federal candidate. *Id.* § 431(20)(A)(iii). FECA does not limit the amount that state and local parties may receive from donors for other purposes.

Contributions to any "other" political committee may not exceed $5,000 in a single year. A "political committee" is a group that receives or spends more than $1,000 during a calendar year for the purpose of influencing federal elections, 2 U.S.C. § 431(4) (referencing "contributions" and "expenditures" under FECA), and has as its "major purpose . . . the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).

FECA also contains limitations on the amounts that individuals, political parties, and PACs can contribute to candidates. 2 U.S.C. § 441a. These contribution limits apply both to direct contributions of money and in-kind contributions of goods or services. 2 U.S.C. § 431(8)(A). If an individual or entity coordinates with a candidate or her campaign to make an expenditure, that expenditure is considered an in-kind contribution because it benefits the campaign just as if the individual or entity had donated the good or service directly to the campaign. 2 U.S.C. § 441a(a)(7)(B). Political parties, unlike all other entities, are permitted under FECA to coordinate spending with candidates well above their contribution limits. 2 U.S.C. §§ 441a(d)(2)-(3). The Act currently allows the national and state committee of a political party each to coordinate spending with a candidate up to $46,600 or $93,100 in races for the House of Representatives (depending on whether the state has only one or multiple districts), and up to a range of $93,100 to $2,682,200 in races for the Senate (depending on the state's voting age population). 2 U.S.C. §§ 441a(d)(2)-(3); 78 Fed. Reg. 8530-02 (Feb. 6, 2013). The Act also permitted the national parties to coordinate spending up to $21,684,200 in the most recent Presidential race. 2 U.S.C. §§ 441a(d)(2); *Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 77 Fed. Reg. 9925 (Feb. 21, 2012).

There are no limits on the amounts that political parties can spend to make independent expenditures. *Colo. Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) ("*Colorado I*"). "Independent expenditure" is defined under the Act as an expenditure "(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17); *see also* 11 C.F.R. § 109.30 ("Political party committees may make

independent expenditures subject to the provisions in this subpart.").

C. The History of Political Party Corruption and Congressional Responses

Since the founding of this nation, political parties have presented special concerns of corruption. The Constitution's Framers consciously created a constitutional framework designed to restrain the power of political parties because they viewed parties as a potential threat to representative governance. "Partisan politics bears the imprimatur only of tradition, not the Constitution." *Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976) (plurality). Commenting on the political beliefs of leaders like Washington, Adams, Madison, Hamilton, and Jefferson, the historian Richard Hofstadter has written: "If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." Richard Hofstadter, *The Idea of a Party System* at 3 (1970). Alexander Hamilton was among those who agreed that the elimination of parties was a possible goal in a well-designed and well-run state. "We are attempting by this Constitution," he said to the New York ratifying convention in 1788, "to abolish factions, and to unite all parties for the general welfare." *Id.* at 17; *see also The Federalist*, No. 85 (Hamilton) at 521 (Rossiter ed., 1961). George Washington warned that although political parties can play a useful role, if their power is not checked they can destroy the government through corruption: "I have already intimated to you the danger of parties in the State. . . . It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion." G. Washington, *Farewell Address*, reprinted in *Documents of American History*, 169, 172 (H. Commager ed. 1946).

These concerns led the framers to structure the Constitution to try to minimize the influence of parties.

> [T]he authors of the Constitution set up an elaborate division and balance of powers within an intricate governmental structure designed to make parties ineffective. It was hoped that the parties would lose and exhaust themselves in futile attempts to fight their way through the labyrinthine framework of the government. . . . This is the antiparty part of the constitutional scheme. To quote Madison, the "great object" of the Constitution was "to preserve the public good and private rights against the danger of such a faction [party] and at the same time to preserve the spirit and form of popular government."

E.E. Schattschneider, *Party Government*, at 7 (1942) (citing *The Federalist*, No. 10 (Madison) (alteration by Schattschneider). "[T]he Fathers hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties." Hofstadter at 53.

In the first half of the twentieth century, Congress became particularly concerned about corruption arising from contributions to candidate campaigns and political parties. In 1939 Senator Carl Hatch introduced, and Congress passed, S. 1871, officially titled "An Act to Prevent Pernicious Political Activities" and commonly referred to as the Hatch Act. S. Rep. 101-165 at *18; *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 560 (1973) ("*Letter Carriers*"); 84 Cong. Rec. 9597-9600 (1939). Congress established individual contribution limits in the 1940 amendments to the Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940). That legislation prohibited "any person, directly or indirectly" from making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to any candidate for federal office, to any committee "advocating" the election of such a candidate, or to any national political party. *Id.* § 13(a), 54 Stat. 770. The limit was sponsored by Senator John H. Bankhead, who expressed his hope that it would help "bring about clean politics and clean elections": "We all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation . . . ." 86 Cong. Rec. 2720 (1940) (statement of Senator Bankhead); *see also* 84

Cong. Rec. 9616 (daily ed. July 20, 1939) (statement of Rep. Ramspeck) (stating that what "is going to destroy this Nation, if it is destroyed, is political corruption, based upon traffic in jobs and in contracts, by political parties and factions in power"). The House debates were animated in part by the notorious "Democratic campaign book" scandal, in which federal contractors were forced to buy books at hyper-inflated prices from the Democratic party to assure that they would continue to receive government business. 84 Cong. Rec. 9598-99 (1939) (statement of Rep. Taylor).

From the start, the 1940 limit was "ineffective." Robert. E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* 66 (Praeger 1988). Individuals circumvented the $5,000 limit by routing contributions in excess of that amount through multiple committees supporting the same candidate. *See* Louise Overacker, *Presidential Campaign Funds* 36 (Boston University Press 1946) ("Gifts were hung on more branches of the family tree and routed through a variety of committees, but they came from the same old Santa Claus."). In addition, the Hatch Act amendments allowed donors to continue making unlimited contributions to state and local parties. *See* 86 Cong. Rec. 2852-2853 (1940) (amending bill to exempt state and local parties from contribution limit). Indeed, after the law was passed, the general counsel of the Republican National Committee asked contributors to do just that: "It is therefore our advice that donors desiring to give more than $5,000 . . . should give only one gift of $5,000 . . . . Amounts above $5,000 that a donor desires to give should be given to State or local committees." *Fletcher's Opinion on the Application of Hatch Act*, N.Y. Times, Aug. 4, 1940, at 2.

In the elections that followed, contributors used these techniques to make five- and six-figure contributions to both parties. *See, e.g.*, Overacker at 42-43 (summarizing

spending in the 1944 elections and concluding that "the $5,000 ceiling presented no barrier which could not be surmounted by generous, determined donors. By routing gifts through several committees . . . the 'sky was the limit . . . .'"); Herbert E. Alexander, *Financing Politics: Money, Elections and Political Reform* 86 (Congressional Quarterly Press 1976) (listing the number of individuals who contributed $10,000 or more in each election cycle from 1952 through 1972); *see also* David W. Adamany & George E. Agree, *Political Money: A Strategy for Campaign Financing in America* 45 (Johns Hopkins University Press 1975) (noting that twenty-one members of a single family contributed more than $1.8 million in the 1968 elections, an average of more than $85,000 each).

By 1971, when Congress began debating the initial enactment of FECA, the $5,000 individual contribution limit was being "routinely circumvented." 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug). In 1974, shortly after the Watergate scandal, Congress substantially revised FECA. These amendments established new contribution limits, including a $1,000 base limit on contributions to candidates and a $25,000 aggregate limit on how much an individual could contribute to all federal candidates and political committees during a two-year election cycle. Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443 § 101(b)(3), 88 Stat. 1263.

Shortly after the 1974 amendments to FECA were enacted, the statute was the subject of a broad challenge by a number of plaintiffs, including the Libertarian Party, in *Buckley v. Valeo*. 424 U.S. 1. The Supreme Court upheld FECA's contribution limits on the basis that they furthered the government's important interest in preventing corruption and the appearance of corruption. *Id.* at 23-38. In 1976, after *Buckley*, Congress again amended FECA. The new amendments included an annual limit of $20,000 on contributions to national party committees

and a $5,000 annual limit on contributions to non-party political committees or PACs. Fed. Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283 § 112 (1976), 90 Stat. 475, 486-87.

