No. _____

In The
Supreme Court of the United States

Republican Party of Louisiana, **Jefferson Parish Republican Parish Executive Committee**, and **Orleans Parish Republican Executive Committee**, *Appellants*

v.

Federal Election Commission, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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Questions Presented

The Bipartisan Campaign Reform Act of 2002 ("BCRA") defines most traditional activities of state and local political parties as "federal election activity" ("FEA")"[1] and regulates FEA with three provisions: (1) the Ban, requiring such political parties to use only "federal funds," rather than state-regulated funds, for FEA; (2) the Fundraising Requirement, requiring that federal funds be used to raise funds for FEA; and (3) the Reporting Requirement, requiring monthly FEA reporting ("FEA Restrictions").

This Court in *McConnell v. FEC* upheld the FEA Restrictions on their face, but political parties here challenge these provisions as applied to FEA conducted independent of any federal candidate. The court below rejected this as-applied challenge.

1. Whether *McConnell*'s general language facially upholding the FEA Restrictions, or the narrow holdings in *Citizens United v. FEC* and *McCutcheon v. FEC*, preclude this as-applied challenge, contrary to *Wisconsin Right to Life v. FEC* ("*WRTL-I*").

2. Whether the FEA Restrictions violate the First Amendment as applied to independent FEA, given *Buckley v. Valeo*'s holding that independence eliminates the required potential for quid-pro-quo corruption.

3. Whether the FEA Restrictions also violate the First Amendment facially, given the return to *Buckley*'s quid-pro-quo definition of corruption in *Citizens United* and *McCutcheon*.

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[1] E.g., voter registration, voter identification, get-out-the-vote activity, generic campaign activity, and federal candidate advocacy.

Parties to the Proceeding

All parties are named in the caption.

Corporate Disclosure

Republican Party of Louisiana ("LAGOP"), Jefferson Parish Republican Parish Executive Committee ("JPGOP"), and Orleans Parish Republican Executive Committee ("OPGOP") are not incorporated.

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Introduction

A grave inequity exists in American politics—at the expense of state and local political parties. While behemoth super-PACs and 501(c)(4) nonprofit corporations receive unlimited donations used for independent communications and voter mobilization,[2] state and local parties can do nothing similar. They must fund similar independent FEA[3] communications and voter mobilization efforts solely with limited, restricted federal funds[4] because the FEA Restrictions require them to use only federal funds for FEA, rather than non-federal funds as they once did.

So state and local parties—vital mediating forces—struggle to do their traditional activities and be rele-

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[2] *See, e.g.*, Sam Stein, *Dem Megadonor Tom Steyer Gives Millions More to Bolster Ground Game*, Huffington Post, Sept. 21, 2016, http://www.huffingtonpost.com/entry/tom-steyer-ground-game_us_57e1e38ae4b0e80b1b9f0b4d ("For Our Future PAC, a 501c4 and super PAC organization, is aiming to knock on 5.3 million doors between now and Election Day in a variety of battleground states....").

[3] *FEA* ("federal election activity") sweeps in voter-registration activity ("VR"); voter-identification ("VID"); get-out-the-vote activity ("GOTV"); generic-campaign activity ("GCA," i.e., communications solely promoting a party committee); communications that "promote," "attack," "support," or "oppose" federal candidates without express advocacy ("PASO Communications"), and compensation of employees spending over 25% of their time in a month "on activities in connection with a federal election" ("25% Employee Rule"). 52 U.S.C. 30101(20); 11 C.F.R. 100.24.

[4] "*Federal funds* ... comply with the limitations, prohibitions, and reporting requirements of the [Federal Election Campaign] Act." 11 C.F.R. 300.2(g). *Nonfederal funds* comply with state law. 11 C.F.R. 300.2(k).

vant while the behemoths assume traditional political-party activities. The harms the FEA Restrictions inflict on state and local parties may be remedied because the FEA Restrictions violate the First Amendment as applied to non-corrupting *independent* FEA.

The only interest this Court recognizes to justify restrictions on political contributions or expenditures is preventing narrowly defined quid-pro-quo corruption. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976); *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985) ("*NCPAC*") ("dollars for political favors").[5] So whether the challenged provisions restrict contributions or expenditures, FEC must prove an interest in preventing quid-pro-quo corruption.

But independence eliminates the potential for quid-pro-quo corruption. *Buckley*, 424 U.S. at 47; *Citizens United v. FEC*, 558 U.S. 310, 357 (2010); *McCutcheon v. FEC*, 134 S.Ct. 1434, 1454 (2014) (Roberts, C.J., joined by Scalia, Kennedy & Alito, JJ.).[6] Political parties pose no inherent corruption risk and thus can engage in independent campaign activity. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (Breyer, J., joined by O'Connor & Souter, JJ.) ("*Colorado-I*"). And this Court rejected the requirement that political parties should be banned from doing independent expenditures if they engage in

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[5] *See infra* note 21 (cognizable corruption).

[6] This plurality opinion states the opinion of the Court, *Marks v. United States*, 430 U.S. 188, 193 (1977), and is called "*McCutcheon*" without "plurality" indication. Justice Thomas concurred, saying the "decision represents a faithful application of our precedents," but would have overruled *Buckley*'s lower protection for contributions. 134 S.Ct. at 1462-63.

coordinated expenditures with federal candidates, despite the finding that national parties are "inextricably intertwined with federal officeholders and candidates." *McConnell v. FEC*, 540 U.S. 93, 155, 213-19 (2003). As with advocacy groups, the independence of the activity breaks the link between political parties and federal candidates that can give rise to the threat of quid-pro-quo corruption because political parties pose no special risk of quid-pro-quo corruption.

Because government lacks an anti-corruption interest to restrict donations used for independent activity. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010), super-PACs receive unlimited contributions (including from corporations/unions) for independent activity. And PACs making candidate contributions can nonetheless receive unlimited contributions to a separate account for independent activity. *See* "FEC Statement on *Carey v. FEC*" (Oct. 5, 2011), www.fec.gov/press/press2011/20111006postcarey.shtml. Crucially, this turns on the non-corrupting nature of the *expenditures*, which frees the *contributions* used therefor from corruption risk. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) ("*Berkeley*") ("Placing limits on contributions, which, in turn, limits expenditures, plainly impairs freedom of expression."). As the independent activities of political parties are equally independent, no quid-pro-quo corruption interest justifies banning nonfederal funds for independent activity.[7]

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[7] If not subject to the federal fund's requirement, Plaintiffs' FEA will still be subject to the requirements of Louisiana's campaign finance law, including a shared contribution limit of $100,000 per 4 years. La. Rev. Stat. 18.1505.2.K.

