United States District Court
District of Columbia

Republican Party of Louisiana et al., *Plaintiffs* *v.* **Federal Election Commission**, *Defendant*	**Civil Case No. 1:15-cv-1241 (CRC-SS-TSC)** THREE-JUDGE COURT

Plaintiffs' Memorandum Opposing FEC's Motion to Dissolve Three-Judge Court or Dismiss

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Table of Contents

Introduction[1]

The basis of FEC's[2] present Motion is that "Plaintiffs lack ... actual injury." (Mot. 1.) FEC is wrong. Preliminarily note the following controlling First Amendment analysis.

The gravamen of this case is that Plaintiffs want to do "FEA using *nonfederal* funds at *any* level of expenditure, including with funds on hand and at the level of even just $1." (LAGOP's 1st Disc. Resp. 4 (emphasis in original) (FEC's Ex. 1) .) Plaintiffs *cannot* use nonfederal funds for their independent-communication FEA because of the Ban. Whether the Ban is deemed an expenditure or contribution restriction, it is a First Amendment "ban" or "burden," i.e., "actual injury." *Citizens United v. FEC*, 558 U.S. 310, 336-40 (2010) (PAC option did not prevent independent-communication prohibition from being a "ban" that "burdens" free-speech rights requiring strict scrutiny); *McCutcheon v. FEC*, 134 S.Ct. 1434, 1448-49 (2014) (plurality[3]) (aggregate-contribution limit is "outright ban" and "special burden").

And Plaintiffs want to do independent-communication FEA without complying with the Ban, Fundraising Requirement, and Reporting Requirement but are *chilled* from doing so. (Compl. ¶¶ 6-8; 74-76; 84; 86-87; 94; 97; 106; 113 ("Absent requested relief, Plaintiffs are chilled from

[1] Plaintiffs oppose FEC's Motion to Dissolve Three-Judge Court with Instructions to Dismiss or, Alternatively, to Dismiss Action ("Mot.) and Memorandum ("Mem.") (Doc. 40).

[2] **Abbreviations** herein are those established in the Complaint ("Compl.") (Doc. 1) and Plaintiffs' Summary Judgment Memo ("Pls. Summ. J. Mem.") (Doc. 33), e.g., *Ban* (52 U.S.C. 30125(b)(1)); *BCRA* (Bipartisan Campaign Reform Act); *FEC* (Federal Election Commission); *FEA* (federal election activity); *FECA* (Federal Election Campaign Act); *Fundraising Requirement* (52 U.S.C. 30125(c)); *GCA* (generic-campaign activity); *GOTV* (get-out-the-vote activity); *JPGOP* (Jefferson Parish Republican Parish Executive Committee); *LAGOP* (Republican Party of Louisiana); *Mem. Op.* (Memorandum Opinion (granting three-judge court) (Doc. 24)); *OPGOP* (Orleans Parish Republican Executive Committee); *PAC* (political committee); *PASO* (promoting, attacking, supporting, or opposing federal candidate); *Reporting Requirement* (52 U.S.C. 30104(e))); SP (screening problem)**;** *VID* (voter identification); *VR* (voter-registration activity).

[3] This controlling opinion states the holding, *Marks v. United States*, 430 U.S. 188, 193 (1977), and is called "*McCutcheon*" herein without further "plurality" notation.

exercising First Amendment rights."); 115 ("Plaintiffs face a credible threat of civil enforcement and prosecution if they proceed with planned activities without complying with challenged provisions, absent requested relief."). That chill is also an actual First Amendment injury. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("self-censorship [is] a harm").

FEC attempts to evade these First Amendment actual injuries by reframing the case erroneously. For example, Plaintiffs made clear that "[t]he gravamen of this case is that Plaintiffs want to use funds *from their state account*, even *at the level of $1*, for FEA" (LAGOP's 1st Disc. Resp. 30, Interrog. 10), but they cannot because of the Ban. Though FEC quotes that statement (Mem. 17), in the very next sentence it attempts this reframing: "At oral argument, plaintiff argued that they should be free *to deposit* that $1 *individual* contribution in their state account 'bucket' instead of their federal account 'bucket' if they so choose." (*Id.* (emphasis added).) That is wrong, and this case is neither about whether Plaintiffs may *deposit* a dollar in a particular account nor about using a dollar just from an *individual*. Rather, again, what Plaintiffs "*really* want to do [is] use nonfederal funds for FEA, including those on hand, at *any* level of expenditure (including just $1)." (LAGOP's 1st Disc. Resp. 4 (emphasis in original).) FEC's erroneous reframing here is emblematic of its entire argument for its Motion.

Nor can FEC's self-inflicted-harm argument (Mem. 19) prevail since it is a just-do-something-else argument, which was rejected in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 (2007) (plurality[4]) (rejecting argument that WRTL could just avoid the "electioneering communication" definition by (i) using a PAC, (ii) doing non-broadcast ads, or (iii) changing its speech). That *WRTL-II* rejection controls this similar First Amendment case.

So Plaintiffs have actual injury, and the present Motion should be denied.

[4] This controlling opinion states the holding, *Marks*, 430 U.S. at 193, and is called "*WRTL-II*" herein without further "plurality" notation.

I. FEC's Motion Is Essentially Extra Summary-Judgment Briefing.

Preliminarily, note that FEC's Motion and Memo are essentially extra summary-judgment briefing though made under Rule 12(b)(1). (Mot. 1.) FEC did not move to dismiss under Rule 12(b)(1) in lieu of an answer. It filed an Answer. (Doc. 19.) It asserted no defenses. (Doc. 19 at 35.) *See* Fed. R. Civ. P. 12(b). Rather, in the Joint Scheduling Report (Doc. 20), "[t]he parties agree[d] that this case can be resolved on cross-motions for summary judgment, following discovery." (Doc. 20 at 3, #6.) And they agreed to a briefing schedule, with page limits, for the summary-judgment briefing to resolve this case. (Doc. 20 at 3-4, #6.)

FEC's discovery of Plaintiffs ended on January 29, 2015. Plaintiffs filed summary-judgment briefing on February 11, 2016. (Doc. 33.) On March 15, 2016, shortly before FEC's summary-judgment briefing was due, FEC moved to dissolve this three-judge Court and dismiss this case. This Motion to dissolve/dismiss should be denied because, as this Court already held in its Memorandum Opinion (Doc. 24 ("Mem. Op.")), "Plaintiffs have advanced substantial constitutional claims and have standing to pursue those claims." (Mem. Op. at 19.) That is unchanged, despite FEC's erroneous efforts to evade Plaintiffs' actual First Amendment injuries by reframing Plaintiffs' verified intent and injuries as something other than what they are.

Of course, standing may be raised at any time. But FEC could have raised it in agreed summary-judgment briefing, and it does so here on insubstantial arguments, purportedly based on newly discovered facts, but actually based on reframing Plaintiffs' claims in factually and constitutionally impermissible ways. An example is in the Introduction, *supra* at 1-2, where FEC simply twists what Plaintiffs say to something they do not say. Other examples are detailed below. Given FEC's insubstantial grounds for its Motion, this Motion seems an effort to make some FEC summary-judgment arguments twice.

II. Plaintiffs Have Actual Injury Under First Amendment Doctrine.

As shown in the Introduction, *supra* at 1-2, Plaintiffs have actual injury under First Amendment doctrine: (i) Challenged provisions ban/burden expressive activity/association that Plaintiffs want to do; (ii) Plaintiffs are chilled from doing that activity (though one inadvertently did some[5]); and (iii) the ban, burden, and chill give Plaintiffs standing to raise First Amendment claims against the challenged provisions. *Citizens United*, 558 U.S. at 336-40 (independent-communication prohibition is actual injury); *McCutcheon*, 134 S.Ct. at 1448-49 (2014) (contribution limit is actual injury); *American Booksellers*, 484 U.S. at 393 (chill is actual injury).

As noted, *supra* at 1-2, the core of this case is Plaintiffs' desire to use *nonfederal* funds—including funds currently in their state accounts and even at the level of just $1—for independent-communication FEA, which they cannot do because of the Ban. That is actual injury. Plaintiffs want to raise funds for FEA and do independent-communication FEA without complying with the challenged provisions, but they are chilled from doing so by fear of enforcement and penalties, which desire and chill they verified under penalties for perjury. (*See, e.g.*, Compl. ¶¶ 6-8, 74-76, 84, 86-87, 94, 97, 106, 113, 115.) That is actual injury. These actual injuries are further described next for each Plaintiff. FEC has not even tried to refute the following verified harms.

A. LAGOP Has Actual First Amendment Injury.

LAGOP has actual First Amendment harm. It generally verified its intent to do independent FEA without complying with challenged provisions, "as lawful" or "when legal to do so," thereby establishing intent, ban, burden, and chill (Compl. ¶¶ 6, 74, 75 (emphasis added)):

> **6.** .... LAGOP intends to do independent federal election activity without complying with the challenged provisions *as lawful*.
>
> **74.** ... LAGOP ... intended to do independent federal election activity in 2014 without

[5] *See infra* Part II.B.

complying with challenged provisions, *had it been legal to do so*, and [it] intend[s] to do so in 2015 and future years, *when legal to do so*. Examples are provided below.