Despite the restrictions in FECA, corruption through political parties persisted. FECA only "limited contributions to political parties to the extent those contributions are made for the purpose of influencing federal elections." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 153 (2010). Money raised pursuant to FECA's source and contribution limits came to be known as "hard money," while money raised outside those limitations was known as "soft money." To evade the hard money limitations, the national parties began to accept donations of unlimited amounts of soft money for "mixed" activities purportedly affecting both federal and state elections, including advertising that "did not expressly advocate the election or defeat of a federal candidate" but which influenced federal elections. *Id.* In 1998, after an extensive investigation, the Senate Committee on Governmental Affairs issued a report detailing the influence that soft money had come to wield in the electoral and legislative processes. *McConnell v. FEC*, 540 U.S. 94, 129 (2003); S. Rep. No. 105-167 (1998). The report concluded that the parties' ability to solicit and spend soft money had completely undercut FECA's source-and-amount limitations. *See McConnell*, 540 U.S. at 129-32. The report also noted that state and local parties had played a crucial role in the soft-money system, as the national parties had made a practice of transferring funds to the state and local parties to conduct putatively non-federal activities "'that in fact ultimately benefit[ed] federal candidates.'" *Id*. at 131 (quoting S. Rep. 105-167 at 4466 (alteration in original)). In sum, the national, state, and local political parties, as well as federal candidates themselves, had all become players in a system that was designed to evade FECA's contribution limits and that permitted large and corporate donors the

corrupting potential FECA had been intended to limit.

Congress enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002) in part to plug this "soft-money loophole" that had "enabled parties and candidates to circumvent . . . limitations on the source and amount of contributions [made] in connection with federal elections." *McConnell*, 540 U.S. at 126, 133. After BCRA, the national parties could no longer accept any soft money, 2 U.S.C. § 441i(a), and state and local parties could not use any soft money to fund "Federal election activity," 2 U.S.C. § 441i(b), *see supra* p. 2. Congress also increased the limit on contributions to national parties from $20,000 to $25,000 and indexed it for inflation, BCRA §§ 307(a)(2), (d) 116 Stat. 102-03 ("Modification of Contribution Limits"), and increased the contribution limit to state and local party committees from $5,000 to $10,000, BCRA § 102, 116 Stat. 86-87 ("Increased Contribution Limit for State Committees of Political Parties"). In doing so, Congress sought to set the new limits high enough to compensate the parties for some of the funds they were expected to lose as a result of the soft money ban. 107 Cong. Rec. S2153 (2002) (statement of Sen. Feinstein) ("The soft money ban will work because we came to a reasonable compromise with regard to raising some of the existing hard money contribution limits by modest amounts, and indexing those limits for inflation.").

Following the passage of BCRA, numerous individuals and entities, including the Libertarian National Committee ("LNC") and the Libertarian Party of Illinois, challenged various provisions of the law. In *McConnell v. FEC*, the Supreme Court upheld most of the law, including the restrictions on the acceptance of soft money by political parties. 540 U.S. at 131-32. In *RNC v. FEC*, this Court rejected an as-applied challenge to the soft money restrictions by parties who sought to collect unlimited funds for ostensibly non-federal activities, and the

Supreme Court affirmed. 698 F. Supp. 2d 150 (D.D.C.), *aff'd* 130 S. Ct. 3543 (2010).

ARGUMENT

Plaintiffs' request for a preliminary injunction should be denied. FECA's political party contribution limits are closely drawn to serve the important government interests of deterring corruption and its appearance. Plaintiffs attempt to evade binding precedent upholding the challenged limits regardless of how parties ultimately use the money — even if for activities that, unlike plaintiffs' planned expenditures, have no explicit link to federal elections. Thus, plaintiffs' merits arguments are unlikely to succeed. And plaintiffs' generalized legal assertions fail to demonstrate irreparable harm or to meet the other requirements for the extraordinary remedy they seek in this case.

A. Requirements for a Preliminary Injunction

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20; *see also Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). A plaintiff must make a "clear showing" that the extraordinary remedy is necessary, and it cannot be "based only on a possibility of irreparable harm." *Winter*, 555 U.S. at 22. Moreover, the D.C. Circuit "has suggested, without deciding, that *Winter* should be read to abandon [any] sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson* , 944 F. Supp. 2d

89, 95-96 (D.D.C. 2013) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011)).

Plaintiffs here shoulder a particularly heavy burden because their request is at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather than seeking to preserve the status quo, plaintiffs seek to "upend" it by asking this Court to prevent the Commission from enforcing contribution limits to parties that have been in place for almost 40 years. *See Sherley*, 644 F.3d at 398.

B. Plaintiffs Are Unlikely to Succeed on the Merits

Plaintiffs challenge the limits on contributions to parties as applied to funds to be used for independent expenditures advocating the election of federal candidates. Ample evidence shows the danger of corruption that would be presented if parties could use unlimited contributions for federal campaign activity, and the challenged limits are closely drawn to address that threat, including the threat posed by contributions to minor parties. The Supreme Court has thus twice upheld those limitations against similar challenges, and the relevant holdings of those cases have not been undermined by recent decisions, including cases recognizing the right of nonconnected PACs to collect unlimited funds for independent expenditures.

1. Contribution Limits Are Reviewed Under a More Deferential Standard Than Laws That Restrict Expenditures

Since *Buckley*, laws that restrict expenditures have been subject to strict scrutiny, while laws that restrict contributions have been reviewed under a more deferential standard. *See* 424 U.S. at 23. The Supreme Court applies this lesser standard of review because contributions "lie closer to the edges than to the core of political expression," *FEC v. Beaumont*, 539 U.S. 146, 161 (2003), in contrast to laws limiting campaign expenditures, which "impose significantly more

severe restrictions on protected freedoms of political expression and association," *Buckley*, 424 U.S. at 23. Unlike a "limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. "Contribution limits 'permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (quoting *Buckley*, 424 U.S. at 21, alterations in *McCutcheon*).[1]

A contribution limit thus need not pass the strict scrutiny test of being upheld only if it "promotes a compelling interest and is the least restrictive means to further the articulated interest." *McCutcheon*, 134 S. Ct. at 1444. Instead, "[e]ven a significant interference with protected rights of political association may be sustained if the [government] demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* (internal quotation marks and citation omitted). "[C]ontribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21)).

This case is about how much money individuals can contribute to political parties. Plaintiffs attempt to obscure this fact by repeatedly invoking language from cases discussing expenditure limits, but those cases are inapposite. The fact that receiving unlimited contributions might allow the party plaintiffs to engage in more spending does not turn contribution limits into

[1] The plurality opinion authored by Chief Justice Roberts is "the holding of the Court" because it rests on narrower grounds than Justice Thomas's opinion concurring in the judgment. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted).

expenditure limits. As the Supreme Court explained in *Buckley*, the "overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would [have] otherwise contribute[d] amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 21-22.

2. The Limits on Contributions to Political Parties Further the Important Government Interest in Preventing *Quid Pro Quo* Corruption and Its Appearance

The party contribution limits that plaintiffs challenge serve to prevent *quid pro quo* corruption and its appearance, interests that the Supreme Court has recently reaffirmed are sufficiently important to support such a law. *McCutcheon*, 134 S. Ct. at 1450 ("As *Buckley* explained, Congress may permissibly seek to rein in 'large contributions [that] are given to secure a political *quid pro quo* from current and potential office holders.'" (quoting *Buckley*, 424 U.S. at 26)); *McCutcheon*, 134 S. Ct. at 1450 ("In addition to 'actual *quid pro quo* arrangements,' Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates." (quoting *Buckley*, 424 U.S. at 27)).

In *Buckley*, the Supreme Court upheld FECA's limit on individual contributions to candidates in light of the "deeply disturbing examples" of corruption relating to contributions found in the record and concluded that FECA's purpose of "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions" was a "constitutionally sufficient justification" for that contribution limit. 424 U.S. at 26-29. In *McConnell*, the Court upheld the constitutionality of the BCRA soft money ban, finding that "there [was] substantial evidence to support Congress' determination that large soft-money

contributions to national political parties give rise to corruption and the appearance of corruption." 540 U.S. at 154. As the Court observed, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised," and the "idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible." *McConnell*, 540 U.S. at 144 (citation and internal quotation marks omitted).

a. There Is Ample Evidence of Parties Playing a Key Role in *Quid Pro Quo* Corruption and Its Appearance

The history of campaign finance in the United States clearly shows that *quid pro quo* corruption does not just occur through contributions made directly to candidates; political parties have played a critical role in such corruption. *See supra* pp. 4-8. As described earlier, prior to the enactment of the Hatch Act, political parties had engaged in *quid pro quo* corruption involving federal legislation, contracts, and jobs. *See supra* pp. 5-6.