While *McConnell* upheld the FEA Restrictions on their face, this case involves an as-applied challenge to the application of the FEA Restrictions to *independent* FEA. The court below erroneously found that there is "no salient distinction" (App.2a) between this as-applied challenge and the upholding of FEA Restrictions on their face in *McConnell* and the decision in *Republican National Committee v. FEC,* 698 F. Supp. 2d 150 (D.D.C. 2010) (three-judge court) ("*RNC-I*"), *aff'd,* 561 U.S. 1040 (2010). In so doing, the court below erroneously (i) relied on general statements in *McConnell* rejecting an overbreadth facial challenge, contrary to *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*") (App.16a, 17a, 21a); (ii) similarly disregarded the implications of this Court's analysis in *Citizens United* and *McCutcheon* because those cases did not strike the FEA restrictions in those cases (App.14a, 18a, 22a); (iii) failed to understand that federal candidates do not have a "close relationship" with political party independent spending as held in *Colorado-I* (App.18a); (iv) decoupled the validity of contribution limits from the expenditures they fund, contrary to *Berkeley* (App.13a, 21a); and (v) failed to correctly apply this Court's quid-pro-quo corruption analysis to political-party independent spending (App.17a-23a).

The FEA Restrictions are also unconstitutional facially and *McConnell* should be overruled because only quid-pro-quo corruption is cognizable and there is no evidence of quid-pro-quo corruption in the record of *McConnell* or any case regarding political parties, despite the contrary claim of the court below. (App.23a.)

Probable jurisdiction should be noted to fully consider these substantial issues.

Opinion Below

The *Memorandum Opinion* is at 2016 WL 6601420 and App.1a. The *Order* is at App.24a.

Jurisdiction

On November 7, 2016, the district court granted FEC's summary-judgment motion and denied Appellants' summary-judgment motion. (App.24a.) Appellants timely noticed appeal on November 14. (App. 25a.) This Court has appellate jurisdiction under BCRA § 403(a)(3). (App.34a.)

Constitution, Statutes & Regulations

Appended are the First Amendment; 52 U.S.C. §§ 30101(17)-(24), 30104(e)(2)-(4), 30125(b)-(c); BCRA § 403(a); and 11 C.F.R. 100.24.

Statement of the Case

Since this country's founding, the core function of state and local political parties was twofold: nominating candidates and voter-mobilization activities, e.g., voter registration, voter identification, get-out-the-vote activity, generic campaign activity, and candidate advocacy, which activities, if regulated at all, were regulated by state or local laws. Even post-Watergate Amendments to the Federal Election Campaign Act ("FECA") of 1974 did not bring such traditional political-party activities under federal regulation.[8]

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[8] FEC brought certain voter-mobilization activities under federal control by regulation—without proper statutory authority—eventually allowing some activities to be allocated between federal and nonfederal accounts. "[A]llocation ... [was] determined by the proportion of federal offices

(continued...)

This was changed[9] by BCRA, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002), which does the following four things to state and local parties.

First, it sweeps their traditional activities into an **FEA definition**. 52 U.S.C. 30101(20).[10] Some FEA is only such for a certain time: FEC publishes such periods for (**a**) VR (120 days before regular election, 52 U.S.C. 30101(20)(A)(i)) and (**b**) VID, GCA, and GOTV (from earliest primary filing date to the general election, *id.* 30101(20)(A)(ii); 11 C.F.R. 100.24(a)(1)).[11] PASO-Communication and 25%-Employee-Rule definitions apply year-round. 52 U.S.C. 30101(20)(A)(iii)-(iv).

Second, the **Ban** bars using any nonfederal funds[12] for FEA.[13] 52 U.S.C. 30125(b).

Third, the **Fundraising Requirement** mandates that only federal funds be used "to raise funds ... used,

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[8] (...continued)
to all offices on a state's general election ballot." *McConnell v. FEC*, 251 F. Supp. 2d 176, 196-97 (D.D.C. 2003).

[9] According to the court below, "[a] primary reason for enacting BCRA was precisely to bring an end to that acknowledged 'soft-money loophole,'" which created "a new constraint that did not exist under FECA." (App.10a.)

[10] *See supra* note 3 (FEA scope and FEA abbreviations).

[11] Louisiana FEA periods related to 2016 elections were as follows: VID/GCA/GOTV = 12/02/15 to 11/08/16; VR = 11/06/15 to 03/05/16 and 07/11/16 to 11/08/16.

[12] *See supra* note 4 (federal/nonfederal funds defined).

[13] *Levin funds*, 11 C.F.R. 300.31, .32, and .33(c), allow some allocation but are not at issue here. Appellants cannot use them, e.g., for planned broadcast communication, payments under the 25% Employee Rule, or PASO Communications. 11 C.F.R. 300.32(c). And Appellants don't use them generally due to their complexity, burdens, and restrictions.

in whole or in part, for [FEA]," 52 U.S.C. 30125(c), prohibiting nonfederal funds for such purpose.

Fourth, the **Reporting Requirement** imposes monthly FEA reporting on parties that are federal "political committees," instead of usual quarterly reporting, including identifying information on disbursements/receipts for "person[s] aggregating in excess of $200 for any calendar year." 52 U.S.C. 30104(e)(2)-(4).

Appellants challenge the Ban and the derivative Fundraising and Reporting Requirements (collectively "FEA Restrictions") as unconstitutional under the First Amendment, as applied to independent FEA and facially. The Ban and Fundraising Requirements are clearly restrictions requiring quid-pro-quo corruption justification. The court below treated the Reporting Requirement as a disclosure provision subject only to minimal scrutiny. (App.15a.) But as will be argued further in merits briefing, the provisions were considered as a unit in *McConnell* and so should fall as a unit because all were justified there by a now-rejected, broad "corruption" definition and because quid-pro-quo corruption is absent as to the activity here.[14] Here the Appellants primarily argue against the Ban—the focus

[14] *McConnell* mentions the Ban, *see, e.g.*, 540 U.S. at 161-62, but not the Fundraising or Reporting Requirements, other than to indicate that "[t]he remaining provisions of [52 U.S.C. 30125] largely reinforce the restrictions in [52 U.S.C. 30125(a)]." *Id.* at 133 (thereby sweeping in the Ban and Fundraising Requirement, but not the Reporting Requirement at BCRA § 103a). FEC acknowledges these have been considered together. (Doc. 15 at 41 n.12 ("[O]ne of the district court opinions in *McConnell* also reviewed the analysis of section 30125(c) as deriving from the analysis of section 30125(b)'s restrictions on FEA." (citing 251 F. Supp. 2d at 412 (Henderson, J., concurring/dissenting)).)

of argument and opinion in *McConnell*—because it is central and the other Requirements are derivative.