75. LAGOP currently complies with the Ban, Fundraising Requirement, and Reporting Requirement by using all federal funds from a federal account for federal election activity. But its ability to do desired federal election activity is *burdened* by the inability to allocate costs to nonfederal funds as allowed before BCRA, and it *cannot do some* desired federal election activity due to this inability. LAGOP reasonably believes that it will have sufficient funds to pay for some or all of the examples of federal election activity described below if it may allocate them as possible absent the challenged provisions. But *it will not do some or all of the examples described below absent requested relief.*

LAGOP then verified its intent to do communications that would be VR[6] and GOTV for merely exhorting registration/voting, with examples (Compl. ¶ 84 (emphasis added)):

84. Plaintiffs *want* to make non-individualized communications exhorting registration and voting during applicable federal-election-activity periods that will be VR (voter-registration activity) and GOTV (get-out-the-vote activity) under the "encouraging or urging" standard of 11 C.F.R. 100.24(a)(2)(i)(A) and (3)(i)(A).... Nine examples follow.

But LAGOP said it would *not* do these example absent requested relief, i.e., it was *chilled* from intended speech. For example, LAGOP's first example involved independent expressive activity on its website that would become FEA "unless it is taken down" and that "LAGOP will take it down absent requested relief" (Compl. ¶ 85 (underlining added).)

85. *First*, LAGOP has on the home page of its *website* a drawn outline of Louisiana, across which are the words "click here to REGISTER TO VOTE" (linking to www.lagop.com/get-registered) and below which are the words "Get Registered." *See* www.lagop.com.[14] The imperative "Get Registered" is "[e]ncouraging or urging potential voters to register to vote," so this communication must be paid for with all federal funds starting November 6, 2015. Also currently on the website are Instagram images, one of which says "Geaux Vote Today," which referred to the last general election but will become get-out-the-vote activity (for exhorting voting) and require all federal funds for the communication on December 2, 2015, unless it is taken down.

LAGOP has also posted on its website a nonpartisan article merely exhorting registration and voting without promoting any political party as follows, www.lagop.com/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

[6] For abbreviations used herein, *see supra* note 2.

> 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!

The article provides hyperlinks to *state* election materials, which do not constitute federal election activity at any time. 11 C.F.R. 100.25(c)(7).[15] And this article is not federal election activity as this Complaint is filed. But it will become voter-registration activity on November 6, 2015 and get-out-the-vote activity on December 2, 2015, if it remains on the website. LAGOP will take it down absent requested relief.

> FN 14: The federal-election-activity definition excludes "*[d]e minimis* costs associated with" a party committee, on its website, "enabling visitors to download a voter registration form ...." 11 C.F.R. 100.24(c)(7)(ii). But the exception seems not to apply to "Get Registered."
>
> FN 15: The federal-election-activity definition excludes "*[d]e minimis* costs associated with" a party committee providing, on its website, hyperlinks to an election-board's site, downloadable registration and absentee-ballot forms, and voting dates, hours, and locations. *Id.*

LAGOP in fact *took down or altered the foregoing online speech* so as not to be FEA when the FEA periods arrived, as Plaintiffs advised the Court. (*See* Plaintiffs' Notice Regarding Changed Facts (Doc. 22) (describing changes to online speech and advising that Gov. Jindal (subject of an

intended ad) suspended his presidential campaign).) That is chill and altered behavior as a result of the challenged provisions, i.e., actual injury. LAGOP has not done the other examples of intended independent speech that would be FEA for exhorting registration/voting precisely because of the verified chill. (*See* Compl. ¶¶ 86 (email of nonpartisan article above "if it may do without complying with challenged provisions"); 88 (vote-Republican mail piece "if it may do so without complying with challenged provisions"); 89 (Democratic Outreach ad "if it may do so without complying with challenged provisions"); 90 (Voter Drive ad "if it may do so without complying with challenged provisions"); 91 (switch-registration mail piece and phone calls "if it may do so without complying with challenged provisions"); 92 (new-resident registration mail piece "if it may do so without complying with challenged provisions"); 93 (absentee-voting mail piece "if it may do so without complying with challenged provisions").)

LAGOP then verified its intent to do communications that would be FEA as VID communications "if it may do so without complying with challenged provisions." (Compl. ¶ 94 (with example and description of additional burden of not being able to use off-year VID in election year unless LAGOP accepts burdens of challenged provisions in off year, ¶¶ 95-96).) That is chill.

LAGOP then verified its intent to do GCA communications "if it may do so without complying with challenged provisions." (Compl. ¶ 97.) That too is chill. LAGOP then provided examples of intended CGA communications "if it may do so without complying with challenged provisions." (Compl. ¶ 98.) Chill again. Then followed two examples of such chilled ads, which have never been run: African-American Outreach (for Black History Month) (Compl. ¶ 99) and Youth Outreach (Compl. ¶ 100).

LAGOP then verified its intent to do PASO communications "when legal to do so without complying challenged provisions." (Compl. ¶ 101.) Once more, chill. LAGOP then provided ex-

amples of intended PASO communications that remain chilled. (Compl. ¶¶ 103-05.)

LAGOP then verified its intent to provide employee compensation without the FEA 25% rule "when legal without complying with challenged provisions." (Compl. ¶ 106.) Again, chill.

LAGOP intends to spend over $5,000 on FEA this year and next, making it subject to the challenged Reporting Requirement, but though LAGOP intends to do the FEA it does not want to comply with the Reporting Requirement's stricter reporting requirements. (Compl. ¶ 110.) That is a cognizable First Amendment burden, which provides standing.

LAGOP verified that "[i]n 2014, [it] wanted to use approximately $100,000 in nonfederal funds for federal election activity, but could not because it did not want to do so under the challenged provisions." (Compl. ¶ 111.) That is further evidence of its First Amendment chill.

The foregoing verified statements readily establish that (i) LAGOP engages, or intends to engage in, independent, expressive activities that constitute FEA, (ii) such activities are banned (as to using nonfederal funds) or burdened by challenged provisions, (iii) LAGOP is chilled from most such activity, and (iv) for FEA from which LAGOP is not chilled, it is burdened by the restrictions on which funds it may use (the Ban), by how it may raise funds to be used for FEA (the Fundraising Requirement), and by increased reporting requirements (the Reporting Requirement). And LAGOP's summary-judgment briefing has been entirely consistent with the intent and injuries verified in the Complaint[7] as were its discovery responses[8] as discussed further in Part III.A. Based on these First Amendment harms, LAGOP has actual injury. So FEC's dissolve/dismiss Motion (premised on lack of actual injury) should be denied as to LAGOP.

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[7] Plaintiffs state this case's core in opening their Summary-Judgment Memo: "The central focus of their case is [Plaintiffs'] desire to use 'nonfederal' funds[] for independent communications qualifying as ...'FEA'[]." (Doc 33 at 1.)

[8] *See, e.g.*, LAGOP's 1st Disc. Resp. 2 (FEC Ex. 1) ("Plaintiffs seek to ... engage in federal election activity ... *using nonfederal funds*" (emphasis in original)).

B. JPGOP Has Actual First Amendment Injury.

JPGOP also has actual First Amendment injury, for essentially the same reasons as LAGOP. The Verified Complaint establishes that JPGOP generally intends to do independent FEA without complying with challenged provisions, "as lawful" or "when legal to do so," thereby establishing intent, ban, burden, and chill (Compl. ¶¶ 7, 74, 76 (emphasis added)):

> **7.** ... [JPGOP] intends to engage in independent federal election activity without complying with the challenged provisions *as lawful*, *but absent requested relief will not*.
>
> **74.** ... JPGOP, and OPGOP intend[] to do independent federal election activity ... without complying with challenged provisions ... in 2015 and future years, *when legal to do so*....
>
> **76.** JPGOP and OPGOP do not currently do federal election activity because of the complexity and burden of compliance, including creating a federal account to fund such activity, they want to do independent federal election activity without complying with the challenged provisions, and they will not do their intended activities absent requested relief.[9]

JPGOP intends to do independent communication that would be VR and GOTV for merely exhorting registering/voting (Compl. ¶ 84):

> **84.** Plaintiffs want to make non-individualized communications exhorting registration and voting during applicable federal-election-activity periods that will be VR (voter-registration activity) and GOTV (get-out-the-vote activity) under the "encouraging or urging" standard of 11 C.F.R. 100.24(a)(2)(i)(A) and (3)(i)(A)....

JPGOP's example was an inexpensive email with content like the nonpartisan "Get Registered" article formerly on LAGOP's website, *see supra* at 5-6 (Compl. ¶ 85), but JPGOP is chilled (Compl. ¶ 87 (underlining added)):

> **87.** JPGOP and OPGOP want to *email* a nonpartisan article substantially similar to the nonpartisan article described in ¶ 85, with links of the sort excluded from "federal election activity" if done on a *party committee's website*, 11 C.F.R. 100.24(c)(7), <u>if they may do so</u>

[9] FEC has raised an issue concerning whether the local committees must establish a federal account to do FEA under $5,000 per year, which is discussed below. *See infra* at 36-37, 39-42. But even if they do not, (i) "the complexity and burden of compliance" that the challenged provisions impose exists without such a federal-account burden and (ii) if these Plaintiffs ever exceed the $5,000 line, as they express their hope to do, FEC does not dispute that they will have to form a federal account. So even absent the one requirement, the local committees have cognizable First Amendment harm, i.e., actual injury.

without complying with challenged provisions. Such an email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015.

Moreover, JPGOP actually inadvertently *did* FEA with nonfederal funds in violation of the challenged provisions. So it has the additional actual injury of being subject to enforcement. The incident involved independent communications posted on OPGOP's website that constituted FEA because of their content and timing, as set out in detail in Plaintiffs Statement of Material Facts Not in Genuine Dispute at ¶ 76 (quoting JPGOP 1st Disc. Resp. at 22-25 (Ex. 1 to Statement).)