Some years later, the congressional findings accompanying the enactment of contribution limits after Watergate identified instances in which contributors had made excessive contributions by giving to numerous separate entities, transferred through political party committees. For example, the dairy industry had divided $2 million in support for President Nixon into $2,500 contributions made to hundreds of committees in different states. *Buckley* v. *Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975) (per curiam), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976) (per curiam); Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. at 615 & n.44 (1974) ("Final Report") (explaining that "this use of multiple committees was not unusual—even 750 or 1,000 committees would not have been too many, if needed to accommodate a large contributor like

the milk producers"). Party committees were evidently involved in funneling the contributions to the reelection campaign. Final Report at 736-42; *id.* at 738 ("[W]ithin th[e] 2-week period just before and after the [1972] election, the two [Republican] congressional committees received $352,500 from [the dairy industry's political fund] and transferred $221,000 to RNC committees, which, in turn, forwarded $200,000 to [the Finance Committee to Re-Elect the President]."). In return for the dairy industry's contribution, President Nixon "reversed the decision * * * the Agriculture Department" had made just two weeks earlier not to increase milk price supports, "circumvent[ing]" that department's "legitimate functions." *Id.* at 1209. President Nixon's Secretary of Agriculture estimated that the decision would cost the public "'about $100 million.'" Richard Reeves, *President Nixon: Alone in the White House* 309 (Simon & Schuster 2001). The industry's contribution also led Attorney General John Mitchell — who at that time "doubled" as President Nixon's reelection campaign manager — to instruct that a grand jury investigation of the industry's associations be ended. Final Report at 1184, 1205.

Voluminous record evidence in *McConnell* revealed donors' more recent use of large soft-money donations to affect legislative outcomes and create at least the appearance if not the reality of *quid pro quo* arrangements. That evidence was exhaustively catalogued in several lower court opinions (*see, e.g.*, *McConnell v. FEC*, 251 F. Supp. 2d 176, 481-512 (D.D.C. 2003) (opinion of Kollar-Kotelly, J).[2]

[2] *McConnell*'s documentation of soft money circumvention is among the best evidence now available, even though plaintiffs seek here to engage in independent speech that — unlike in the soft money era — includes express advocacy of candidates. FECA has limited contributions to federal party committees for more than 35 years, including contributions used for independent expenditures. "Since there is no recent experience with unlimited [contributions to fund party express advocacy], the question is whether experience under the present law confirms a serious threat of abuse from the unlimited [contributions to finance party independent expenditures]." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (citing *Burson v.*

The *McConnell* record contains frank testimony from former officeholders about how large soft money donors to political parties were able to exact favorable legislative outcomes in these *quid pro quo* arrangements. For example, former Senator Paul Simon testified about consideration of the amendment of a bill that would benefit Federal Express, a large soft-money donor to the Democratic Party. *McConnell,* 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.). Simon stated that, after one Senator said "we've got to pay attention to who is buttering our bread," the Democratic caucus voted to move ahead on the legislation, and Simon believed that "[t]his was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors." *Id.* (quoting Simon Decl.); *see also FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 451 n.12 (2001) ("*Colorado II*") (quoting Senator Simon's statement that "I believe people contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively.")

Former Senator Warren Rudman and current Senator John McCain shared similar stories and perspectives. *McConnell*, 251 F. Supp. 2d at 496 ("Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: 'We gave money so you should do this to help us.' No one needs to say it — it is perfectly understood by all participants in every such meeting." (quoting Rudman Declaration)); Decl. of Sen. John McCain, No. 02-0582 (D.D.C. Mar. 27, 2002) at ¶ 10, http://www.campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_Supreme_Court/719.pdf (describing the Senate Democratic leadership's procedural

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Freeman, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes)).

blocking of his proposed amendment to Sarbanes-Oxley at the behest of a large soft money donor)

Similarly, lobbyists have long believed that contributions to political parties and various entities would lead to desirable legislative action. "The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients" contribute to such committees. *McConnell*, 251 F. Supp. 2d at 869. Former lobbyist Jack Abramoff, who pled guilty in 2006 to corruption and related charges, wrote a book about how he and fellow lobbyists made campaign contributions to a range of political committees as part of a strategy to obtain political favors. *See generally* Jack Abramoff, *Capitol Punishment: The Hard Truth About Washington Corruption From America's Most Notorious Lobbyist* (WND Books 2011). In one instance, Abramoff arranged for lavish contributions to be made, including donations to the Democratic Party, in exchange for legislative action that benefitted his client. *See* Abramoff at 206 (commenting that "request for a $50,000 contribution to the Democrats . . . was just how politics worked").

In another instance, in exchange for Congressman Bob Ney's commitment to add to the Help America Vote Act ("HAVA") language favoring a casino owned by the Tiguas, a Texas Indian tribe that Abramoff represented, Abramoff arranged for lavish contributions to be made by tribal officials to or on Ney's behalf, including at least $32,000 in contributions "to Ney's campaign and political action committees." James Grimaldi & Susan Schmidt, *Lawmaker From Ohio Subpoenaed in Abramoff Case*, Wash. Post, Nov. 5, 2005, www.washingtonpost.com/wp-dyn/content/article/2005/11/04/AR2005110401197.html (last visited June 11, 2014); Information, *United States* v. *Abramoff*, No. 06-01, Jan. 3, 2006 (D.D.C.) ¶¶ 22-23; Information, *United States* v. *Ney* (D.D.C.) (Ney Information) ¶ 20,

http://graphics8.nytimes.com/packages/pdf/politics/060915_Information-signed,unstamped.pdf (last visited June 11, 2014). On March 20, 2002, Ney agreed to "move forward" with the plan to slip into HAVA an "abstruse" sentence drafted by Abramoff's office that "would magically open the doors to the Tigua casino." Abramoff at 197-198, 205-206; *United States* v. *Ney*, Plea Agreement, Sept. 16, 2006 (Ney Plea Agreement), Att. A ¶ 10(a)(ii), http://graphics8.nytimes.com/packages/pdf/politics/060915_pin.ney.fact.pdf (last visited June 11, 2014). In exchange, Abramoff had the Tiguas make contributions to Congressman Ney's campaign committee and a nonconnected PAC, Ney Information ¶ 20; *see also* Ney Plea Agreement, Att. A ¶ 9(d) (admitting receipt of substantial campaign contributions from Abramoff's clients in exchange for performing official acts); according to FEC records, two days after the March 20, 2002 agreement between Abramoff and Ney, the Tiguas donated $30,000 to the NRSC's nonfederal account and over the next few months gave an additional $62,000 in soft money to other Republican party entities. FEC, *Transaction Query by Individual Contributor*, http://www.fec.gov/finance/disclosure/norindsea.shtml (search "Tigua" for a summary of soft money donations and links to reports).

There have been similar experiences at the state level. In 2005, for example, Wisconsin Senate Majority Leader Charles Chvala pled guilty to felony corruption charges arising out of an investigation of his fundraising techniques. Steven Walters & Patrick Marley, *Chvala Reaches Plea Deal*, Milwaukee J. Sentinel, Oct. 24, 2005. Witnesses confirmed Chvala's practice of conducting "cattle calls," in which he summoned lobbyists to his offices and requested that they have their clients contribute to a list of approved candidates, PACs, and party committees with

"target amounts for contributions" suggested by Chvala.[3] Chvala and his aides also set up several PACs that purported to be independent, but in fact made excess in-kind contributions to a state senator's campaign through coordinated advertisements. Chvala Complaint ¶¶ 130-233; *see also* Wis. Stat. § 11.06(7); 2 U.S.C. 441a(a)(7)(B)(i). At least $292,000 of these contributions were funneled through the Democratic Legislative Campaign Committee, a political party committee, which then made matching contributions back to Chvala's ostensibly independent PACs supporting the other Senator's campaign. *See id.* ¶¶ 170-172; *see also id.* ¶¶ 220-24 (suggesting a scheme of contributions routed through the Kansas Democratic Party). Contributions to these groups resulted in legislative favors. *See, e.g.*, Chvala Complaint ¶ 173-174 (describing how a $40,000 contribution resulted in the removal of an "unfavorable" tax provision from the Senate version of the 2001 budget).

Thus, the ability to lavish unlimited funds on political party committees has resulted in *quid pro quo* corruption and its appearance. The government therefore has a strong and enduring interest in preventing such conduct in the future.

b. Unlike PACs, Parties Have a "Unity of Interests" and Are "Inextricably Intertwined" With Candidates

The threat of *quid pro quo* corruption and its appearance is heightened with respect to political parties both because of the special role parties play in our democratic process and their inherent connection with candidates and officeholders. This starkly distinguishes parties from

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[3] *Wisconsin* v. *Chvala*, Crim. Compl., Oct. 17, 2002 ¶ 8, www.docstoc.com/docs/133062815/Plaintiff-CRIMINAL-COMPLAINT-vs-Chvala (last visited June 11, 2014) (Chvala Complaint); Steve Schultze & Richard P. Jones, *Chvala Charged With Extortion*, Milwaukee J. Sentinel, Oct. 18, 2002; Jodi Wilgoren, *Leader Charged With Extortion And Misconduct*, N.Y. Times, Oct. 18, 2002, www.nytimes.com/2002/10/18/politics/campaigns/18WISC.html?tntemail0 (last visited June 11, 2014); see also *In re Disciplinary Proceedings Against Chvala*, 300 Wis. 2d 206, 208 (2007).