Harms caused by FEA Restrictions are widely recognized. For example, representatives of state parties and a committee of the Association of State Democratic Chairs explained harms at FEC's political-party forum. (*See* Pls.' S.J. Mem. (Doc. 33) at 4-7.) Relief proposals include Brennan Center for Justice's, *Stronger Parties, Stronger Democracy: Rethinking Reform* (2015), https://www.brennancenter.org/publication/stronger-parties-stronger-democracy-rethinking-reforming, which recommended substantial federal deregulation of the FEA Restrictions.

LAGOP[15] is a "[s]tate committee," 52 U.S.C. 30101 (15), and "state party committee" (as a federal "political committee"). 11 C.F.R. 100.5(d)(4).

JPGOP and OPGOP are "local committees." 11 C.F.R. 100.14(b). They are not federal political committees, so not "party committees."

FEC enforces FECA and BCRA.

Appellants intend to do independent FEA without complying with the FEA Restrictions if lawful, but are currently prohibited from doing so in violation of their First Amendment rights. Appellants verified intent to do the full range of voter-mobilization activities and related communications that would constitute FEA.

An example of both voter-registration activity (VR) and get-out-the-vote activity (GOTV) is a nonpartisan paean to patriotic participation called *Get Registered* which the LAGOP had to remove from its website when it would become VR and GOTV on FEA trigger dates. The text follows:

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[15] *See supra* at ii (Appellants' names and abbreviations).

Get Registered

Your right to vote for public officials and representatives is valuable. It is rare in human history. It was hard-won by America's founders.

Before America gained independence, the colonies were ruled by Great Britain. In the Declaration of Independence, the founders listed many grievances against British rule, especially the lack of representation. The Declaration said King George would not enact needed laws "unless ... people ... relinquish[ed] the right of Representation in the Legislature." It said the British were "suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."

The Revolutionary War rejected British rule. America established a republic where citizens select their representatives in government. Yet astonishingly, many people don't register and vote.

As Americans who enjoy the benefits that a democratic society offers, it is our civil duty to actively participate in government by voting. But more importantly, voting allows citizens the opportunity to make direct decisions that better our communities and allows us to build a free and prosperous society. Many people in the world live in places where their voices will not be heard because they are unable to vote. So take a stand to let your voice be heard, and help build a stronger America by registering to vote today!

The Louisiana Secretary of State's website provides valuable information to help you register and vote. For registration information and to

register online, see

- www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx and
- www.sos.la.gov/ElectionsAndVoting/Pages/OnlineVoterRegistration.aspx.

For voting information, see

- www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx.

The calendar of elections and deadlines for registration and voting by mail, see

- www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2016.pdf.

Check out those websites today, and let your voice be heard in 2016!

An example of generic campaign activity (GCA) is the following radio ad that LAGOP was prevented from broadcasting in February 2016 using state funds:

AFRICAN-AMERICAN OUTREACH
Republican Party of Louisiana
:60 Script

February is Black History Month.

It is a time to honor those who have fought to secure freedom and prosperity for our people.

A great distinction must be attributed to the Republican Party, which was FOUNDED in 1854 with one simple creed: that "Slavery is a violation of the rights of man."

You see, the movement to end slavery and the creation of the Republican Party were one and the same.

Abolitionist leaders like Harriet Tubman and Sojourner Truth were committed Republicans. Frederick Douglass was one of the party's early champions.

> The first Republican President was Abraham Lincoln—author of the Emancipation Proclamation.
>
> Republicans voted unanimously for the 13th Amendment, which abolished slavery.
>
> The Republican Party has never been the party of white Americans. Or Black Americans. It is the party for all Americans ... promoting freedom, justice and equal opportunity for all.
>
> FEMALE VO: This moment in black history has been brought to you by the Republican Party of Louisiana.

Appellants verified that their intended activities would be "independent," i.e., compliant with federal law governing independence when the FEA is done. Appellants intend materially similar activity in the future, if not restricted by the challenged provisions.

On August 3, 2015, Plaintiffs-Appellants filed their Verified Complaint (Doc.1) and three-judge-court motion under BCRA § 403 (Doc. 3), which was granted November 25 (Doc. 23). On February 11, 2016, Plaintiffs moved for summary judgment. (Doc.33.) Discovery and discovery disputes ensued. On March 15, FEC filed a motion to dissolve the three-judge court or dismiss. (Doc.40.) On March 18, FEC moved for summary judgment. (Doc.41.) On November 11, the three-judge court issued a Memorandum Opinion (App.1a) and Order (App.24a) denying FEC's dissolve/dismiss motion and Plaintiffs' summary-judgment motion and granting FEC's summary-judgment motion. On November 14, Appellants noticed appeal of these "final decision(s)" as authorized by BCRA § 403. (App.25a.)

The Questions Presented Are Substantial

The Questions Presented, *supra* at i, are on these topics: (**I**) Whether language in prior cases decided this as-applied challenge; (**II**) Whether independence eliminates quid-pro-quo corruption risk; and (**III**) Whether the FEA Restrictions violate the First Amendment facially.

I.
Neither *McConnell*'s Broad Facial-Holding Language Nor the Narrow Holdings of *Citizens United* and *McCutcheon* Preclude this As-Applied Challenge.

Appellants challenge the FEA Restrictions as applied to independent FEA, which challenge the court below rejected in part based on some broad facial-holding language in *McConnell* (App.16a, 18a,18a-19a) and narrow holdings in *Citizens United* and *McCutcheon* (App.14a, 18a, 22a) that did not reach issues here.

The court below relied on the following language from *McConnell*'s facial upholding to determine that *McConnell* decided this as-applied challenge on the merits:

- "'Because all those [FEA] activities "confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption."'" (App.16a, *quoting RNC-I*, 698 F. Supp. 2d at 161-62, *quoting McConnell*, 540 U.S. at 168.)
- "'[I]t is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money con-

tributions to national parties suspect.'" (App.18a, *quoting McConnell*, 540 U.S. at 154-55.)[16]

- "'Given this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used* by the parties.'" (App.18a-19a, *quoting McConnell*, 540 U.S. at 155 (emphasis by lower court).)