The foregoing verified statements readily establish that JPGOP has actual harm similar to, and for essentially the same reasons as, LAGOP: (i) JPGOP has engaged, and intends to engage, in independent-communication FEA using nonfederal funds, (ii) such activity is banned or burdened by challenged provisions, and (iii) JPGOP is chilled from such activity. Based on these First Amendment harms, JPGOP has actual injury. So FEC's dissolve/dismiss Motion (premised on lack of actual injury) should be denied as to JPGOP.

C. OPGOP Has Actual First Amendment Harm.

OPGOP also has actual First Amendment injuries for essentially the same reasons that LAGOP and JPGOP do. The Verified Complaint establishes that JPGOP generally intends to do independent FEA without complying with challenged provisions, "as lawful" or "when legal to do so," thereby establishing intent, ban, burden, and chill (Compl. ¶¶ 8, 74, 76):

> **8.** ... [OPGOP] intends to engage in independent federal election activity without complying with the challenged provisions as lawful, but absent requested relief will not.
>
> **74.** ... JPGOP, and OPGOP intend[] to do independent federal election activity ... without complying with challenged provisions ... in 2015 and future years, *when legal to do so*....
>
> **76.** JPGOP and OPGOP do not currently do federal election activity because of the complexity and burden of compliance, including creating a federal account to fund such activity, they want to do independent federal election activity without complying with the

challenged provisions, and they will not do their intended activities absent requested relief.[10]

OPGOP intends to do independent communication that would be VR and GOTV for merely exhorting registering/voting (Compl. ¶ 84):

> **84.** Plaintiffs want to make non-individualized communications exhorting registration and voting during applicable federal-election-activity periods that will be VR (voter-registration activity) and GOTV (get-out-the-vote activity) under the "encouraging or urging" standard of 11 C.F.R. 100.24(a)(2)(i)(A) and (3)(i)(A).... Nine examples follow.

OPGOP's example was an inexpensive email with content like the nonpartisan "Get Registered" article formerly on LAGOP's website, *see supra* at 5-6 (Compl. ¶ 85), but OPGOP is chilled (Compl. ¶ 87 (underlining added)):

> **87.** JPGOP and OPGOP want to *email* a nonpartisan article substantially similar to the nonpartisan article described in ¶ 85, with links of the sort excluded from "federal election activity" if done on a *party committee's website*, 11 C.F.R. 100.24(c)(7), <u>if they may do so without complying with challenged provisions</u>. Such an email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015.

The foregoing verified statements readily establish that OPGOP has actual harm similar to, and for essentially the same reasons as, LAGOP and JPGOP: (i) OPGOP intends to engage in independent-communication FEA using nonfederal funds, (ii) such activity is banned or burdened by challenged provisions, and (iii) OPGOP is chilled from such activity. Based on these First Amendment harms, OPGOP has actual injuries. So FEC's dissolve/dismiss Motion (premised on lack of actual injury) should be denied as to OPGOP.

III. FEC Erroneously Reframes Plaintiffs' Claims and Harms.

Though Part II establishes that all Plaintiffs have actual injury under standard First Amendment doctrine, FEC tries to resist this by erroneously reframing Plaintiffs' actual claims and injuries, as discussed next. Preliminarily, note that FEC's current effort is in the same genre as its

[10] FEC has raised an issue concerning whether the local committees must establish a federal account to do FEA under $5,000 per year, but even if they need not, they yet have actual First Amendment injury. *See supra* note 9. *See also infra* at 36-37, 39-42.

rejected effort to prove that Plaintiffs challenge the base limit: "[P]laintiffs' ... complaint avoids mentioning FECA's $10,000 base annual limit on contributions to state and local committees in order to avoid admitting the obvious—that they are again challenging this limit." (FEC's Three-Judge Opp'n 1 (Doc. 15).) This Court rejected that: "Plaintiffs have ... standing because ... the relief they seek can be achieved by invalidating BCRA's soft-money ban while leaving FECA's base limits in place." (Mem. Op. 4.) As discussed next, FEC again claims this case challenges the base limit, and in trying to prove it posits a convoluted, erroneous argument that is inconsistent with its argument that the base limit is challenged.[11] Once again that claim and FEC's attempted reframing of LAGOP's actual claims and asserted harm should be rejected.

A. FEC Erroneously States LAGOP's Claims and Asserted Harm.

FEC erroneously states LAGOP's claims and asserted harm. (Mem. 15-20.) By beginning with what the challenged provisions require and what LAGOP seeks, FEC's errors become clear.

What do the challenged provisions require? The Ban prohibits LAGOP from *using* non-federal funds (not compliant with FECA's "limitations, prohibitions, and reporting requirements"[12]) for FEA. The Fundraising Requirement mandates that funds used for FEA be *raised* using federal funds. 52 U.S.C. 30125(c). And the Reporting Requirement requires LAGOP to

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[11] The claim that Plaintiffs *challenge* the base limit ($10,000) on individual contributions is inconsistent with its argument that the only funds *at issue* are *sub*-base-level individual contributions. (Mem. 17.) But both claims are factually and analytically erroneous. *See* Part III.A.

[12] The *Ban* does this as follows, 52 U.S.C. 30125(b)(1) (emphasis added):

> **(b) State, district, and local committees**
>
> **(1) In general**
>
> Except as provided in paragraph (2) ["Levin funds"], an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from *funds subject to the limitations, prohibitions, and reporting requirements of this Act*.

report FEA-related activity monthly at the level of $200 per calendar year from a donor, 52 U.S.C. 30104(e), which is done by LAGOP's federal-account (registered as a federal PAC).

What does LAGOP want to do? It wants to do independent-communication FEA with nonfederal funds (including current funds in its state account and at the level of just $1). The Ban prevents that. It wants to use funds for FEA that did not have to be raised using federal funds. The Fundraising Requirement prevents that. It wants its federal account to do ordinary PAC disclosure without the Reporting Requirement overlay. The Reporting Requirement prevents that.[13] It simply wants to what the challenged provisions forbid, and it believes no anti-corruption interest justifies the challenged provisions' bans and burdens.

Regarding the Ban in particular, LAGOP simply wants to do what the Ban prohibits: use nonfederal funds for independent-communication FEA. LAGOP's *non*-FECA-compliant funds are in its state account. The state-account funds are not usable for FEA and are *non*federal funds because, inter alia, (i) they were not raised using federal funds, (ii) LAGOP does not screen them for compliance with federal source-and-amount restrictions and Louisiana has a higher contribution limit and allows corporate/union contributions, and (iii) LAGOP does not do any sort of federal reporting concerning them. LAGOP wants to pay for its independent-communication FEA with nonfederal funds in its state account, including with funds *already on hand in the state account* and *even at the level of $1*.

So this case is not limited to funds to be *raised*, because it includes funds *on hand*. This case is not limited to funds *over a certain amount*, because if there is *even $1* in LAGOP's state account (there is) LAGOP wants to use that for independent communications for FEA. This case is

[13] As an *alternative*, only if necessary to gain requested relief, LAGOP wants do its independent communications constituting FEA through an independent-communications account ("ICA"), which would only receive contributions from *individuals* and would *comply* with the Reporting Requirement. (Compl. ¶¶ 1, 109, 132, 137-38 (Count II(b)).)

not limited to *individual* contributions, because Louisiana permits corporate/union contributions and LAGOP wants to use those for FEA (except under the ICA alternative in Count II(b)). This case is not about how LAGOP *decides* to put funds in one account over another, or about how LAGOP *screens* funds for FECA or Louisiana compliance, because LAGOP wants to do independent-communication FEA using *both* what is *now* in its account and what LAGOP *will put* in its state account.

LAGOP has provided numerous examples of independent communications constituting FEA for which it would like to spend even $1 from its state account. *See* Part II.A. But LAGOP cannot use those nonfederal funds in its state account for its desired FEA because they do not comply with FECA source-and-amount rules, the Fundraising Requirement, and the Reporting Requirement. So it is banned as to some FEA it would like to do, burdened as to some FEA it does (using federal funds and reporting monthly), and chilled from desired activity. The ban, burden and chill are First Amendment injuries to LAGOP's rights to free expression and free association[14] that FEC must justify with an anti-corruption interest that is absent given the independence of planned communications.

This Court has recognized the nature of this case as described above. It has recognized that "Plaintiffs ... characterize their injury as simply being prevented from spending funds from state-party-committee accounts on federal election activities." (Mem. Op. 3.) And this Court has recognized that what Plaintiffs seek to do may be achieved by invalidating the Ban. (*Id.* 4.)

Given the foregoing, FEC's description of LAGOP's claims and harms is a nearly unrecognizable (and erroneous) reframing. (Mem. 15-20.) Note two key FEC passages from FEC's argu-

[14] As stated in the Introduction, *supra* at 1-2, the Ban's First Amendment "ban" or "burden" is actual First Amendment injury, *Citizens United*, 558 U.S. at 336-40; *McCutcheon*, 134 S.Ct. at 1448-49, as is Plaintiffs' chill, *American Booksellers*, 484 U.S. at 393.

ment that LAGOP lacks standing. In the first, FEC sets up its argument:

> LAGOP lacks standing because discovery shows it does not reasonably anticipate receiving any individual contributions that it cannot spend on FEA. LAGOP is not aware of any individual contributor wishing to give it more than the federal limit of $10,000 [citations omitted]. Because any funds raised within that limit are federally compliant and can easily be identified as such, LAGOP's claim based upon the receipt of hypothetical nonfederal funds is fictitious.