PACs, who "do not select slates of candidates for elections," "determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." *McConnell*, 540 U.S. at 188 ("[P]olitical parties have influence and power in the Legislature that vastly exceeds that of any interest group."); *id.* ("[P]arty affiliation is the primary way . . . voters identify candidates," and therefore parties "have special access to and relationships with" those who hold public office.)

Parties also present special risks of corruption because they differ greatly from PACs in their purposes and goals. "A primary goal of all the major political parties is to win elections." *Cao v. FEC*, 688 F. Supp. 2d 498, 527 (E.D. La.), *aff'd sub nom In re Cao*, 619 F.3d 410 (5th Cir. 2010).[4] This overriding purpose makes political parties particularly susceptible to contributors who want to create a *quid pro quo* relationship with an officeholder. As the Supreme Court has explained,

> [p]arties are . . . necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.

[4] *See also Cao*, 688 F. Supp. 2d at 527 ("The ultimate goal of a political party is to get as many party members as possible into elective office, and in doing so to increase voting and party activity by average party members." (quoting declaration from former Representative Meehan)); *id.* ("The entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." (quoting Senator McCain's declaration in *McConnell*); *id.* ("Then-RNC Chairman Haley Barbour stated: 'The purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president. . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures.'" (quoting Barbour letter from *McConnell* record); *id.* ("Senator Bumpers testified that he was 'not aware that the party has any interest in the outcome of public policy debates that is separate from its interest in supporting and electing its candidates.'" (quoting Senator Bumpers's declaration in *McConnell*)); *id.* ("State parties also have the primary purpose of winning elections."); *id.* ("[C]ertainly we're concerned about issues, but our main emphasis is to run communication in support of electing our candidates." (quoting Louisiana state GOP deponent)).

Colorado II, 533 U.S. at 451-52 (footnote omitted); *id.* at 455 ("In reality, parties . . . function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape. Indeed, parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players.); *id.* at 452 ("[W]hether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders.").[5]

c. *McConnell* and *RNC* Have Already Held the Contribution Limits Prevent *Quid Pro Quo* Corruption

Twice in the past eleven years, the Supreme Court has decisively rejected claims that were very similar to those plaintiffs make — indeed, claims that were arguably more likely to succeed than those in this case because they were focused on allegedly non-federal activity. In *McConnell*, plaintiffs including national and state committees of the Libertarian Party challenged the soft money ban, arguing that certain expenditures, such as money spent exclusively on state and local elections, would not corrupt federal office holders and therefore any such limits on contributions to fund those expenditures were unconstitutional. *McConnell*, 540 U.S. at 145, 154. The Supreme Court disagreed, concluding that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders,

[5] FECA reflects the unique relationship between parties and candidates, perhaps most notably in the special provision for party coordinated expenditures. Political parties, unlike PACs or any other entities, are given special dispensation to coordinate higher amounts of spending with candidates. *See* 2 U.S.C. §§ 441a(d)(2)-(3); *see also supra* p. 3. For example, FECA allows national and state parties to join together and spend as much as $2.6 million in conjunction with some Senate candidates to accomplish their shared goal of winning elections. The provision represents Congress's recognition that parties and candidates are in many ways a coherent unit. By contrast, funds that a PAC coordinates with candidates are subject to the contribution limits in 2 U.S.C. § 441a(a), which are $2,600 or $5,000 per election, depending on the type of PAC.

regardless of how those funds are ultimately used." *Id.* at 155 (emphasis added). Thus, large contributions to political parties can lead to corruption or its appearance even if the funds are ultimately used in non-federal elections.

The Supreme Court reaffirmed *McConnell*'s holding just four years ago. In *RNC*, plaintiffs argued that the limits on contributions to parties were unconstitutional when the resulting funds were spent on activities that lacked a "sufficient connection to a federal election," (such as supporting state candidates and "grassroots lobbying efforts"), which were allegedly less likely to corrupt federal candidates and officeholders. 698 F. Supp. 2d at 155. The *RNC* plaintiffs submitted declarations indicating that federal candidates and officeholders would not be involved in soliciting any soft money contributions, and therefore there could be no corruption or appearance of corruption. *Id* at 159. A three-judge panel of this court rejected the argument. It held, based on *McConnell*, that unlimited funds pose a danger of corruption no matter how the recipient party committee uses the money. *Id.* at 157. It also held that *Citizens United v. FEC*, 558 U.S. 310 (2010), which had been decided in the interim, did not overturn *McConnell*'s holding on this issue because *McConnell* had been based in part on the danger of *quid pro quo* corruption and its appearance, a justification expressly endorsed in *Citizens United*. *RNC*, 698 F. Supp. 2d at 158-59. The case received direct review from the Supreme Court, and the Court summarily affirmed the judgment. 130 S. Ct. 3544.[6]

Plaintiffs' efforts to escape the conclusion that *McConnell* and *RNC* foreclose their claims are unavailing. Their first flawed argument is that *McConnell* and *RNC* were "broad facial challenges to the application of contribution limits to all soft money collected by political

[6] A summary affirmance is not merely a denial of certiorari, but an act of the Supreme Court with precedential value, at least with respect to "the precise issues presented and necessarily decided by those actions." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983). Plaintiffs here fail to show that their claims differ sufficiently from those decided in *RNC*.

parties," while plaintiffs here have made "an as-applied challenge specifically focusing on the right of political party committees to create accounts solely for the purpose of engaging in independent expenditures." (Mem. of P&A in Supp. of Pls.' Mot. for Prelim. Inj. ("Pls.' Mem.") at 21 (Docket No. 3-1).) As an initial matter, *RNC* was not a broad facial challenge, but an as-applied challenge after *McConnell* had facially upheld the law. *RNC*, 698 F. Supp. 2d at 157. The *RNC* court found that distinction unimportant because "[i]n general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision." *RNC*, 698 F. Supp. 2d at 157. Plaintiffs' claims suffer from the same flaw — their legal argument that contributions used for allegedly non-corrupting expenditures must be unlimited is foreclosed by *McConnell*'s holding that "large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id.*[7]

Furthermore, even if the ultimate use of the funds did matter, the activities that the party plaintiffs contemplate here, engaging in express advocacy in support of federal candidates, pose an even greater threat of corruption than the activities contemplated in those earlier cases. *See McConnell*, 540 U.S. at 167 (contributions to state and local parties "that pose the greatest risk" of corruption are those "that can be used to benefit federal candidates directly"); *RNC*, 698 F.

[7] The plaintiffs engage in some obfuscation about the term "soft money" to make it seem as though this case is distinct from *McConnell* and *RNC*, despite the obvious similarities among the three cases. Seizing upon a quote from *Citizens United*, the plaintiffs argue that, unlike *McConnell* and *RNC*, this case is "about independent expenditures, not soft money." (Pls.' Mem. at 21 (quoting *Citizens United*, 558 U.S. at 361).) But "soft money" refers to the receipt of donations — funds raised outside of the FECA source and amount limitations constitute "soft money." Plaintiffs here also seek to give and receive funds that do not comply with those limits. When *Citizens United* said it was a case "about independent expenditures, not soft money," it was merely stating that the case was about the right to make expenditures, not contributions.

Supp. 2d at 162 (tying the danger of corruption to "whether the activity would provide a direct benefit to federal candidates"); *cf. FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007) (advertisements expressly advocating the election or defeat of a candidate can be constitutionally limited more easily than issue advertisements).[8] It is unreasonable to believe that the Supreme Court would hold that the Constitution requires permitting unlimited contributions for an activity with *more* corruptive potential but allows limits on contributions for less corrupting activities.