Of course, *McConnell* involved a facial challenge where the question was whether the soft money ban was substantially overboard. 540 U.S. at 166. Inherent in that analysis is the fact that the challenged statute may be *insubstantially* overboard such that, while the statute could be upheld on its face, certain applications would be unconstitutional. Thus, broad facial upholding language does not preclude future as-applied challenges. *WRTL-I*, 546 U.S. 410.

However here, the court below relied on broad facial-upholding language, i.e., "all large soft-money contributions," the "regardless" language, and "all," to preclude this as-applied challenge. This is the sort of mere broad language that this Court unanimously rejected as foreclosing an as-applied challenge in *WRTL-I* to distinguish "genuine" from "sham" issue ads:

> We agree with WRTL that the District Court misinterpreted the relevance of our "uphold[ing] all applications of the primary definition" of electioneering communications. *Id.*, at 190, n.73. Contrary to the understanding of the District

[16] The quotes involved *national* parties. (App.19a-20a.) *McConnell* relied on a "prediction" of "corruption"for state and local parties. 164-65.

> Court, that footnote merely notes that because we found BCRA's primary definition of "electioneering communication" facially valid when used with regard to BCRA's disclosure and funding requirements, it was unnecessary to consider the constitutionality of the backup definition Congress provided. *Ibid*. *In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges*.

546 U.S. at 411-12 (emphasis added).

If the lower court here had engaged in the required as-applied analysis and faithfully applied this Court's longstanding and consistent independence analysis, it would have found that independence vitiates the key aspects of *McConnell*'s facial analysis. First, while it is true that *coordinated* FEAs "all 'confer substantial benefits on federal candidates'" (App.16a, *quoting* 540 U.S. at 168), this Court has consistently held that *independent* expenditures fail to provide this benefit. *Buckley*, 424 U.S. at 47; *Citizens United*, 558 U.S. at 357.

Second, while it is true that there is a "close relationship between federal officeholders and the national parties" (App.18a-19a, *citing* 540 U.S. at 155) when they coordinate their spending,[17] this is not the case

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[17] Indeed, it is just this type of coordinated spending that *McConnell* seemed to have in mind:

> [B]oth parties began to use ... soft money ... for issue advertising ... to influence federal elections. The [Senate] Committee found such ads highly problematic for two reasons. Since they accomplished the same purposes as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contribu-

(continued...)

with independent spending. Independent spending requires that the spender not coordinate its spending with a candidate by becoming, in effect, "partners or joint venturers" in the spending. *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999); *see also* 11 C.F.R. 109.37 ("party coordinated expenditure"). However, this close relationship is forbidden in the case of independent spending and such a close relationship is not inherent in the relationship between a candidate and a political party. *Colorado-I*, 518 U.S. at 619 (rejecting FEC presumption that parties coordinate with candidates).

Third, and once the link between the party spending and the candidate is broken by the independence of the spending, this Court has consistently held that it also breaks the connection to quid-pro-quo corruption. *See, e.g., id.* at 615-16. So it does matter that the "'funds are ultimately used'" for independent spending. (App.18a-19a, *quoting McConnell*, 540 U.S. at 155.)

Furthermore, the court below relied on narrow holdings in *Citizens United* and *McCutcheon* to also preclude this as-applied challenge. Regarding *Citizens United*, the lower court cited this Court's statement that "[t]his case ... is about independent expenditures, not soft money," 558 U.S. at 360-61 (citations omitted),

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[17] (...continued)

> tors to circumvent protections that FECA was intended to provide. Moreover, though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns.

540 U.S. at 131 (footnote omitted). And if such coordinated spending violates campaign-finance limitations, severe civil and criminal penalties await. 52 U.S.C. 30109.

to draw the conclusion that—in accord with *RNC-I*, which the lower court cited and found persuasive and possibly binding (App.7a)[18]—"*Citizens United* did not disturb *McConnell*'s holding with respect to the constitutionality of BCRA's limits on contributions to political parties." (App.18a, *citing RNC-I*, 698 F. Supp. 2d at 153.)

Regarding *McCutcheon*, the court below cited *McCutcheon*'s statement that its "holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about 'soft money'" (App.

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[18] The precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). In *RNC-I*, Plaintiffs argued that the soft money ban "cannot constitutionally be applied to activities that are not 'unambiguously related to the campaign of a particular federal candidate,' *Buckley,* 424 U.S. at 80," such as communications regarding state ballot measures and FEA "not targeted to any federal race or candidate." 698 F. Supp. 2d at 157, 160 (citation omitted). The present as-applied challenge cuts this issue at a completely different angle and involves issues not presented (precisely or by implication) and necessarily decided in *RNC-I* because here, even if FEAs are clearly "unambiguously campaign related," the FEA Restrictions could not constitutionally be applied if the FEA were independent.

Anyway, in this Court, a summary affirmance has "considerably less precedential value than an opinion on the merits.... '[U]pon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.'" *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) (citations omitted).

14a, 22a, *citing* 134 S.Ct. at 1451 n.6) to conclude that "the *McCutcheon* plurality's [decision] affords no basis for us to disregard *McConnell's* holding about the facial validity of § 323(b)" (App.14a) and, further, "forecloses plaintiffs' as-applied challenge" (App.22a).

However, these statements in *Citizens United* and *McCutcheon* establish nothing more noteworthy than that these decisions did not strike down the soft money ban that was not at issue in either case. So the lower court made too much of them. And while overruling its own decisions is generally this Court's prerogative, *but see Obergefell v. Hodges*, 135 S.Ct. 2584, 2953, 2598, 2605 (2015) (district courts all found a federal constitutional right to same-sex marriage before this Court overruled contrary precedent), lower courts still must apply this Court's current reasoning to issues properly before them, as did the district courts in *Obergefell*. So given the change in cognizable corruption between *McConnell* and both *Citizens United* and *McCutcheon*, the court below should have applied this Court's current quid-pro-quo corruption analysis to the new issue before it. But it erroneously used these statements in *Citizens United* and *McCutcheon* to fail to do so.

So this as-applied challenge is not precluded by *McConnell*, *Citizens United*, or *McCutcheon* and should be decided on the merits. This is also a substantial question that this Court should decide.