(Mem. 15-16.) FEC's attempted reframing there is self-evident, but it will be analyzed in detail.

In the second key passage, FEC announces what it believes it has shown—a base-limit challenge:

> There is not a single dollar that LAGOP has or expects to receive from an individual that it is prevented from using on the FEA it alleges it would like to do. Its *choice* not to use its FECA-compliant funds on FEA, because it would prefer to spend those funds on other things, is "self inflicted harm [that] doesn't satisfy the basic requirements for standing." [citation omitted] And even if LAGOP or one of the other plaintiffs were now to produce a donor wishing to give it more than $10,000, plaintiffs claims have been revealed to be what the FEC has said all along: a hypothetical challenge to "FECA's $10,000 base annual limit on [individual] contributions to state and local committees" (Three-Judge Court Opp'n at 1) that this Court lack jurisdiction to redress [citation omitted].

(Mem. 19 (emphasis in original).) That is remarkable: FEC simultaneous claims that (i) Plaintiffs challenge the $10,000 base limit (despite the absence of such a challenge in the Complaint and the rejection of that erroneous notion by this Court (Mem. Op. 4)) and (ii) this case is solely about *sub*-base-limit individual contributions. FEC can't have it both ways. But of course Plaintiffs neither challenge the base limits nor is this case solely about sub-FECA-base-limit individual contributions. And this Court has already rejected FEC's reframing thus (Mem. Op. 4):

> Depending on the contribution limits in the relevant state, if any, an individual or corporation would be able to contribute sums in excess of the existing FECA-imposed federal limits to a state party, and the party could then deposit those funds in a state account and use them to engage in 'independent' federal election activity on a scale that would be impossible under existing law.

FEC's argument is in four parts. The fourth (a self-inflicted-harm claim) is FEC's goal, and the first three parts attempt to set up a self-inflicted harm. The parts are: (1) LAGOP only wants

to use donations *from individuals*; (2) no individual wants to give more than the FECA base limit; (3) sub-base-limit contributions from individuals could be put in LAGOP's federal account for doing FEA; so (4) LAGOP's choice not to put sub-base-level donations from individuals into its state account for doing FEA is a self-inflicted harm removing standing. The argument is erroneous for multiple reasons, discussed next under those four parts.

(1) FEC's foundation—that LAGOP wants to use donations from *only individuals* for intended FEA—is erroneous. Nowhere has any Plaintiff said that, and FEC cites no such statement. To the contrary, Plaintiffs have expressly indicated otherwise, as FEC admits: "[P]laintiffs' discovery responses and deposition answers mention that they would like to use corporate contributions on FEA (*e.g.* Exh.1, LAGOP Disc. Responses at 24-25 (Interrogatory #3))." (Mem. 16 n.4.) But the actual interrogatory answer establishes that Plaintiffs want to use whatever nonfederal funds may be in a state account, including corporate/union donations, which Louisiana allows:

> As Plaintiff understands the question, it is simply this: Do Plaintiffs seek to use corporate or union contributions for FEA as part of this case? Plaintiffs simply seek to use nonfederal funds in a state account, with the question of what may be in a political party's state account left to state law. To the extent that state law allows Plaintiffs to have corporate and union contributions in their state accounts, then they want to do so and want to be able to use all lawful funds in their state accounts for FEA should they cho[o]se to do so. As an alternative, Plaintiffs have also said that if the only way they may get requested relief is to use an independent-communications-only account ("ICA") that "would contain only contributions from individuals" (Doc. 1, ¶ 132), then that is what they want to do as an alternative. So whether corporate funds could be used would depend on the relief granted ....

So LAGOP *wants* to use corporate/union donations, including any currently in its state account.[15] But as an *alternative*, and only if necessary to gain requested relief, LAGOP wants do its independent communications constituting FEA through an ICA receiving contributions from individuals. (Compl. ¶¶ 1, 109, 132, 137-38 (Count II(b)).) Whether LAGOP may only get requested

[15] LAGOP does receive corporate donations. For example its state report shows a $1,000 contribution on July 13, 2015, from "PETRO MARINE UNDERWITERS INC." http://ethics.la.gov/CampaignFinanceSearch/ShowEForm.aspx?ReportID=49807.

relief as applied to an ICA is a merits-briefing issue to be settled on the basis of FEC's ability to prove an anti-corruption interest and proper tailoring for the alternative challenges. But for present, FEC is wrong to claim that "[c]orporate contributions are therefore excluded from the case" (Mem. 16) and "the only nonfederal source of funds at issue is LAGOP's individual contributions" (Mem. 17).

FEC's other arguments on this point cannot alter the foregoing, but note other errors. FEC says that "LAGOP's claims have *focused* on individual donors *as the only source of funds at issue*." (Mem. 15 (emphasis added).) But LAGOP clearly indicated in the above interrogatory answer that it wants to use corporate/union donations for its independent communications constituting FEA, so regardless of any perceived "focus" FEC is wrong to say LAGOP wants "individual donors as the only source of funds at issue." And no "focus," even if it were true, can alter the fact that corporate/union donations are at issue as stated in the interrogatory answer. (Plaintiffs also *focus* on the Ban, but that does not mean they do not also challenge the derivative Fundraising Requirement and Reporting Requirement.) FEC's quote from the expedition-motion reply (Doc. 18 at 1) to the effect that Plaintiffs want to use donations from individuals for independent communications (Mem. 16) does not establish that corporate/union funds are "excluded from the case" (*id.*). FEC says the *ICA* "would 'only solicit contributions from individuals,' not corporations or unions" (Mem. 16 (quoting Compl. ¶ 137)), but that *ICA alternative* to Plaintiffs' other challenge shows that the *rest* of Plaintiffs' challenges *do* include corporate/union donations. FEC recites that Plaintiffs said funds for FEA would not include "'contributions by national banks and congressionally authorized corporations "in connection with *any* election"'" (Mem. 16 (quoting Compl. ¶ 107 (citing 52 U.S.C. 30118(a)) (emphasis added))), but there is more than one part to 52 U.S.C. 30118(a), and Plaintiffs only cited the part banning contributions by corporations *cre-*

ated by Congress, not the ban on *other* corporations, which latter applies only "in connection with" *federal* elections.[16] So state and local committees in Louisiana may have corporate donations in their state accounts,[17] which they may use if the Ban is held unconstitutional (unless only as applied to an ICA), and Plaintiffs did not say they would eschew corporate donations here as FEC claims. Finally, FEC's claim that "this Court lacks the authority to invalidate FECA's ban on corporate contributions in 30118(a)" (Mem. 16 n.4) is true but a red herring. Just as Plaintiffs do not challenge the base contribution limit, but that does not affect this case, so Plaintiffs do not challenge the corporate-contribution ban, but that does not affect this case. If the Ban is declared unconstitutional, Plaintiffs may use nonfederal funds in their state accounts, which may contain funds beyond the federal base limit and from corporate/union donations (unless relief is granted only as applied to an ICA).

Moreover, LAGOP's deposition answer was unequivocal in stating that corporate contributions are a primary source of the funds it wishes to use for FEA. When asked about "primary sources of nonfederal money" to be used for FEA, Jason Doré included "[c]orporations and LLCs." (LAGOP 30(b)(6) Dep. 125:11-18 (Ex. 1) So LAGOP *expressly said* it wants to use corporate contributions for intended FEA. And FEC is wrong that LAGOP just focuses on individual contributions and that corporate contributions are not at issue in funds that may be used for FEA.

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[16] In the Amended Complaint, Plaintiffs quoted 11 C.F.R. 300.30(b)(3)(iv) for the proposition that "'[i]n connection with a Federal election' 'includ[es] payments for Federal election activities.'" (Compl. ¶ 37 (quoting 11 C.F.R. 300.30(b)(3)(iv).) In the Answer (Doc. 19), FEC does not admit that, but disputes it, asserting that "the section does not define 'in connection with,' despite plaintiffs' suggestion that it does." (Answer ¶ 37.) Before BCRA's FEA restrictions, activity now included in the FEA definition was considered "in connection with" *both* federal and state elections, leading to FEC's allocation scheme that BCRA rejected. (Compl. ¶¶ 10-27.)

[17] LAGOP *has* received corporate donations in its state account. *See supra* note 15.

In sum, FEC is wrong that "[c]orporate contributions are ... excluded from the case" (Mem. 16) and that "the only nonfederal source of funds at issue is LAGOP's individual contributions" (Mem. 17).[18] In fact, corporate donations and data fees have been placed in the LAGOP state account that it wants to use for independent-communication FEA. And LAGOP wants to use nonfederal funds from sources other than individuals in the future. There should be no mistake about what LAGOP wants to do, not only because it has been repeatedly stated but also because FEC expressly asked the following question to LAGOP Executive Director Jason Doré to which he assented: "[A]m I understanding your answer correctly to be as follows; that what the plaintiffs would like to do is spend these nonfederal dollars from not necessarily FECA compliant sources and spend that on F.E.A.?" (LAGOP 30(b)(6) Dep. 127:7-14 (FEC's Ex. 4).) So LAGOP does not just want to use FECA-compliant donations from individuals for its independent-communication FEA. And consequently, FEC's foundation crumbles. (And the only reason FEC tries to lay this flawed foundation is its erroneous self-inflicted-harm claim.)