Plaintiffs next argue that this case is not settled by *McConnell* and *RNC* because those cases rested in part on the premise that candidates may view contributions to their parties as being as valuable as contributions to their campaigns. (Pls.' Mem. at 22 (citing *RNC*, 698 F. Supp. 2d at 159).) According to plaintiffs, that premise is "flatly inapplicable" to independent expenditures because it applies to activity in which there "was no assurance that such activities were not coordinated with candidates." (Pls.' Mem. at 22.) But *RNC* actually said that "federal officeholders and candidates may value contributions to their national parties — *regardless of how those contributions ultimately may be used* — in much the same way they value contributions to their own campaigns." *RNC*, 698 F. Supp. 2d at 159 (emphasis added and altered from original). The category therefore encompasses the independent expenditures that plaintiffs seek to engage in here. Moreover, the *RNC* opinion was not concerned with coordination. What makes a particular expenditure valuable to candidates is whether it benefits

[8] Indeed, the plaintiffs in *McConnell* — including the LNC — *conceded* that contributions to fund party independent expenditures could be corrupting and thus permissibly subject to contribution limits. *McConnell v. FEC*, 251 F. Supp. 2d at 765 & n.24 (Leon, J.) (describing, *inter alia*, the position of the *McConnell* plaintiffs); *id.* at 221 n.55 (per curiam) (listing the *McConnell* plaintiffs). And though he was overruled, Judge Leon struck down all of the soft money restrictions *except* as to contributions to fund independent expenditures and communications that promote, support, attack, or oppose federal candidates. *Id.* at 758-59, 763-68. Plaintiffs thus attack the limits as applied to some of the party committees' most clearly regulable contributions.

them, not necessarily whether they are involved in making the expenditure. While the Supreme Court has stated that coordinated expenditures are more valuable to a candidate than independent expenditures on his behalf (because in the former case he is able to exert control over the content and conduct), expenditures made on his behalf are likely more valuable than expenditures spent on other things. Thus, federal candidates are more likely to value contributions to the party that are spent on express advocacy for candidate campaigns (as plaintiffs want to do in this case) than contributions spent on helping state candidates, grassroots lobbying, or maintenance of party headquarters (as the plaintiffs in *RNC* wanted to do).

Plaintiffs next argue that notwithstanding *McConnell* and *RNC*, there is no danger of corruption from their planned activities because the Supreme Court's subsequent decisions in *Citizens United* and *McCutcheon* undermine all of the rationales of those earlier cases (Pls.' Mem. at 23). That is incorrect. First, the decision in *Citizens United* had already been issued prior to both the district court's decision and the Supreme Court's summary affirmance in *RNC*. And the plurality opinion in *McCutcheon* expressly stated that it was leaving intact *McConnell*'s holding about soft money, which is the relevant holding for purposes of this case. *McCutcheon*, 134 S. Ct. at 1451 n.6 ("Our holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell* 's holding about 'soft money.'")[9]

Lastly, the plaintiffs argue that *McConnell* and *RNC* are distinguishable because "unlike

[9] Furthermore, even if all of the justifications in *McConnell* and *RNC* had been arguably undercut by *Citizens United* or *McCutcheon*, this Court would nonetheless be bound by those earlier decisions. "If a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [and the District Court] should follow the case which directly controls, leaving [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)); *see also Ognibene v. Parkes*, 671 F.3d 174, 184 (2nd Cir. 2011) ("*Citizens United* left *Buckley* intact, and it is not for this Court to stretch *Citizens United*.").

what might have been possible with general contributions to a party's soft-money account, a contributor cannot use contributions to a political party committee's segregated IE-only account to circumvent base limits on contributions to a candidate." (Pls.' Mem. at 24.) But there is no relevant difference between plaintiffs' proposed independent expenditure account and the proposed soft money accounts at issue in *McConnell* and *RNC*. Under both scenarios the parties sought to collect unlimited funds, and even though it would be unlawful for the parties to use the funds to make contributions or coordinated expenditures with a candidate, *McConnell* and *RNC* were concerned with how federal officeholders and candidates might value the party contributions.[10] A federal candidate who received that money would benefit in the same manner as if the donor had contributed directly to his campaign.

As discussed *infra* pp. 32-35, this bond between parties and their candidates does not dissolve merely because the party chooses to place certain funds into a segregated account or to build firewalls between personnel. Though particular expenditures may not be coordinated with federal candidates, the danger of corruption exists if the amounts at which the parties take in funds are not limited.

d. Courts Have Uniformly Found That Contributions to Political Parties Pose a Danger of Corruption Even if Contributions to PACs for Independent Expenditures Do Not

Plaintiffs rely heavily on cases holding that PACs have a constitutional right to accept unlimited contributions to engage in independent expenditures (Pls.' Mem. at 8-13), but virtually all of those cases held that PACs have that right specifically because they are *not political*

[10] In addition, the national parties currently use a significant amount of their hard money to engage in independent expenditures, but do not maximize their candidate contributions and coordinated expenditures in most races. *See Cao*, 688 F. Supp. 2d at 520-22. If the parties could use unlimited funds to engage in those independent expenditures, that would free up more hard money to be spent to make contributions to candidates, including through coordinated spending.

parties. As a result, those cases undermine rather than support plaintiffs' position here.

In *EMILY's List v. FEC*, the D.C. Circuit struck down FEC regulations related to mixed federal and nonfederal activities because they infringed upon the First Amendment rights of a PAC that wished to engage in "election-related activities such as advertisements, get-out-the-vote efforts, and voter registration drives." 581 F.3d 1, 5, 24 (D.C. Cir. 2009). But the *EMILY's List* opinion repeatedly stated that the outcome of the case would have been governed by *McConnell* and come out the other way if the challenge had come from a political party rather than a PAC. The court first noted that contribution limits to candidates could be limited and, due in part to "the close relationship between candidates and parties, the [*McConnell*] Court has held that the anti-corruption interest also justifies limits on contributions to *parties*." *Id.* at 6 (emphasis in original). The court then characterized its constitutional analysis as a question of "whether independent non-profits are treated like individual citizens (who under *Buckley* have the right to spend unlimited money to support their preferred candidates) or like political parties (which under *McConnell* do not have the right to raise and spend unlimited soft money)." *Id.* at 8 (footnote omitted). It concluded that "non-profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do." *Id.* at 14. The court approvingly quoted the plaintiff attorney's conclusion that the FEC had mistakenly "brought to bear what was essentially a political party analysis to a non-connected, independent committee which is not under the control of, or associated with candidates in the fashion of a political party." *Id.* at 15 (citation and internal quotations omitted). And the court noted that its holding would "permit non-profits to receive and spend large soft-money donations when political parties and candidates cannot." *Id.* at 19.

In *SpeechNow.org v. FEC*, the D.C. Circuit held that, after *Citizens United*, contribution

limits could not constitutionally be applied to PACs that engaged solely in independent expenditures, explaining that "contributions to groups that make *only* independent expenditures also cannot corrupt or create the appearance of corruption." 599 F.3d 686, 694 (D.C. Cir. 2010) (*en banc*) (emphasis added). The court went on to acknowledge that the Supreme Court's plurality opinion in *Colorado I* had indicated that independent expenditures could still lead to corruption or its appearance, but distinguished that case by noting that "*Colorado Republican* concerned expenditures by political parties." *Id.* at 695. The court concluded by cautioning that "[w]e should be clear, however, that we only decide these questions as applied to contributions to SpeechNow, an independent expenditure-only group." *Id.* at 696.

Finally, plaintiffs rely on *Carey v. FEC*, a decision in this District holding that a single nonconnected PAC could operate a segregated independent expenditure account that accepted unlimited contributions, while also accepting hard money funds in a different account for the purpose of candidate contributions. 791 F. Supp. 2d 121, 125-26 (D.D.C. 2011). In addressing the question, the court reaffirmed that contribution limits were constitutional for "political party committees because of the 'close relationship between candidates and parties.'" *Id.* at 125 (quoting *EMILY's List*, 581 F.3d at 9). And in rejecting the FEC's arguments, the court stated that "the Commission fails to recognize that non-connected non-profits are *not* the same as political parties and do *not* cause the same concerns." *Id.* at 131; *see also Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 43 (D.D.C. 2012) ("[T]he government's interest in preventing the appearance of political corruption and undue influence is at its zenith when individuals and organizations give money directly to political candidates and political

parties.").[11]

The decisions plaintiffs cite from other Circuits similarly make clear that parties should be treated differently from PACs. As the Fourth Circuit explained:

> *McConnell* specifically emphasized the difference between political parties and independent expenditure political committees, which explains why contribution limits are acceptable when applied to the former, but unacceptable when applied to the latter. . . . It is thus not an exaggeration to say that *McConnell* views political parties as different in kind than independent expenditure committees.

N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 292-93 (4th Cir. 2008). None of the cases plaintiffs cited support the view that parties should be treated like PACs, and virtually all of the cases specifically state that political parties do not have a constitutional right to collect unlimited contributions to spend on independent expenditures.[12]

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[11] Plaintiffs ignore or distort the inherent differences between political parties and advocacy groups. When quoting a Supreme Court case about a group formed to oppose a ballot measure, for example, plaintiffs suggest that "[p]olitical parties may be considered modern-day variations of "[t]he 18th-century Committees of Correspondence.'" (Pls.' Mem. at 14 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981).) But the Committees of Correspondence were simply pro-colonist advocacy groups formed to disseminate information during the time of British rule. *See* Craig A. Doherty, Katherine M. Doherty, *New York* 85 (2005). Today's political parties have little in common with either the Committees of Correspondence or the group at issue in *Citizens Against Rent Control*.