II.
The FEA Requirements Are Unconstitutional as Applied to Independent FEA.

Appellants challenge the FEA Requirements as unconstitutional under the First Amendment's "right to participate in democracy" by free speech and association, *McCutcheon*, 134 S.Ct. at 1441, as applied to independent FEA.

The court below erroneously rejected this as-applied challenge by failing to apply correctly this Court's quid-pro-quo corruption analysis to political-party independent spending. In so doing, the court below erroneously failed to employ strict scrutiny (App.11a-14a), employed an overbroad and now-repudiated concept of "corruption" (App.16a, 18a-19a, 22a), failed to recognize that independence precludes quid-pro-quo corruption (App.16a-18a), and failed to recognize that there is no evidence of political parties corrupting their candidates (App.23a). Under the correct analysis on any one of these key points, the FEA Requirements are unconstitutional as applied to independent FEA.

A. This Court's Precedents Require that the FEA Restrictions Be Subject to Strict Scrutiny.

While there is no dispute that this Court employs strict scrutiny to determine the constitutionality of expenditure limits on campaign spending, *Buckley*, 424 U.S. at 44-45; *NCPAC*, 470 U.S. at 500-01; *Randall v. Sorrell*, 548 U.S. 230, 240-46 (2006); *Citizens United*, 558 U.S. at 340 ("Laws that burden political speech are 'subject to strict scrutiny.'"), and that any expenditure limit is per se unconstitutional, *SpeechNow*, 599 F.3d at 694 (independent expenditures pose no corruption risk as a matter of law), a controversy continues to rage on this Court on whether contribution limits enjoy

strict scrutiny protection, *see Randall*, 548 U.S. at 265 (Thomas, J., concurring, joined by Scalia, J.); *McCutcheon*, 134 S.Ct. at 1462 (Thomas, J., concurring); *see generally* Bopp, *The Constitutional Limits on Campaign Contribution Limits*, 11 Regent U. Law Rev. 235 (1998-99), or are subject to a reduced level of scrutiny under which *McConnell* upheld the soft money ban, 540 U.S. at 134-42, i.e. whether the challenged restriction is closely drawn to match a sufficiently important interest," 540 U.S. at136.

However, this Court need not resolve this controversy here since *McConnell* committed a more fundamental error by choosing the level of scrutiny based on an erroneous dichotomy: that there are only contribution and expenditure limits,[19] and each is subject to its own distinct level of scrutiny. 540 U.S. at 161 (Ban is "a straight forward contribution regulation."). In fact, this Court has long recognized contribution limits that function as expenditure limits, and that, as a result, are invalid on that ground, even if they survive the

[19] This Court has generally recognized two forms of campaign spending: contribution and expenditures. Contributions are donations of funds ("direct contributions") and donations of other things of value ("in-kind contributions") to influence an elections. 11 C.F.R. §§ 100.51-100.94. A contribution is usually given to a political actor, i.e., a candidate, political party or political action committee. An expenditure is the spending of money to influence an election. 11 C.F.R. §§ 100.110-100.155. To be an expenditure, the spending must be independent of a candidate; if the spending is "coordinated" with a candidate, 11 C.F.R. §§ 100.30-100.37 (coordination for party committees), it will be considered a contribution to the candidate ("coordinated expenditure"). Thus, inherent in spending being an expenditure is that it is independent of a candidate.

more relaxed scrutiny some courts have applied to contribution limits. *Buckley*, 424 U.S. at 34 (otherwise valid candidate contribution limit may be unconstitutional if it prevents candidates from "amass[ing] the resources necessary to reach the electorate"); *Berkeley*, 454 U.S. at 299 (striking a political committee contribution limit for ballot-measure advocacy because "[p]lacing limits on contributions, which, in turn, limits expenditures, plainly impairs freedom of expression."); *McCutcheon*, 134 S.Ct. 1434 at 1452 (the contribution limit there was "restricting speech" and thus required a robust "closely drawn" test[20]).

McConnell failed to perform this functional analysis because it looked only at the form of the ban, i.e., it "simply limit[s] the source and individual amount of the donations," rather than "in any way limiting the total amount of money parties can spend." 540 U.S. at 139. Of course, the required functional analysis would have revealed that the soft-money ban on national parties deprived the national parties in 2003 and thereafter of the millions of dollars in soft money they had raised and spent prior to 2003. And state and local parties, which can raise nonfederal funds, cannot spend those existing and available funds on FEA. (App.11a ("Invalidation of [the FEA Ban] would enable plaintiffs to use the corporate funds they have on hand to engage

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[20] "[I]f a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights, ... it cannot survive 'rigorous' review," *id.* at 1446 (citations omitted), and "fit matters," so tailoring must be "reasonable" with "'means narrowly tailored to achieve the desired objective.'" *Id.* at 1456-57 (citation omitted). *See generally* Bopp, Elf & Milanovich, *Contribution Limits after* McCutcheon v. FEC, 49 Val. U. L. Rev. 361 (2015).

in at least some kinds of FEA, as they would have been able to do under FECA.").)

Thus, the FEA Restrictions on state and local parties function as an expenditure limit on their independent FEA and strict scrutiny should apply. And this is a substantial question that this Court should decide.

B. Only Narrow Quid-Pro-Quo Corruption Is Cognizable, Regardless of Scrutiny Level.

Regardless of whether the FEA Restrictions are considered a contribution or expenditure limit (with the resulting scrutiny), this Court has only recognized one government interest sufficient to uphold any campaign-finance restriction: quid-pro-quo corruption. This has been true historically and is true now. Thus, the application of the FEA Restrictions to the Plaintiffs' independent FEA must be justified by quid-pro-quo corruption. But the independence of the Plaintiffs' FEA precludes a legitimate threat of quid-pro-quo corruption. And in any event, there is no evidence that a political party has ever been a party to a quid-pro-quo exchange with its candidate, and certainly not by state and local parties with respect to their independent FEA. Thus, the FEA Restrictions cannot be constitutionally applied to the Plaintiffs' independent FEA, and this is also a substantial question that this Court should decide.

1. Historically, Quid-Pro-Quo Corruption Has Been the Only Justification for Campaign-Finance Restrictions.

Beginning with the seminal campaign finance case of *Buckley v. Valeo*, this Court has held that for a candidate contribution to be limited it must pose a risk of "be[ing] given as a *quid pro quo* for improper commitments from the candidate." *Buckley,* 424 U.S. at 47.