(2) The second part of FEC's argument—the first floor of the superstructure built on the now-crumbled foundation—is that no *presently known* individual wants to give LAGOP more than the FECA base limit ($10,000 per year). (Mem. 17.) That fact is immaterial to LAGOP's First Amendment harm, i.e. that its First Amendment rights are violated by the challenged provisions

[18] FEC also attempts to remove qualifying fees and data fees from the analysis, but again erroneously. (Mem. 16-17.) FEC says LAGOP puts those in its federal account (Mem. 17), which it may. But LAGOP's Executive Director specifically said in deposition that data fees are presently in LAGOP's state account. (LAGOP 30(b)(6) Dep. 110:12-13 (FEC Ex. 4).) And FEC erroneously asserts that "LAGOP admits that the qualifying fees are 'not relevant' to its claims, a 'matter of state law,' and 'not relevant to this case.'" (Mem. 17 (quoting interrogatory response #7).) But LAGOP actually objected to the *interrogatory* as "*not relevant* to any cognizable claim or defense," which is true, and LAGOP said, "Plaintiffs want to use nonfederal funds from their state account for doing FEA ...." (LAGOP Disc. Resp. 28, #7 (emphasis added).) LAGOP said, "What a state permits ... is *a matter of state law*, *not relevant to this case*." (*Id.* (emphasis added).) Those statements neither modify "qualifying fees," as FEC represents (Mem. 17), nor support the claim that only individual contributions are at issue.

now because it cannot freely use nonfederal funds—including funds *on hand* and at the level of *$1*—in its state account for independent-communication FEA. This injury, occurring at the level of *$1* of funds *on hand*, is unaffected by the absence of a *presently known* donor wanting to give $10,001. Of course, FEC is trying to make this case only about sub-base-limit individual contributions to get to its self-inflicted harm claim. But FEC's effort must fail because (i) more than donations by individuals are at issue and (ii) the injury occurs at the level of $1 of funds on hand and does not turn on a future donation of $10,001.[19]

(3) The third part of FEC's argument—the second floor of the superstructure built on the now-crumbled foundation and collapsed first floor—is that sub-base-limit donations from individuals could be put in LAGOP's federal account for doing FEA. They could be, if they are otherwise compliant with FECA.[20] But that does not alter LAGOP's injury, i.e., that it cannot freely

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[19] Moreover, FEC's argument is too narrow, i.e., that LAGOP knows of no person *presently* wanting to give LAGOP over $10,000. As this Court recognized, this challenge would *allow* persons to do so. (Mem. Op. 4.) And FEC's own online reports show that LAGOP has *received* contributions at the $10,000 level (the maximum contribution limit allowed to the federal account). *See, e.g.*, http://docquery.fec.gov/cgi-bin/fecimg/?201512149004177786 ($10,000 contribution on November 4, 2015 from "Mr. Dave Roberts"). And as FEC acknowledges, when LAGOP receives contributions it puts permissible funds (screened contributions up to the base limit from individuals) in its federal account first, with the rest in its state account. (Mem. 18.)

[20] FEC dubs "applesauce" LAGOP's description of a screening problem ("SP") involved with state and local committees trying to determine whether particular funds are FECA compliant. (Mem. 18.) The problem arises from several factors, including that the plaintiffs share the $10,000 base limits so that it is extremely difficult for a particular committee to know whether a particular contribution is FECA-compliant by determining, inter alia, whether the individual has donated to another in-state committee and whether another such committee has done FEA, thereby converting funds in its state account into federal funds that must be accounted for. Typically state committees do FEA and the local committees do not, to simplify matters. But as happened here, a local committee may inadvertently do FEA, which converts some state funds to federal funds that must be identified and accounted for. The SP is explained in greater detail in FEC's Ex. 1 (LAGOP Disc. Resp. 17-19, #14.) LAGOP's Executive Director also explained the SP problem succinctly as to local committees: "[N]o local party is going to take on the burden to check on all 64 parties to see if they have received contributions in filing with the FEC and paying $3,000 a month to people like Red Curve in getting that done." (LAGOP 30(b)(6) Dep. 126:3-7 (FEC's Ex. 4).) The foregoing proves the SP no "applesauce," despite FEC's ignoring

use nonfederal funds—including funds *on hand* and at the level of *$1*—in its state account for independent-communication FEA. That injury is unaffected by whether sub-base-limit donations from individuals could be put in the federal account for doing FEA. This is part of FEC's effort to make this case just about individual contributions under the base limit, which is erroneous because (i) more than donations by individuals are at issue, (ii) the injury occurs at the level of $1 of funds on hand, and (iii) that injury does not turn on what funds are put where.

FEC says LAGOP's policy is to put permissible contributions into its federal account first, then remaining amounts into its state account. (Mem. 18.) That is so. LAGOP must have federal funds for much of what it does—federal contributions, independent expenditures, and currently *all* FEA (setting aside Levin funds not at issue here). And federal funds are the most versatile because they can be used for most anything, while state funds are limited in use. So a state committee that does not prioritize putting donations into its federal account, where both permissible and practical, would be less effective. But that policy does not alter the injury of not being able to use funds in the state account—including those on hand and at the level of even $1—for independent-communication FEA. And some state-account funds could not be made FECA compliant by being placed in the federal account because of FECA's source-and-amount restrictions (i.e., this case is not just about contributions from individuals). So the policy does not affect the constitutional analysis that requires requested relief for LAGOP.

Then FEC makes its lynchpin arguments: (i) that "LAGOP does not actually want" to use "federally-permissible funds for FEA"; (ii) that LAGOP "wishes ... to 'free[] up' ... its federal money for use on other federally permissible expenditures—such as independent expenditures";

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the SP by asking no specific deposition questions about the SP and by reciting generalized deposition answers about the purported ease of screening. (Mem. 18.) Anyway, the SP was asserted to explain the difficulty of responding to discovery requests. It does not alter the outcome of the controlling First Amendment analysis in text above, though it is a further indication of burden.

(iii) that "though it *can* use FECA-compliant contributions on FEA, it would *prefer* to use other, hypothetical nonfederal funds on FEA so that FECA-compliant funds can be saved for other federal uses that LAGOP values more." (Mem. 19 (emphasis in original; citations omitted).)

These assertions contain some inaccurate allegations (to which we shall return), but focusing first on the *free-up-funds argument*, the question arises: So? *Of course* political parties want to free up funds. Federal funds are more difficult to raise than nonfederal funds because of the source-and-amount restrictions, yet only federal funds can be used for federal contributions, federal independent expenditures, and FEA. Even if Plaintiffs are successful in their challenges, they expect that FEC will reintroduce the allocation scheme that requires part of what is defined as FEA to be paid for with federal funds. So state committees need as many federal funds as possible, which is why LAGOP puts individual contributions into the federal account first where permissible and practical. For the same reason, things that need not be funded with federal funds are not funded with federal funds where practical. And for the same reason, it is true that LAGOP does not want to use "federally-permissible funds for FEA" where the First Amendment protects its right not to do so. But that is the *issue* here, not something that eliminates standing.

And the same applies to FEC's claim that there is some case-ending problem because LAGOP "would *prefer* to use ... nonfederal funds on FEA so that FECA-compliant funds can be saved for other federal uses ...." (Mem. 19 (references to "hypothetical" and "values more" are removed from this quote because they are unsupported by the evidence, erroneous, and beside the present point).) *Of course* LAGOP wants to do that. And the *issue* this case raises is whether the First Amendment protects LAGOP's right to that preference.

FEC may not use the *issue* here—whether LAGOP constitutionally may choose to use nonfederal funds for independent-communication FEA—to defeat *standing*. Otherwise, WRTL

would not have had standing to challenge the ban on corporate electioneering communications because it *preferred* to use its general-corporate-fund (not PAC) money for its ads and *chose* to communicate in ways that fit the "electioneering communication" definition (broadcast, naming a candidate, during blackout periods). *See WRTL-II*, 551 U.S. 449, 477 n.9 (rejecting FEC's argument that WRTL should just use alternatives). Under FEC's theory here, WRTL's choice would have been a self-inflicted harm eliminating standing, but such a just-do-something-else argument was rejected. *See infra* at 24-25. It must again be rejected, despite FEC's attempt to conceal it in different garb.

Moreover, the contributions at issue are not merely "hypothetical" for reasons detailed above, including the fact that LAGOP wants to use even $1 on hand for FEA (so there is no need to know someone *presently* wanting to give $10,001). And LAGOP has strong incentives to maximize its federal funds, not because it "values" some "federal uses" over others (though that would not be illicit), but because it needs federal funds for many things, including FEA, and will continue to need it for FEA if it receives requested relief (because of likely FEC allocation requirements). So incentives exist, and will remain, for LAGOP to put as much money as *practical*[21] in its federal account. In any event, FEC's whole argument about possibly FECA-compliant individual contributions being put in the state account is about possibly "5,000." (LAGOP 30(b)(6) Dep. 119:22 ("I guess $5,000) (FEC's Ex. 4).) The existence of that amount in the state account cannot, under any theory, possibly remove standing where FEC argues that "plaintiffs[] attempt to 'eviscerate' FECA's soft money contribution limits." (Mem. 21 (quoting Mem. Op. at 7) (FEC's emphasis omitted).) And this is especially so in a case where LAGOP

[21] FEC says some possibly FECA-compliant individual contributions are put in the state account for "convenience," but LAGOP's representative said such was done "where it's not practical." (LAGOP 30(b)(6) Dep. 111:1-2 (FEC's Ex. 4).)

verified that "[it] wants to make disbursements of over $5,000 per calendar year for federal election activity in 2015 and 2016" (Compl. ¶ 110) and "[i]n 2014, [it] wanted to use approximately $100,000 in nonfederal funds for federal election activity" (Compl. ¶ 111).