[12] *See Republican Party of N.M. v. King*, 741 F.3d 1089, 1100 (10th Cir. 2013) (holding that "more onerous contribution restrictions may be placed on political parties than on independent groups."); *id.* at 1102-03 (noting that "[a] state political party, due to *McConnell*, is much less likely to bring a successful as-applied challenge to a limitation on the contributions it may receive" (quoting *McConnell*, 540 U.S. at 153)); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696, 698 (9th Cir. 2010) (stating that *McConnell* upheld limitations on contributions to political parties due to their close relationship to candidates before concluding that "the City offers no basis on which to conclude that the Chamber PACs have the sort of close relationship with candidates that supports a plausible threat of corruption or the appearance thereof."); *Stay the Course W. Va. v. Tennant*, Civ. No. 12-1658, 2012 WL 3263623, at *6 (S.D.W. Va. Aug. 9, 2012) (citing *Leake*'s analysis about why contribution limits on political parties are acceptable, but such limits on independent expenditure groups are not); *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1041 (D. Haw. 2012) ("Although the government can still limit contributions made directly to candidates or parties, . . . contribution limitations to [independent expenditure only organizations] violate the First Amendment.").

e. Minor Parties Present the Threat of *Quid Pro Quo* Corruption and Its Appearance

The threats of corruption and its appearance presented by unlimited contributions are no less real in the case of minor party committees like LNCC and LPIN. As the Supreme Court has recognized, "the relevance of the interest in avoiding actual or apparent corruption is not a function of the number of legislators a given party manages to elect," and thus it is "reasonable to require that *all parties* and all candidates follow the same set of rules designed to protect the integrity of the electoral process." *McConnell*, 540 U.S. at 159 (emphasis added).

In *Buckley*, the Supreme Court rejected a claim by the Libertarian Party, among others, that FECA's contribution limits invidiously discriminate against minor-party candidates. 424 U.S. at 33-35 & n.40. The Court explained that "any attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election." *Id.* at 34-35.[13] In *McConnell*, the Court rejected a similar argument by the LNC, another national committee of the Libertarian Party, and others who claimed that the soft money ban was overbroad because it applied to minor parties, "which, owing to their slim prospects for electoral success and the fact that they receive few large soft-money contributions from corporate sources, pose no threat of corruption comparable to that posed by the RNC and DNC." 540 U.S. at 158-59. In response, *McConnell* reiterated *Buckley*'s observation that minor-party

[13] "Even when a minor-party candidate has little or no chance of winning, he may be encouraged by major-party interests in order to divert votes from other major-party contenders." *Buckley*, 424 U.S. at 70. *See, e.g.*, *United States v. Goland*, 959 F.2d 1449 (9th Cir. 1992); Carla Marinucci, *GOP Donors Funding Nader/Bush Supporters Give Independent's Bid a Financial Lift*, S.F. Chron., July 9, 2004, http://www.sfgate.com/politics/article/GOP-donors-funding-Nader-Bush-supporters-give-2708705.php (last visited June 11, 2014).

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candidates may win or substantially affect elections and held that the corruption rationale applies fully to minor parties. *Id.* at 159.

In this case, the party plaintiffs argue that, even if the Constitution permits limits on contributions to the major parties, minor parties should be treated differently because they "lack the number of supporters that major parties enjoy to help them propagate their message" and therefore "are limited to a fairly small base of realistic potential donors to fund their political expression." (Pls.' Mem. at 25-26.) According to the plaintiffs, preventing them from receiving unlimited contributions makes it more difficult for them to convey their message and attract supporters, thereby "perpetuating their relegation to minor-party status." (*Id*. at 26.) But these are the same assertions the Supreme Court has rejected.

Plaintiffs have provided no evidence that they lack the funds for "effective advocacy." *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (contribution limits are unconstitutional if they "prevent[ ] candidates and political committees from amassing the resources necessary for effective advocacy." ((quoting *Buckley*, 424 U.S. at 21).) But the current $32,400 limit on contributions to LNCC and the $10,000 limit on contributions to LPIN are no lower than the limits the Supreme Court has previously indicated would enable advocacy by minor parties. *See McConnell*, 540 U.S. at 158-59; *Buckley*, 424 U.S. at 34 (no evidence that FECA's contribution limit "will have a serious effect on the initiation and scope of minor-party and independent candidacies").

Furthermore, while *McConnell* noted that "a nascent or struggling minor party" might bring an as-applied challenge against the soft money ban, 540 U.S. at 159, the Libertarian Party is not a "nascent or struggling minor party." Plaintiffs state that "[i]n 2012, dozens of Libertarian candidates ran for the U.S. House of Representatives and Senate across the country"

and that "[o]ver 50 Libertarian candidates presently are running for Congress in districts throughout the nation in 2014." (Complaint ¶¶ 39-40.) They also note that Libertarian candidates have run for numerous federal offices in the past two election cycles, including a Senate candidate who received 5.33% of the vote and a House candidate who received 7.74% of the vote. (*Id.* ¶ 55.) Several Libertarian candidates will also be running for federal office in Indiana this election cycle. (*Id.* ¶56.) Plaintiffs also state that LPIN "is Indiana's third-largest political party" and identify "three elected Libertarian officials in the State of Indiana." (*Id.* ¶¶ 52, 54.)

The LNC recently made a similar argument to this Court in a case involving limits on bequests to political parties. *Libertarian Nat'l Comm., Inc. v. FEC*, 930 F. Supp. 2d 154, 167 (D.D.C. 2013) *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014). The Court rejected the LNC's attempt to claim special privileges for minor parties while the party was also asking to strike down a law for all parties. 930 F. Supp. 2d at 167 ("LNC seeks to eliminate the restrictions on all bequests to all political parties, not just to smaller parties such as the LNC. . . . Thus, the arguments about the effect of FECA limits on the LNC's ability to express its message as a struggling minor party or to engage in effective advocacy, even if credited, do not support the claim as articulated".). This Court should decline the plaintiffs' request to do the same here.[14]

[14] Plaintiffs have failed to establish that their principal claims in this case would actually help LNCC and LPIN achieve major party status. The plaintiffs challenge the current party contribution limits to *all* national and state party committees (Pls.' Mem. at 28); if plaintiffs were to prevail, all those parties — including their major-party rivals — would be able to accept unlimited contributions for independent expenditures, possibly putting the LNC at a further competitive disadvantage. The Court is forbidden from adjusting the contribution limits to equalize the resources of the Libertarian Party with the major parties. *Buckley*, 424 U.S. at 34-35. Even if the Court were not so constrained, however, plaintiffs would not have established the propriety of the relief they seek. *Cf. id.* at 33 (explaining that the contribution limits "would

f. The Constitutionality of the Limits Is Not Undermined by Plaintiffs' Assurances About How Personnel or Funds Will Be Segregated

Plaintiffs make numerous assurances about how they intend to keep their independent expenditures segregated from other activities, and they argue that these steps will ensure that expenditures are "sufficiently insulated" to prevent corruption and circumvention. (Pls.' Mem. at 24.)[15] For several reasons, these assurances fail to ameliorate the corruption concerns underlying the party contribution limits. As an initial matter, plaintiffs' *ad hoc* assurances would appear to be illusory because there is no showing of how they would be enforced over time. The party plaintiffs in *RNC* made similar promises, stating that they would "not involv[e] federal candidates or officeholders in its soft-money solicitations" and "not grant[ ] soft-money donors preferential access to candidates based on their large, soft-money contributions." *RNC*, 698 F. Supp. 2d. at 158. But the court held that those assurances were not enough, due to the "inherently close relationship between parties and their officeholders and candidates." *Id.* at 159 (citing *McConnell*). The same is true here.

First, a wealthy donor intent on *quid pro quo* corruption need not be formally solicited

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appear to benefit minor-party and independent candidates relative to their major-party opponents because major-party candidates receive far more money in large contributions").