This was reiterated and explained in *NCPAC,* 470 U.S. at 497 ("Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors."). And in *Colorado-I*, this Court again reiterated *Buckley*'s requirement. 518 U.S. at 615 (For campaign expenditures to rise to the level of corruption, they must "be given as a *quid pro quo* for improper commitments from the candidate." (quoting *Buckley,* 424 U.S. at 47)).

However, 24 years after *Buckley*, this Court appeared to move away from this rigorous definition of corruption in *Nixon v. Shrink Missouri PAC*, 528 U.S. 377 (2000), where this Court described the corruption interest to include the "broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 390. And *McConnell* made the most dramatic break by holding that access, gratitude, and consequent "circumvention" constituted "corruption" or "the appearance of corruption." 540 U.S. at 119 n.5, 142, 145. But in *Citizens United* and *McCutcheon* this Court returned to the original understanding.

2. *Citizens United* and *McCutcheon* Reaffirmed that a Finding of Quid-Pro-Quo Corruption Is the Only Justification for Campaign-Finance Restrictions.

First, *Citizens United* held that, as related to independent expenditures, "corruption" that would justify their restriction "means quid-pro-quo corruption or the appearance of quid-pro-quo corruption of a federal candidate." 558 U.S. at 359. The *Citizens United* Court specifically rejected influence, access, favoritism, and gratitude or ingratiation as quid-pro-quo corruption or

its appearance. *Id.* (citing *McConnell,* 540 U.S. at 296-98 (Kennedy, J., concurring/dissenting)).

Then *McCutcheon* applied the same requirement to contribution limits: the "Court has identified only one legitimate governmental interest for *restricting campaign finances*: preventing corruption or the appearance of corruption," 134 S.Ct. at 1450 (emphasis added), which is "a direct exchange of an official act for money," *id.* at 1441, which entails "'large individual financial contributions' *to particular candidates*," *id.* (citation omitted; emphasis added), and which is "an act akin to bribery," *id.* at 1466 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting,). Thus,

> [s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties.... And because the Government's interest in preventing the appearance of corruption is equally confined ..., the Government may not seek to limit the appearance of mere influence or access.

Id. at 1450-51 (plurality; citations omitted).

Cognizable "corruption" thus means "'quid-pro-quo corruption or the appearance of quid-pro-quo corruption of a federal candidate,'" *id.* at 1441 (quoting *Citizens United,* 558 U.S. at 359), with quid-pro-quo corruption meaning only "a direct exchange of an official act for money." *Id.* (citing *McCormick v. United States,*

500 U.S. 257, 266 (1991)).[21] "And—importantly—we

[21] As the law now stands, ***cognizable corruption*** is as follows: "Corruption" means quid-pro-quo corruption or the appearance of quid-pro-quo corruption of a federal candidate, *McCutcheon,* 134 S.Ct. at 1441 (quoting *Citizens United,* 558 U.S. at 359), with quid-pro-quo corruption meaning only "a direct exchange of an official act for money." *Id.* (citing *McCormick,* 500 U.S. at 266). This is "an effort to control the exercise of an officeholder's official duties," *id.* at 1450, i.e., "an act akin to bribery." *Id.* at 1466 (Breyer, J., dissenting). "Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption[.]" *Id.* at 1451 (plurality). No "conjecture"—including about "recontributed funds" or contributions "rerouted to candidates"—suffices. *Id.* at 1441 (citing *Arizona Free Enterprise Club's Freedom PAC v. Bennett,* 131 S.Ct. 2806, 2826-27 (2011). Influence, access, favoritism, and gratitude or ingratiation are not quid-pro-quo corruption or its appearance. *Citizens United,* 558 U.S. at 359 (citing *McConnell,* 540 U.S. at 296-98 (Kennedy, J., concurring/dissenting); *NCPAC,* 470 U.S. at 497 ("Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors")). For campaign expenditures to rise to the level of corruption, they must "be given as a *quid pro quo* for improper commitments from the candidate." *Colorado-I*, 518 U.S. at 615 (quoting *Buckley,* 424 U.S. at 47). Such corruption occurs when a "public official receives a payment in return for his agreement to perform specific official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). That a candidate alters or reaffirms his positions on issues because of a contribution or makes a promise or commitment is not, in and of itself, evidence of quid-pro-quo corruption. *NCPAC*, 470 U.S. at 498;

(continued...)

'have never accepted mere conjecture as adequate to carry a First Amendment burden.'" *Id.* at 1452 (citation omitted).

3. *McConnell* Failed to Employ the Required Narrow Definition of Quid-Pro-Quo Corruption to the FEA Restrictions.

As a result of *McConnell*'s general departure from a rigorous definition of corruption, it upheld the soft-money ban because nonfederal funds might cause gratitude and influence, 540 U.S. at 145, 168, or access, *id.* at 119 & n.5, 124-25 & n.13, 155. "[S]oft money ... enabled parties and candidates to circumvent FECA's limitations ..." *Id.* at 126; *see also id.* at 145 ("widespread circumvention of FECA's limits on contributions" due to likelihood "that candidates would feel grateful ... and ... donors would seek to exploit that"). The Court said such access, gratitude, and consequent "circumvention" constituted "corruption" or "the appearance of corruption." *Id.* at 119 n.5, 142, 145.

Thus, *McConnell* upheld the FEA Restrictions on a now-rejected nature of the "corruption" interest, i.e.,

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[21] (...continued)
Brown v. Hartlage, 456 U.S. 45, 55-56 (1982) ("Some promises are universally acknowledged as legitimate, indeed 'indispensable to decisionmaking in a democracy,' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); and the 'maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system.' *Stromberg v. California*, 283 U.S. 359, 369 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote.").

"close relationship," "close connection and alignment of interests," "indebtedness," and "benefits." The court below applied *McConnell*'s reasoning to this as-applied challenge, holding that since *McConnell* had "concluded that because all of those [FEAs] confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption," "[t]hat is fully true with regard to the independent FEA sought to be conducted by plaintiffs in this case." (App.16a (citations omitted).) This Court, however, had already rejected *McConnell*'s broad definition of corruption in both the expenditure context, *Citizens United*, 558 U.S. at 360, and the contribution context, *McCutcheon*, 134 S.Ct. at 1441, by returning to this Court's long-held narrow definition of cognizable quid-pro-corruption in *Buckley*, 424 U.S. at 26, and *NCPAC*. 470 U.S. at 497.