So FEC's lynchpin arguments fail factually and analytically. And they provide no structure on which to build FEC's self-inflicted-harm argument, considered next.

(4) The fourth part of FEC's argument—the third floor of the superstructure built on the now-crumbled foundation and collapsed lower floors—is that LAGOP's "*choice* not to use its FECA-compliant funds on FEA, because it would prefer to spend those funds on other things, is a 'self-inflicted harm [that] doesn't satisfy the basic requirements for standing.'" (Mem. 19 (quoting *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006).)[22] At last, FEC gets to the crux of its argument toward which its prior assertions were bent—self-inflicted harm. FEC puts it last, but it should have been first because with its refutation any perceived need to reframe claims vanishes.

Factually, as just established, this argument fails because only possibly $5,000 could be the subject of this alleged self-inflicted-harm accusation. That could not remove standing, especially where LAGOP wants to do more than that amount and FEC claims limit-evisceration.

Legally, this self-inflicted-harm argument is really a just-do-something-else argument, which has repeatedly been made by FEC and rejected by the Supreme Court in controlling cases.

First, *WRTL-II*, 551 U.S. 449, rejected the just-do-something-else argument. Because the case was a facial challenge to the ban on corporate electioneering communications (held unconstitu-

[22] *Gonzales* is readily distinguishable because the plaintiff there could have eliminated all harm by choosing a path they rejected, but which did not involve constitutionally protected free expression and association as involved here, and *Gonzales* is also not controlling because there are on-point, First Amendment, controlling cases, discussed below, that expressly reject the just-do-something-else argument FEC attempts here.

tional in *Citizens United*, 558 U.S. 310), FEC argued that WRTL should just *choose* to avoid the "electioneering communication" definition by (i) using a PAC, (ii) doing non-broadcast ads, or (iii) changing its speech,[23] all of which were rejected as follow, 551 U.S. at 477 n.9:

> First, the dissent overstates its case when it asserts that the "PAC alternative" gives corporations a constitutionally sufficient outlet to speak.... PACs impose well-documented and onerous burdens, particularly on small nonprofits. See *MCFL,* 479 U.S. 238, 253-255 (1986) (plurality opinion). *McConnell* [*v. FEC*, 540 U.S. 93 (2003),] did conclude that segregated funds "provid[e] corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy" and its functional equivalent, 540 U.S., at 203, but that holding did not extend beyond functional equivalents—and if it did, the PAC option would justify regulation of all corporate speech, a proposition we have rejected, see *Bellotti,* 435 U.S., at 777-778. Second, the response that a speaker should just take out a newspaper ad, or use a website, rather than complain that it cannot speak through a broadcast communication, ... is too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness. See *McConnell v. FEC,* 251 F.Supp.2d, at 569-573, 646 (Kollar-Kotelly, J.). Third, we disagree with the dissent's view that corporations can still speak by changing what they say to avoid mentioning candidates .... That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says "I disagree with the draft," cf. *Cohen v. California,* 403 U.S. 15 (1971), or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices, cf. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). Such notions run afoul of "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 573 (1995).

Here, too, FEC is "too glib," *id.*, with its just-do-something-else argument (a Cohen-wear-a-different-jacket argument). FEC's arguments here are a reprise of rejected arguments. To have

[23] FEC has made these arguments before, in this Court, without success. In the *WRTL* district court, FEC argued that WRTL must prove alternatives unconstitutionally burdensome, including (i) using a PAC (or restructuring itself as an "*MCFL* organization"), (ii) changing the nature of its message (by not referring to a federal candidate), or (iii) changing the nature of its communications (by not using broadcasting). FEC's Mot. Summ. J. 21-26 (Doc. 82), No. 04-1260, *WRTL v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006) (three-judge court). FEC argued self-inflicted harm (that WRTL had not really worked to fund its PAC) and that WRTL's problem was a lack of public support for its PAC, so that WRTL should not be allowed to challenge the ban on its use of corporate general funds. *Id.* at 22-26. This Court held, "Because we conclude that the Government has failed to demonstrate a compelling interest in regulating WRTL's ... ads, we need not address whether WRTL could/should have pursued other options for the financing of its advertisements or altered the content of its ads ...." 466 F. Supp. 2d at 210 n.24.

standing, LAGOP does not have to *choose* to do something other than what it wants, which is to use nonfederal funds in its state account—including funds on hand and at the level of just $1—for independent-communication FEA. What LAGOP *chooses* to do is protected by the First Amendment rights to speak freely, to association freely, and "to participate in democracy," *McCutcheon*, 134 S.Ct. at 1441. So FEC must prove a properly tailored, cognizable anti-corruption interest that justifies the challenged provisions as applied, not tell LAGOP to just do something else. That argument does not fly in this First Amendment context.

Second, *Citizens United*, 558 U.S. 310, again rejected FEC's just-do-something-else argument, focused on Citizens United's *choice* not to use a PAC for its independent communications. The Court held that the ban on corporate electioneering communications "is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *Id.* at 337. So an alternative does not make a ban not a ban. And the alternative did not vindicate Citizens United's First Amendment right to communicate using funds of its *choosing*. *Id.* at 337-38.

Third, *McCutcheon*, 134 S.Ct. 1434, again rejected FEC's just-do-something-else argument. FEC argued that plaintiff McCutcheon suffered no injury because of his inability to make multiple contributions (to candidates and three national party committees) totaling more than the challenged aggregate contribution limit since he had two alternatives—(i) just contribute less to each intended recipient and/or (ii) just give to a super-PAC—and that "[h]is decision to 'dilute[] the amount of his speech' by not making these contributions is his own," i.e., self-inflicted harm. FEC's Opp'n to Prelim. Inj. 38-39 (Doc. 16), *McCutcheon v. FEC*, No. 12-1034 (D.D.C. July 9, 2012). But the Supreme Court recited McCutcheon's *choice*, a desire to make contributions above the aggregate limit, recognized his injury and standing, *McCutcheon*, 134 S.Ct. at 1443, and expressly rejected the just-do-something-else argument:

> It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for "robustly exercis[ing]" his First Amendment rights. *Davis v. Federal Election Comm'n,* 554 U.S. 724, 739 (2008).

Id. at 1449. Moreover, *lack* of other expressive avenues can *magnify* First Amendment injuries, *id.* and *like* McCutcheon, *id.*, LAGOP *also lacks* (i) the ability to personally volunteer as to all topics of desired independent communications and (ii) the celebrity of "a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening," *id.*

Fourth, in the present case, before this Court, FEC argued self-inflicted harm in its Opposition to a Three-Judge Court: "[B]ecause some of plaintiffs' contemplated activities can be funded right now with an allocation of non-federal contributions, [i.e., Levin funds,] but plaintiffs have chosen not to do so, their injury is *self-inflicted*." (Doc 15 at 2 (emphasis added).) FEC returned to this theme: "Their disinclination to use Levin funds is a *self-inflicted* injury that was not caused by the FECA provisions they challenge." (*Id.* at 21 (emphasis added).) FEC has not returned to the Levin-fund version of self-inflicted harm argument here because it was rejected (Mem. Op. 12-13), but for the same reasons that this Court rejected FEC's self-inflicted-harm argument before, it should do so again because Plaintiffs are not required to just do something else (especially where, as here, the "something else" does not allow them to do what they want to do). Plaintiffs have actual First Amendment injury because they cannot do what they *choose* and *prefer*, i.e., to use nonfederal funds in their state accounts—including those on hand and at the level of $1—for independent-communication FEA.

As shown by all the foregoing, FEC's just-do-something-else superstructure collapses atop its crumbled foundation. So FEC's conclusion that LAGOP's challenge is "'fictitious'" and "should

be dismissed" (Mem. 19 (citation omitted)) is erroneous. FEC's Motion should be denied.

B. FEC Erroneously States JPGOP's Claims and Asserted Harm.

Given FEC's erroneous attempt to reframe LAGOP's claims and injuries in this case, it is unsurprising that FEC attempts the same with the local committees. And given the foregoing, it will take less time to deconstruct FEC's construction. We begin with JPGOP.

As set out above, *see* Part II.B, the Verified Complaint establishes that JPGOP generally wants to do independent-communication FEA without complying with challenged provisions, "as lawful" or "when legal to do so," thereby establishing intent, ban, burden, and chill. (Compl. ¶¶ 7, 74, 76.) JPGOP intends to do independent communications that would be VR and GOTV for merely exhorting registration/voting, and it provides an example. (Compl. ¶¶ 84, 87.) JPGOP's example is an email with content like the "Get Registered" article exhorting registering/voting formerly on LAGOP's website, but JPGOP is chilled:

> **87.** JPGOP and OPGOP want to *email* a nonpartisan article substantially similar to the nonpartisan article described in ¶ 85, with links of the sort excluded from "federal election activity" if done on a *party committee's website*, 11 C.F.R. 100.24(c)(7), if they may do so without complying with challenged provisions. Such an email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015.

(Compl. ¶ 87 (underlining added).) The foregoing verified statements readily establish that JPGOP has actual First Amendment injury: (i) it intends to engage in independent-communication FEA using nonfederal funds, (ii) that activity is banned or burdened by challenged provisions, and (iii) JPGOP is chilled from such activity. Based on these First Amendment harms, JPGOP has actual injury.