[15] Both party plaintiffs submitted declarations from party officials stating how they intend to create a wall of separation between their independent expenditures and other activities, thereby allegedly diminishing the chance that unlimited contributions to the independent expenditure account will be used to circumvent other limits. The parties state an intention to: 1) maintain separate accounts solely for independent expenditures; 2) create a special committee chaired by a party member for a period of two years that unilaterally makes all decisions about the party's independent expenditures; 3) segregate the members of the independent expenditure committee so that they will not interact with federal candidates and officeholders, nor participate in other party decisionmaking such as contributions and coordinated expenditures; 4) prohibit candidates from involvement in soliciting or fundraising for the independent expenditure accounts; and 5) assure that contributions to the accounts will not be tallied, nor will contributors obtain special access to candidates, nor will contributors even be identified to candidates. (Pls.' Mem. at 3-4, 24.)

before making a large contribution and any solicitation that does occur need not come directly from candidates. Evidence even in the BCRA era makes clear that donors who have "maxed out" on candidate contributions are encouraged to contribute to the state and national parties. *See Cao*, 688 F. Supp. 2d at 526. There would be no need for federal candidates and officeholders to solicit specifically for their party's independent expenditure fund, because maxed-out contributors could be encouraged to do so by the party itself. And contributions to the independent expenditure account made at the suggestion of the party would have corruptive potential, just as contributions to its hard money account do. *Cf. RNC*, 698 F. Supp. 2d at 162 (noting in the context of BCRA's solicitation ban that "there is no reason to think that contributions made *to* a national party and contributions made *at the behest of* a national party are any different in terms of their potential ability to produce corruption or the appearance of corruption." (emphasis in original)). In addition, large donations to parties are often made not in response to particular solicitations, but at the suggestion of professional lobbyists. *McConnell*, 251 F. Supp. 2d at 495 (Kollar-Kotelly, J.).

Second, an officeholder intent on rewarding contributors can easily determine the identities of those contributors from a wide variety of other sources, without any need for the party to share that information. Contribution patterns are commonly discussed by party officials, officeholders, staff, and opposing lobbyists. *See McConnell*, 540 U.S. at 148 n.47; *see also McConnell*, 251 F. Supp. 2d at 488 (Kollar-Kotelly, J.) ("'[T]here is communication among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff.'" (quoting CEO Wade Randlett)); *id*. at 487 (Kollar-Kotelly, J.), 853-54 (Leon, J.) ("'[Y]ou cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party.'"

(quoting Sen. Bumpers)); *id*. at 487-88 (Kollar-Kotelly, J.), 854 (Leon, J.) ("'Legislators of both parties often know who the large soft money contributors to their party are.'" (quoting Sen. McCain)); *id*. at 487-88 (Kollar-Kotelly, J.), 854 (Leon, J.) (noting that a donor's "'lobbyist informs the Senator that a large donation was just made'" (quoting Sen. Boren)).

Third, the revolving door nature of plaintiffs' segregated personnel guarantees that party leadership will continue to exert control over the expenditures. The party plaintiffs indicate that the chair of the independent expenditure committee will be a party member, serving a two-year term, who is hand-picked by the party chair to serve in that role. (Pls.' Mem. at 3.) This means that a party official who regularly interacts with candidates and the party chair can be installed as the chair of the independent expenditure committee. Any independent expenditure committee leader who fails to please candidates can simply be replaced at the conclusion of his or her term, if not sooner.

Finally, plaintiffs' assurances fail to address the constitutionally significant interest in preventing the *appearance* of corruption. Large contributions to political parties will be perceived by the public as corrupting, even if those contributions happen to be placed in a separate bank account and handled by different party personnel. The risk of apparent corruption in these party accounts is considerably greater than it is for a nonconnected PAC like the one at issue in *Carey*, 791 F.Supp.2d at 125, 131. Officeholders are routinely identified by their political party. The specter of a *quid pro quo* arrangement would be raised any time the members of a party pass (or block) legislation to the benefit of one of their major contributors.

3. The Party Contribution Limits Are Closely Drawn to Advance the Government's Interests

To be constitutional, a contribution limit must be closely drawn to match a sufficiently important interest. *McCutcheon*, 134 S. Ct. at 1444. Unlike strict scrutiny, which requires

narrow tailoring, the "lesser demand" of intermediate scrutiny, *id.*, does not require that a contribution limit be the least restrictive means of preventing corruption and its appearance, *see, e.g.*, *Buckley*, 424 U.S. at 27-28 (rejecting argument that contribution limits are invalid because bribery laws and disclosure requirements are "less restrictive means" of addressing corruption). Accordingly, *Buckley* did not find that FECA's contribution limits are overbroad even though most large contributors do not seek improper influence. *Id.* at 29-30. The Court explained that it is "difficult to isolate suspect contributions" and "the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30; *see also FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 500 (1985) (noting the Court's "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized").

As *McConnell* explained, "[t]he Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting *all* donations to national parties to the source, amount, and disclosure limitations of FECA." *McConnell*, 540 U.S. at 156 (emphasis added). For the reasons explained *supra* at pp. 35-39, the application of the limits here "focuses precisely on the problem of large campaign contributions," *Buckley* 424 U.S. at 28, and they are thus closely drawn. In addition, the contribution limits to parties are closely drawn because both parties and donors continue to have ample opportunity to engage in political speech.

a. Political Parties Continue to Thrive Under the Current Contribution Limits

Political parties are fully capable of engaging in effective advocacy while complying with the current contribution limits. "From 1992 to 2006, political party spending 'increased

tenfold.'" *Cao*, 688 F. Supp. 2d at 517 (quoting expert Jonathan Krasno). In the most recent election cycle, political party committees received over $1.6 billion in contributions, $1.3 billion of which went to the six national committees of the two major parties. *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (revised Mar. 27, 2014), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml. A total of $7.1 billion was contributed to candidates, party committees, and other political committees that cycle. *Id.* National political party committees by themselves thus accounted for more than one-fifth of the total funds received by the approximately 8,500 entities that were active during the 2011-2012 cycle. Independent expenditures by party committees totaled $252.4 million. *Id.* Political parties therefore continue to play a significant role in our democratic process while subject to FECA contribution limits.

b. When the Full Scope of FECA Regulation Is Considered, Parties Have Many Advantages Over PACs

The fact that parties and PACs are treated differently under FECA does not make the regime constitutionally suspect; rather, it "reflect[s] a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200-201 (1981) (rejecting argument that contribution limits to multicandidate PACs were unconstitutional because they treated individuals and unincorporated associations differently than corporations and unions, and noting that FECA as a whole imposed far fewer restrictions on the latter groups).

Political parties can both receive and contribute far more hard money than PACs can. Contributors to national parties can give $32,400 annually, while hard money contributions to PACs are limited to $5,000. 78 Fed. Reg. 8530-02 (Feb. 6, 2013); 2 U.S.C. § 441a(a)(1)(C).

Unlike PACs, *see* 2 U.S.C. § 441a(a)(5)(C), FECA does not group together all committees of a political party as if they were a single contributor, so the major parties' three national committees, as well as state and local committees (including state committees outside a candidate's state), may each contribute $5,000 to every federal candidate in each election ($5,000 in the primary and $5,000 in the general election).[16] Moreover, unlimited transfers of hard money may be made among national, state, district, and local party committees of the same political party, further enhancing the ability of parties to provide contributions to their candidates. 2 U.S.C. § 441a(a)(4). Lastly, "a party is better off [than individuals and other political committees], for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to the limit of the Party Expenditure Provision." *Colorado II*, 533 U.S. at 455 (footnote omitted). As discussed *supra* p. 3, this provision allows parties to coordinate with their candidates spending of millions of dollars in some elections.

c. Political Parties Can Continue to Make Independent Expenditures Without Receiving Unlimited Contributions for That Purpose

There is no merit to plaintiffs' argument that political parties must be able to receive unlimited contributions for independent expenditures just because they are able to make such expenditures. (Pls.' Mem. at 8.) The Supreme Court's opinion in *Colorado I*, which established that political parties were capable of making independent expenditures, never suggested that contributions for the purpose of funding those independent expenditures need be unlimited. To the contrary, the Court was explicitly mindful of the fact that "[t]he greatest danger of corruption" as a result of their holding "appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a

[16] In addition, national parties and their senatorial campaign committees may together contribute up to $42,600 to each Senate candidate. 2 U.S.C. § 441a(h).

particular candidate." *Colorado I*, 518 U.S. at 617. The Court even went so far as to say that if Congress feared that this danger was too great, it "might decide to change the statute's limitations on contributions to political parties" by making them even lower. *Id.* Ultimately, the Court found that the danger was insufficient to prevent parties from making independent expenditures, because "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." Plaintiffs suggest that this means party independent expenditures are less corrupting than PAC independent expenditures (Pls.' Mem. at 15), but the *continued operation of the limit* on contributions to parties was a critical part of the Court's reasoning that party independent expenditures could not be limited.

d. The Burden on Contributors Is Marginal and They Have Numerous Other Outlets for Political Expression

Limits on contributions to parties represent only "a marginal restriction upon the contributor's ability to engage in free communication," *Buckley*, 424 U.S. at 20. Mr. Rufer has many other avenues to engage in unlimited political speech, either on his own or in association with others through a PAC. Any infringement on his speech is limited, given that he can use the same money to fund the same intended speech, merely by associating with a PAC rather than a party. *Id.* at 28 (holding that contribution limits "leav[e] persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources"). Libertarian Party supporters can volunteer their efforts freely with Libertarian Party committees, contribute to every Libertarian Party candidate on the ballot, and they do not face what the Supreme Court found in *McCutcheon* to be a geographic problem in supporting a great

number of candidates. 134 S. Ct. at 1449.