So the court below erred in applying *McConnell*'s finding of "corruption" to deny this as-applied challenge. And this is a substantial question that this Court should decide.

C. Independence Eliminates the Threat of Quid-Pro-Quo Corruption.

As noted, the court below rejected this as-applied challenge on the erroneous basis that, since *McConnell* found that FEA generally provides a benefit to federal candidates, this also applies to independent FEA. (App. 16a.) In addition to erroneously applying *McConnell*'s broad corruption interest to this as-applied challenge, the court below also failed to recognize that the *independence* of the FEA eliminated the threat of corruption.

First, it *does* matter how the funds are being spent and this is often a matter of constitutional significance.

Of course, *McConnell*, in its facial-upholding analysis, said that "[g]iven this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used* by the parties." 540 U.S. at 155 (emphasis added). But this was erroneous and the lower court compounded *McConnell*'s error by disregarding the use of the funds in this as-applied challenge. (App.19a-21a.)

Generally speaking, *McConnell* was wrong when it said that it is irrelevant how "those funds are ultimately used by the parties." 540 U.S. at 155. In fact, it was critical to *McConnell*'s own conclusion that federal candidates "benefit" from political party spending, *because those funds were being spent on FEA*. (App.16a ("*McConnell* had concluded that because all of those [FEAs] confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." (citations omitted)).)

Furthermore, this Court has always looked to the ways that funds are spent to determine the constitutionality of campaign-finance regulations. *Buckley*, for example, upheld contribution limits because the funds were given to a candidate's campaign. 424 U.S. at 23 (challenged provision regulated "contributions to any candidate"). Similarly, *California Medical Association v. FEC* 453 U.S. 182 (1981) ("*CalMed*"), upheld PAC contribution limits because the funds were given to a PAC that gave contributions to candidates, *id.* at 197-99 (plurality).[22] And *Berkeley* struck down contribution

[22] Justice Blackmun's concurrence in *CalMed* further illustrates the point. He provided the critical fifth vote to (continued...)

limits to a PAC that engaged only in independent ballot-measure advocacy. *Berkely*, 454 U.S. at 297-99.

Thus, since the only cognizable government interest is preventing quid-pro-quo corruption, only funds actually reaching candidates can pose such a risk because, unless a financial quid *reaches* a candidate, he could not provide the necessary official quo.[23] As a result, "independent expenditures ... do not give rise to corruption." *Citizens United*, 558 U.S. at 357. "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *McCutcheon*, 134 S.Ct. at 1450. As a result, "government ... ha[s] no ... interest in limiting contributions to independent expenditure-only organizations." *SpeechNow*, 599 F.3d at 696. This doctrine is so firmly established that the lower courts have recognized that "*Citizens United* clearly states as a

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[22] (...continued)
uphold the PAC contribution limit precisely because the PAC was going to use the funds to contribute to candidates. *Id.* at 203. He said that the result would have been different if the PAC was going to use the funds for independent expenditures. *Id.* This is the reasoning that has correctly lead to the uniform striking of PAC contribution limits to super-PACs (independent-expenditure-only PACs)—*see e.g.*, *EMILY's List v. FEC*, 581 F.3d 1, 8-14 (D.C. Cir. 2009); *SpeechNow*, 599 F.3d 686, 696; *North Carolina Right to Life v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008)—and this reasoning is directly applicable to this as-applied challenge.

[23] "*Buckley* also made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself." *McCutcheon*, 134 S.Ct. at 1460 (citation omitted). For the corruption risk to arise, "money [must] flow[] ... to a candidate." *Id.* at 1452.

matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption." *Id.* at 695.

D. Political Party Independent Spending Is Also Non-Corrupting.

Nor may the government presume spending by political parties, as opposed to other independent spenders, is inherently corrupting: "We are not aware of any special dangers of corruption associated with political parties...." *Colorado-I*, 518 U.S. at 616 (plurality). Indeed, "[w]hat could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?" *Id.* at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment, dissenting in part).

"[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections." *Id.* at 618. "'[A] vigorous party system is vital to American politics," and "'[p]ooling resources from many small contributors is a legitimate function and an integral part of party politics.'" *Id.* (citations omitted).

Furthermore, "the basic nature of the party system ... [allows] party members [to] join together to further common political beliefs, and citizens can choose to support a party because they share ... beliefs." *McCutcheon*, 134 S.Ct. at 1461. "[R]ecast[ing] such shared interest ... as an opportunity for ... corruption would dramatically expand government regulation of the political process." *Id.* (citations omitted).

In fact, this Court has viewed political parties as posing *less* corruption risk than individuals:

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

Colorado I, 518 U.S. at 617-18.

McConnell, however, seems to treat political parties as suspect, but this seems to be based on a hidden presumption of coordination of party spending. 540 U.S. at 131 ("Both parties began to use ... soft money ... for issue advertising ... to influence federal elections. The [Senate] Committee found such ads highly problematic for two reasons.... [Second,] though ostensibly independent of the candidates, the ads were often actually coordinated with, and controlled by, the campaigns." (footnote omitted)). But *Colorado-I* forbids that presumption: "The question ... is whether the [lower] Court ... erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are 'coordinated.' We believe it did." 518 U.S. at 619. That independent-communication case (*Colorado-I*) must control, not *McConnell*, because "[t]his case ... is about independent expenditures," *Citizens United*,

558 U.S. at 361.

Regarding *coordination* of political-party expenditures with candidates, no presumption is permissible because the independent communications party-committees may make, 11 C.F.R. 109.30, may *not* be coordinated with a candidate, 11 C.F.R. 109.37 ("What is a 'party coordinated communication'?"). And *Colorado-I* expressly *rejected* the FEC's presumption that political parties cannot make independent communications because (as the FEC presumed) *all* political-party committee communications were coordinated with a political party's candidates. 518 U.S. at 614-22. What the *Colorado-I* opinions said in rejecting presumed coordination controls here.

Colorado-I was remanded to decide whether the Party Expenditure Provision limits were unconstitutional facially, i.e., whether the government could limit *coordinated* expenditures. *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*"Colorado-II*"), held there could be limits on *coordinated* expenditures. As Plaintiffs' activities do not involve coordination, *Colorado-II* does not control.[24]

So the independence of the spending on FEA is a decisive and constitutionally significant fact, that breaks the tie between the donor and the party, and the candidate. As a result, the independence of Appellants' proposed spending on FEA precludes a finding of quid-pro-quo corruption and requires the sustaining of this as-applied challenge. This is also a substantial question that this Court should decide.