Now, the fact that JPGOP wants to send an FEA *email* using nonfederal funds—in its state account, including with funds on hand and even at the level of $1[24]—is clear. Yet FEC argues

[24] JPGOP and OPGOP make statements identical to LAGOP's about their intent, claims, and injuries, i.e., what this case is really about. *See, e.g.*, JPGOP 1st Disc. Resp. (FEC's Ex. 2) at 2-3

that "the complaint is *devoid of any allegations discussing specific FEA* these plaintiffs wish to spend money on" and questions whether "the Court [should] assume that such intent exist[s]." (Mem. 13 (emphasis added).) This, too, is remarkable. Not only does FEC say there is no example when there is, but it simultaneously tries to make its most difficult as-applied challenge in this case go away by claiming it does not exist.

That email is FEC's most difficult as-applied challenge to defend in this case because FEC carries the heavy First Amendment burden of proving that the challenged provisions are properly tailored to preventing quid-pro-quo corruption where the communication:

(a) is independent (no quid-pro-quo risk as a matter of law, *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) ("independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"));

(b) is inexpensive (corruption risk requires "large" amounts, *Buckley v. Valeo*, 424 U.S. 1, 26 (1976));

(c) is by email (so low in corruption risk they are not deemed FEA beyond VR/ GOTV);

(d) merely exhorts registering/voting in a nonpartisan way (inherently non-corrupting); and

(e) is done by a small parish-level committee that focuses on state elections and did minimal FEA on its website inadvertently (eliminating conduit concerns, though true conduits require contributions to *reach a candidate*, *McCutcheon v. FEC*, 134 S.Ct. 1434, 1455 (2014), which cannot happen with a communication disbursement).

For FEC to carry its heavy burden of proving tailoring and quid-pro-quo corruption as applied to

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("what they *really* want to do [is] use nonfederal funds for FEA, including those on hand, at *any* level of expenditure (including just $1)" (emphasis in original)); *id.* at 22 ("The gravamen of this case is that Plaintiffs want to use funds *from their state account*, even *at the level of $1*, for FEA, and the government has no constitutional justification for forbidding that." (emphasis in original)). *See* OPGOP 1st Disc. Resp. (FEC's Ex. at 2-3 (same); *id.* at 22 (same).

that at-issue situation seems an insurmountable task, for which we await FEC's further briefing to see if it can carry that burden. But FEC cannot shrug off the burden by claiming local committees have no injury because they recite *no* "allegations discussing specific FEA." (Mem. 12-13.)

Then FEC then tries to create a problem where there is none: "The local party plaintiffs cannot show that FECA causes them any injury because they have no contributions at all, much less any individual contributions that could not be used for FEA." (Of course, JPGOP has already shown its First Amendment injury, which FEC cannot thus undermine.) FEC's argument is in three parts: (1) the local committees' "sole source of funds [is] qualifying fees"; (2) qualifying fees cannot be used "to support federal candidates," and the local committees do not seek to so use them; so (3) they thus lacks funds to do that simple email and really"need a contributor, not a judgment." (Mem. 10-13.) As might be expected by now, FEC's argument has factual and analytical flaws. We analyze the parts seriatim.

(1) FEC claims that the local committees' "sole source of funds [is] qualifying fees." (Mem. 11.) First, that is factually wrong because FEC earlier acknowledged that JPGOP received $1 from an individual in 2015 (Mem. 10), which FEC argues could be used for FEA (Mem. 10 n.1), but that is uncertain given the SP (screening problem) described above and the lack of evidence for screening to assure, for example, that the individual had not already given the base limit amount to LAGOP, which would preclude giving $1 to JPGOP except as non-FECA-complaint funds that could not be used for FEA absent requested relief.[25]

And that $1 must (under FEC's argument that qualifying fees cannot be used) be added to

[25] Anyway, FEC's own evidence shows that the local committees have *tried* to raise donations from individuals, so they *welcome* individual contributions. (Mem. 10.) And the fact that they know of no one who *presently* wants to give them donations does not mean that they won't have persons who will do so. The Verified Complaint states that Plaintiffs intend materially similar future activity (Compl. ¶ 114).

JPGOP's challenge as applied to its email, explained above. So to elements (a)–(e) of that as-applied situation must be added a new element (f) as follows: "FEC carries the heavy First Amendment burden of proving that the challenged provisions are properly tailored to preventing quid-pro-quo corruption where the communication (a) ...; (b) ...; (c) ...; (d) ...; (e) ...; and (f) will be funded to the level of $1. Under FEC's argument (that only individual contributions may be used), it must now prove that $1 spent to send the foregoing email could possibly corrupt some federal candidate who never even gets the $1. FEC cannot prove that, though it must try.

Now, one might be tempted to argue that $1 or an email is of no account and may be ignored. But that is rejected by *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), which held that "we must be ... vigilant against the modest diminution of speech":

> It may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake. Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.

Id. at 264-65. So the $1 may not be ignored.

(2) FEC next argues that qualifying fees cannot be used "to support federal candidates" and the local committees do not seek to so use them. (Mem. 11.) Here FEC employs sleight-of-hand, which can be seen in two parts.

First, note FEC's words "to support candidates." Most FEA does not "support candidates." The exception would be non-independent PASO communications, which includes promoting, attacking, *supporting*, or opposing a federal candidate. And the local committees' email that

would merely exhorts registering/voting in a nonpartisan way does not "support" any candidate.[26] But even "support" is erroneous, as shown next.

Second, "to support candidates" is not used in the language of the state limitation on the use of qualifying fees, which FEC quotes thus: "[S]uch fees 'shall be used solely for the operation of such committee. No such fees shall be used for the *direct benefit* of an *particular* candidate for public office.'" (Mem. 11 (quoting La. Stat. § 18:464(G) (emphasis added)).) So FEC's substitutes its *own* language for the *statute*'s language. And the statute's "benefit" language is limited by both "direct" and "particular," i.e. it is not enough that some activity (e.g., VR, GOTV, VID) might *indirectly* benefit *all* candidates (or even one), rather it must *directly* benefit a *particular* candidate. And GCA promotes political parties, not candidates, so any candidate benefit that might exist is too remote to be cognizable. Thus, there is a broad range of activity defined as FEA that can be done using qualifying fees, based on the statute's *actual* language. Moreover, the FEA communications the local committees want to do will be *independent*, and that independence removes any cognizable "benefit" to a candidate, as a matter of law. *Citizens United*, 558 U.S. at 357.[27]

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[26] Even *McConnell* only said VR, VID, GOTV, and GCA might "benefit," not "support" candidates. 540 U.S. at 168 ("Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption."). And that "benefit" theory of corruption has been replaced by the narrow quid-pro-quo corruption that now controls as the only cognizable interest to justify restrictions in both the expenditure context, *Citizens United*, 558 U.S. 310, and the contribution context, *McCutcheon*, 134 S.Ct. 1434.

Even if the local committees did "support" a candidate (e.g., in a PASO ad), "support" is not the same as the required quid-pro-quo corruption that FEC must prove (along with proving proper tailoring) to justify the challenged provisions. An independent expenditure *supports* the candidate for (or against) whom a communication expressly advocates, yet independent expenditures must be supported by an interest in preventing quid-pro-quo corruption, which is wholly absent in independent communications, *Citizens United*, 558 U.S. at 357.

[27] The recognition that independent communications do not benefit a candidate, as a matter of law, goes back to *Buckley*'s holding, 424 U.S. at 47:

FEC argues that the complaint does not "mention" or "seek any relief relating to such fees." (Mem. 11.) But Plaintiffs have said, repeatedly, that they want to use nonfederal funds in their state accounts, including funds currently on hand and even at the level of $1, for independent-communication FEA,[28] That encompasses qualifying fees and whatever else is in the local committees' state accounts.

FEC again claims that the local committees "said these fees are 'not relevant' to their claims, a 'matter of state law,' and 'not relevant to this case.'" (Mem. 11 (citations omitted).) Such an argument has already been refuted regarding LAGOP's discovery responses. *See supra* note 18. What the local committees actually said in response to Interrogatory 7 in the cited discovery responses is that the *interrogatory* is "*not relevant* to any cognizable claim or defense," that "Plaintiffs want to use nonfederal funds from their state account for doing FEA ...," and that "[w]hat a state permits ... is *a matter of state law*, *not relevant to this case*," followed by the wording of the Louisiana statute with the statement that what the "provision requires calls for a legal conclusion." (JPGOP Disc. Resp. 18-19, #7 (emphasis added); OPGOP Disc. Resp. 18-19, #7 (same).) Those statements neither modify "qualifying fees," as FEC represents (Mem. 11), nor support the claim that plaintiffs consider the qualifying fees they wish to use for independent-

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> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

[28] As noted earlier, JPGOP and OPGOP make statements identical to LAGOP's about their intent, claims, and injuries, i.e., what this case is really about. *See, e.g.*, JPGOP 1st Disc. Resp. (FEC's Ex. 2) at 2-3 ("what they *really* want to do [is] use nonfederal funds for FEA, including those on hand, at *any* level of expenditure (including just $1)" (emphasis in original)); *id.* at 22 ("The gravamen of this case is that Plaintiffs want to use funds *from their state account*, even *at the level of $1*, for FEA, and the government has no constitutional justification for forbidding that." (emphasis in original)). *See* OPGOP 1st Disc. Resp. (FEC's Ex. 3) at 2-3 (same); *id.* at 22 (same).

communications as "not relevant" for that purpose (*id.*)

FEC claims that JPGOP "does not seek to use the qualifying fees that wholly constitute its budget [sic[29]] to support federal candidates because the fees 'cannot be spent on that because of state law.'" (Mem. 12 (citation omitted).) But there is that sleight-of-hand again, substituting "support federal candidates" for what the Louisiana statute actually says and what most FEA is. What actually happened at the deposition is that Polly Thomas, JPGOP's Chairman, responded to FEC's question about whether JPOG would like to spend the "$22,000 or so" on hand "in support of federal candidates." (JPGOP 30(b)(6) Dep. 53:2-6.) To *that* question, about *supporting federal candidates*, Polly Thomas required: "That money cannot be spent on that because of state law," *id.* at 53:7-8, it is "spent for party activity, party building activity," *id.* at 53:11-12, and "we're actually prohibited from spending those moneys *for or against candidates*," *id.* at 53:14-15 (emphasis added). Note that she was responding to FEC's sleight-of-hand question about spending to *support* federal candidates. The error of that reframing has been demonstrated already and need not be repeated. For present, note that Polly Thomas only indicated that qualifying fees are *currently* used for party-building activities and cannot be used *for or against* candidates as *FEC* framed the question. She did not say that JPGOP does not want to use qualifying fees for independent-communication FEA in general or for that nonpartisan email merely exhorting registering/voting. So FEC's attempt here fails.[30]

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[29] FEC ignores that $1 again.