C. Plaintiffs Fail to Demonstrate Irreparable Harm

Plaintiffs fail to meet their burden to show that they will suffer irreparable harm without the extraordinary remedy they seek. *Winter*, 555 U.S. at 22. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). But in the lone paragraph in their motion that plaintiffs devote to this critical element, they supply no evidence and instead rely entirely on their merits argument, merely asserting that their First Amendment rights have been abridged. (Pls.' Mem. at 26-27.) Plaintiffs' "mere allegations, without more, do not support a finding of irreparable injury," even in the First Amendment context. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-99 (D.C. Cir. 2006); *Am. Meat Inst. v. Dep't of Agric.*, 968 F. Supp. 2d 38, 76 (D.D.C. 2013) ("[T]he D.C. Circuit . . . require[s] movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction frame-work" (citations and internal quotation marks omitted)), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014). "This court has set a high standard for irreparable injury," and plaintiffs must "articulate a tangible injury that is either 'certain and great' or irreparable." *Chaplaincy*, 454 F.3d at 297-98. Plaintiffs have failed to do so and "'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

1. Plaintiffs' Mere Allegations of Harm are Insufficient to Show Irreparable Injury

Plaintiffs do not even attempt to show that they will be irreparably harmed without an injunction. Instead, they cite *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality), but that case does

not support their position. *Elrod* held that dismissing employees based on political party affiliation was an unconstitutional infringement on First Amendment rights. *Id.* at 372. But that holding rested on the finding that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were threatened or in fact being impaired at the time relief was sought." *Id.* at 373. *Elrod* did not eliminate a First Amendment plaintiff's burden to show that its interests are actually threatened or being impaired. *Nat'l Treasury Employees Union v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991) ("*NTEU*"); *Am. Meat Inst.*, 968 F. Supp. 2d at 76; *Sweis v. U.S. Foreign Claims Settlement Comm'n*, 950 F. Supp. 2d 44, 48 (D.D.C. 2013) ("merely raising a constitutional claim is insufficient to warrant a presumption of irreparable injury"); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (rejecting preliminary injunction sought by Ku Klux Klan to require local government to issue parade permit for planned march longer than one for which it had received permit, finding *Elrod* not controlling on irreparable harm because shorter parade allowed in permit was not total denial of First Amendment rights); *Wis. Right to Life, Inc. v. FEC*, Civ. No. 04-1260, 2004 WL 3622736, at *4 (D.D.C. Aug. 17, 2004) (rejecting that plaintiff's reliance on *Elrod*).

Here, plaintiffs have alleged no governmental action against them whatsoever. *See NTEU*, 927 F.2d at 1255 ("Nothing in the record convinces us that the appellants will cease speaking or writing before the district court resolves their constitutional challenges."). The Commission has taken no action justifying an injunction resembling the threats that were present in *Elrod*. Since plaintiffs have not established any harm that is actual and certain, they fall short of meeting the "high standard" necessary for a preliminary injunction.

While plaintiffs make no real effort to show irreparable injury in their motion, the declarations they have filed suggest that such injury is entirely absent. Mr. Rufer merely states he "wish[es] to immediately contribute additional funds" to the parties (Decl. of Chris Rufer ¶ 6 (Docket No. 3-3)), which hardly establishes an injury that is "certain and great." *Chaplaincy*, 454 F.3d at 298. Likewise, the declarations from party officials merely claim they would like to accept additional funds to spend on independent expenditures. (*See* Decl. of Evan McMahon ¶ 16 (Docket No. 3-5) (LNCC "wishes to accept additional funds from Rufer this year to subsidize its independent expenditures"); Decl. of Daniel Drexler ¶ 20 (Docket No. 3-4) (LPIN "wishes to accept additional funds from Rufer this year to subsidize its independent expenditures").) These bare allegations are insufficient to meet plaintiffs' burden.

2. Plaintiffs Face No Imminent Injury Requiring Expedited Consideration

Plaintiffs also fail to establish that "[t]he injury complained of [is] of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citation and internal quotation marks omitted). In this case, the limits individuals can contribute to national and state party committees have been in place since 1976 and plaintiffs have long been subject to those limits. Plaintiffs cannot show that an imminent injury to them sufficient to require preliminary relief only emerged in 2014.[17] A "period of delay may indicate an absence of the kind of irreparable harm required to support a preliminary injunction." *See Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258,

[17] *Carey v. FEC*, relied on by plaintiffs (Pls.' Mem. at 16), acknowledged that plaintiffs must make a showing of more than a mere possibility of irreparable harm. 791 F. Supp. 2d at 128. In addition, the Court in that case found that granting a preliminary injunction would merely further existing Circuit authority, and that it was not at odds with multiple recent Supreme Court cases. *Id.* at 130.

1266 (D.C. Cir. 2012) (citations and internal quotation marks omitted); *see also Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) (plaintiff's "cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief"); *Tenacre Found. v. INS*, 78 F.3d 693, 695 n.2 (D.C. Cir. 1996) (finding preliminary injunction unwarranted when seven months elapsed in seeking the injunction). After all, *Citizens United*, 558 U.S. 310, and *SpeechNow.org* , 599 F.3d at 689, upon which plaintiffs rely heavily, were issued four years ago.

Even plaintiffs' accompanying "Statement of Facts Which Make Expedition Essential" (Docket No. 3-2) does not actually present any additional facts, but rather attempts to justify expedition by relying on *Elrod v. Burns* and invoking BCRA Section 403. Plaintiffs do not explain any extraordinarily important planned expenditures that cannot be funded in the interim through appeals to additional donors. *See Buckley*, 424 U.S. at 22. The FEC has shown that *Elrod* did not eliminate a First Amendment plaintiff's burden to show an actual injury, *see supra* pp. 40-41, and entitlement to the BCRA special review procedure is irrelevant to any showing of irreparable harm. In any event, plaintiffs are not entitled to invoke BCRA section 403 in part because their claims are foreclosed by precedent. *See* FEC Opp'n to Pls.' Appl. for a Three-Judge Court at 8-10 (Docket No. 11); *supra* pp. 21-26.[18]

D. The Relief Plaintiffs Request Would Harm the Government and Undercut the Public Interest

Permitting plaintiffs to make or receive contributions in excess of the statutory limits would undermine the anti-corruption purpose of FECA immediately before a federal election,

[18] Should the court agree with the Commission and deny plaintiff's three-judge court application, the Court would need to decide, with respect to some plaintiffs, "whether section 437h deprives the district court of authority to grant such relief based on a constitutional challenge to FECA," a question left open in *Wagner v. FEC*, 717 F.3d 1007, 1017 n.9 (D.C. Cir. 2013) (per curiam), before issuing a preliminary injunction.

harming the public interest and the government. To prevail on their motion for a preliminary injunction, plaintiffs must establish precisely the opposite. *CityFed. Fin. Corp.*, 58 F.3d at 746. But they offer only a few conclusory statements about unconstitutional laws. (Pls.' Mem. at 27.) Thus, the balance of hardships is strongly in the Commission's favor.

The statutory provisions plaintiffs challenge have been on the books for forty years. "The public has a strong interest in the enforcement of laws passed by Congress and signed by the President." *Wis. Right to Life, Inc. v. FEC*, No. 04-1260 DBS RWR RJL (D.D.C. Sept. 14, 2006), 2006 WL 2666017, at *5. There is a "presumption of constitutionality which attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984). As Chief Justice Rehnquist stated in the similar context of a requested injunction pending appeal, "barring the enforcement of an Act of Congress would be an extraordinary remedy." *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1305 (2004) (Rehnquist, C.J., in chambers).

Granting plaintiffs' motion for preliminary injunction would "substantially injure" the government and the public. *CityFed Fin.*, 58 F.3d at 746. Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The government and the public are similarly harmed when a court proscribes enforcement of a federal statute. "[E]njoining the FEC from performing its statutory duty constitutes a substantial injury to the FEC." *Wis. Right to Life*, 2006 WL 2666017, at *5; *see also Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 90 (D.D.C. 2006).

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for preliminary injunction.

Respectfully submitted,

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