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[24] *McConnell* recognized that *Colorado-II* involved coordinated expenditures, with independent expenditures being another kettle of fish. 540 U.S. at 145 n.45 (citations omitted).

E. There Is No Record Evidence that State or Local Political Parties' Independent Spending Involves Quid-Pro-Quo Corruption.

The court below claimed that, if a quid-pro-quo corruption interest is necessary to uphold the FEA Restrictions, the court in *RNC-I* accomplished that task. (App.22a-23a.) This is erroneous.

Rather than finding that there was evidence of quid-pro-quo corruption in the relationship between donors, political parties, and their candidates, *RNC-I* principally relied on *McConnell's* ambiguity: whether *McConnell*'s finding, that there is a "'close relationship between federal officeholders and the national parties,'" and its conclusion, that "'[g]iven this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent *indebtedness* on the part of federal officeholders, regardless of how those funds are ultimately used,'" gave rise to an "independently sufficient rationale for the Court to uphold the blanket ban on soft-money." 698 F. Supp. 2d at 159-160 (citation omitted; emphasis added).

This is clearly erroneous. First, *McConnell*'s *indebtedness* finding applied only to national parties, not state parties, and the FEA Restrictions were upheld against the latter by a "*prediction*" of "corruption." (App.19a-20a, *quoting McConnell*, 540 U.S. at 161, 165 (emphasis added).) Second, *McConnell* was clear that the *indebtedness* it saw as created by the donor's contribution to a national party was a corrupt relationship, not an independent government interest. 540 U.S. at 155. Third, this Court has clearly and repeatedly established that only the actuality and appearance of quid-pro-quo corruption can justify campaign

finance restrictions. *See, e.g.*, *Citizens United*, 558 U.S. at 359; *McCutcheon*, 134 S.Ct. at 1441. And fourth, this Court in *Colorado-I* rejected this theory as nonsensical.[25]

So as to the FEA Restrictions on state and local political parties, the government must establish a bona fide threat of actual or apparent quid-pro-quo corruption to justify them. Despite over 27 years of trying (since FEC's 1989 "probable cause" finding leading to *FEC v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1441, 1451 (1993)), it has failed to do so.

In the present case, Appellants stipulated with FEC that the records in the major, relevant campaign-finance cases may be considered part of the record in this case. These included *Buckley*, 424 U.S. 1; *Colorado-I*, 533 U.S. 431, *Colorado-II*, 533 U.S. 431, *McConnell*, 540 U.S. 93, and *RNC-I*, 698 F. Supp. 2d 150. (Joint Scheduling Report (Doc. 20) at 4-5.) There is no evidence in the record of these or any other FEC cases that national, state, or local party independent spending involved now-cognizable quid-pro-quo corruption, and especially related to spending for independent FEA.

For example, *McConnell* was the landmark FEA case with the mammoth record, yet FEC "identified not a single discrete instance of *quid pro quo* corruption

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[25] *Colorado-I* rejected the notion that a party "expenditure is 'coordinated' because a party and its candidate are identical, *i.e.*, the party, in a sense, 'is' its candidates." 518 U.S. at 622. "We cannot assume ... this is so," the plurality continued, and such "a metaphysical identity ... arguabl[y] ... eliminates any potential for corruption ...." *Id.* at 623 (citation omitted).

attributable to the donation of non-federal funds." *McConnell*, 251 F. Supp. 2d at 395 (op. Henderson, J.). The *McCutcheon* dissent recognized that though the *McConnell* record showed "access" and "influence," 134 S.Ct. at 1469, it did not show narrow quid-pro-quo corruption:

> The District Judges in *McConnell* made clear that the record did *"not* contain any evidence of bribery or vote buying in exchange for donations of nonfederal money." 251 F. Supp. 2d, at 481 (opinion of Kollar-Kotelly, J.) (emphasis added). Indeed, no one had identified a "single discrete instance of quid pro quo corruption" due to soft money. *Id.*, at 395 (opinion of Henderson, J.).

134 S.Ct. at 1469-70 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (quoting *McConnell*, 251 F. Supp. 2d at 395) (op. Henderson, J.).).

In *Colorado-I* there was no evidence of quid-pro-quo corruption from the state party's independent communication related to a federal candidate. 518 U.S. at 618 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures.").

In *Colorado-II*, this Court found it unnecessary to determine if there were "*quid pro quo* arrangements and similar corrupting relationships between candidates and parties." 533 U.S. at 456 n.18. The district court, however, did and found no factual evidence of quid-pro-quo corruption between contributors, parties, and candidates. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1211-12 (D. Colo. 1999) (no corruption in the form of contributors "forc[ing] the party committee to compel a candidate to

take a particular position"); *id.* at 1212-13 (no "corruption" from parties' influence over candidates because "decision to support a candidate who adheres to the parties' beliefs is not corruption"); *id.* at 1213 ("FEC has failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof.").

And FEC proved no narrow quid-pro-quo corruption by political parties in *McCutcheon*. *See, e.g.*, 134 S.Ct. 1450-51 (rejecting dissent's broad "corruption" on which FEC relied).

In this case, the court below made no quid-pro-quo corruption finding, instead relying on language in *McConnell* and *RNC-I*, which did not find quid-pro-quo corruption, as already discussed.

So despite nearly three decades of trying, FEC has shown no cognizable quid-pro-quo justification for the FEA Restrictions. Thus, whether the FEA Restrictions are unconstitutional as applied to independent FEA is a substantial question that this Court should decide.

III.
The FEA Restrictions Are Also Unconstitutional Facially.

Appellants also challenge the FEA Restrictions facially. *McConnell* upheld the challenged provisions facially, 540 U.S. 93, though there was no evidence of *quid pro quo* corruption attributable to the donation of non-federal funds to any national, state or local political party. *See* Part II(E). However as this Court held in *Citizens United*, 558 U.S. at 359-60, and *McCutcheon*, 134 S.Ct. at 1450-51, it has returned to *Buckley*'s requirement that evidence of quid-pro-quo corruption is required to uphold such restrictions. So *McConnell* was

wrongly decided. The challenged provisions, all upheld facially on now-rejected broad "corruption," are facially unconstitutional.

This is also a substantial question that this Court should decide.[26]

Conclusion

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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[26] The court below said it must leave to this Court the overruling of *McConnell*'s facial upholding of the FEA Restrictions. (App.14a.)