[30] FEC's assertion that "[n]one of the plaintiffs is suing Louisiana for the right to use qualifying fees *to support federal candidates*" (Mem. 12 (citation omitted)), is true but wholly irrelevant because most FEA is *not about* "support[ing] federal candidates," *see supra* at 32, and qualifying fees may not be "used for the direct benefit of a particular candidate," which leaves plenty of room for most FEA, *see id.*

FEC also asked some non-specific deposition questions about litigation goals, with responses FEC cites apparently in an attempt to show no injury. (Mem. 11-12.) But the responses cited do not alter the specific statements of intent, claims, and injury verified in the Complaint and written

FEC recites that "plaintiffs want to 'spend under $5,000 in 2015 and 2016 on [FEA],'" (Mem. 12 (quoting Compl. ¶ 110)); asserts that a "single individual" could donate $5,000 (so "[n]o law needs to be invalidated in order for these plaintiffs to do this activity") (Mem. 13); and pronounces that "[w]hat they need is a contributor, not a judgment" (*Id.*). But that is the already refuted just-do-something else argument. *See supra* at 24-27. FEC attempted similar just-do-something-else-arguments before this Court in the *WRTL* litigation, where it asserted that "WRTL ceased raising money for [its federal PAC] and shifted its fundraising efforts toward its general treasury" and that "[h]ad WRTL simply raised for its PAC the same amount of money in 2004 that it did in 2000, it would have had more than enough to pay for the ... ads that are at issue here." FEC's Mot. Summ, J. 11(Doc. 82), No. 04-1260, *WRTL*, 466 F. Supp. 2d 195. Of course, WRTL wanted to use general-corporate funds, not PAC funds, for its anti-filibuster ads, and neither this Court nor the Supreme Court was convinced by the argument FEC now recycles. *See* 466 F. Supp. 2d 195 (allowing WRTL to use general corporate funds for its electioneering communications); *see also WRTL-II*, 551 U.S. 449 (same under "appeal to vote" test). And once again FEC tries to sidestep the central issue in this case, i.e., whether it can show that the challenged provisions are properly tailored to preventing quid-pro-quo corruption as applied to independent-communication FEA, including that nonpartisan email JPGOP wants to do. FEC does not carry its burden by saying that the local plaintiffs should just use FECA-compliant funds and should just find a donor. Nor does FEC carry its burden by concluding that "[t]he evidence conclusively establishes that the local party plaintiffs do not have an injury conferring standing

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discovery responses. The recited questions don't ask, for example, to confirm what was verified in the Complaint, e.g., "In your Complaint and discovery responses you said you wanted to do a nonpartisan FEA email using funds currently on hand, even at the level of $1 in your state account; is that true?" Only if such a specific statement were denied would FEC have a hope of altering the established intent, claims, and injuries.

before this Court" because the fact "[t]hat no one wishes to make contributions to these plaintiffs is simply not attributable to FECA." (Mem. 13.) Plaintiffs' injuries are clear and straightforward under standard First Amendment doctrine, as set out in Part II, and no amount of FEC sidestepping, sleight-of-hand, and recycling rejected arguments changes that, as set out here in Part III.

FEC says the local committees need not open a federal account to make disbursements for FEA and report FEA until they spend $5,000 on FEA, so an injury alleged is not actual injury. (Mem. 13-14.) But even accepting FEC's assertion to be so,[31] the removal of that burden for the local committees has no effect on LAGOP (which has a federal account and must endure the Reporting Requirement overlay), and the local committees' other, straightforward First Amendment injuries give them standing and make their claims non-frivolous for purposes of a three-judge court. This case does not, and never did, turn on whether a federal account is required for sub-$5,000 FEA activity. Plaintiffs all have the First Amendment harms for reasons first set out in the

[31] The Complaint sets out provisions that seem to require that local committees pay for FEA from a federal account below the level of $5,000. (Compl. ¶¶ 36-39.) FEC's online *Local Party Activity* brochure provides the reasonable-accounting method for contributions, independent expenditures, and FEA using Levin funds, but does not include non-Levin-fund FEA in things that may be so funded. http://fec.gov/pages/brochures/locparty.shtml#Federal_Funds. "Prolix" laws are themselves a First Amendment burden. *Citizens United*, 558 U.S. at 324. Nonetheless, if sub-$5000 FEA may be funded without a federal account, that is a good thing, and Plaintiffs proceed here on FEC's assurances that it is so. But as noted in text, that does not eliminate all First Amendment bans, burdens, and chill, so it does not remove standing or alter the propriety of a three-judge court. In any event, the local committees remain burdened by having to retain and produce records of FEA to FEC on demand, which is especially a problem for JPGOP because it has no idea how to value the inadvertent FEA on its website, given conflicting FEC indications of how to value such activity. *See* JPGOP Disc. Resp. 22-25 (FEC's Ex. 2) (explaining how FEC's recited "ripple effect" might sweep in more cost than that of merely having a volunteer post something to a committee-maintained website). And the notion that plaintiffs do maintain records does not remove the burden of having to keep them to FEC's satisfaction and produce them on demand. (Mem. 14.) FEC assertion that "the local parties have not alleged that they will receive any relevant federally impermissible funds" (Mem. 15) is simply wrong, as established above. JPGOP does have $1 it could put in a federal account (if it were screened and proved FECA-compliant), so FEC's assertion to the contrary is wrong. (Mem. 15.) And no one asks this Court to "invalidate the FEC regulations that govern the local party plaintiffs' uses of bank accounts." (Mem. 15.) These are red herrings designed to take the core analysis off track.

Introduction. Namely, the gravamen of this case is that Plaintiffs want to do "FEA using *non-federal* funds at *any* level of expenditure, including with funds on hand and at the level of even just $1." (LAGOP's 1st Disc. Resp. at 4 (emphasis in original) (FEC Ex. 1) .)[32] Plaintiffs *cannot* use nonfederal funds for their independent-communication FEA because of the Ban. Whether the Ban is deemed an expenditure or contribution restriction, it is a First Amendment "ban" or "burden," i.e., "actual injury." *Citizens United*, 558 U.S. at 336-40 (PAC option did not prevent independent-communication prohibition from being a "ban" that "burdens" free-speech rights requiring strict scrutiny); *McCutcheon*, 134 S.Ct. at 1448-49 (aggregate-contribution limit is "outright ban" and "special burden").

And Plaintiffs want to do independent-communication FEA without complying with the Ban, Fundraising Requirement, and Reporting Requirement but are *chilled* from doing so. (Compl. ¶¶ 6-8, 74-76, 84, 86-87, 94, 97, 106, 113 ("Absent requested relief, Plaintiffs are chilled from exercising First Amendment rights."), 115 ("Plaintiffs face a credible threat of civil enforcement and prosecution if they proceed with planned activities without complying with challenged provisions, absent requested relief."). That chill is also an actual First Amendment injury. *American Booksellers*, 484 U.S. at 393 ("self-censorship [is] a harm").

Nor can FEC's self-inflicted-harm argument (Mem. 19) prevail since it is a just-do-something-else argument, which was rejected in *WRTL-II*, 551 U.S. at 477 n.9 (rejecting argument that WRTL could just avoid the "electioneering communication" definition by (i) using a PAC, (ii) doing non-broadcast ads, or (iii) changing its speech). That *WRTL-II* rejection controls this similar First Amendment case.

So FEC's Motion (premised on no actual harm) should be denied as to JPGOP.

[32] JPGOP and OPGOP state the same in discovery responses, as noted.

C. FEC Erroneously States OPGOP's Claims and Asserted Harm.

FEC included OPGOP in its erroneous reframing of the local committees' claims and asserted harm, which has just been discussed and refuted in III.B with arguments that encompass the core of OPGOP's claims and harms. So what was established in III.B about JPGOP applies to OPGOP, with minor exceptions, such as OPGOP not having that $1 donation from an individual that FEC keeps losing sight of. And OPGOP has not inadvertently done FEA on its website as did JPGOP, so it is not subject to enforcement. Nonetheless, OPGOP also has constitutional injuries under the same standard First Amendment analysis.

As set out above, *see* Part II.C, the Verified Complaint establishes that OPGOP generally wants to do independent-communication FEA without complying with challenged provisions, "as lawful" or "when legal to do so," thereby establishing intent, ban, burden, and chill. (Compl. ¶¶ 8, 74, 76.) OPGOP intends to do independent communications that would be VR and GOTV for merely exhorting registration/voting, and it provides an example. (Compl. ¶¶ 84, 87.) OPGOP's example is an email with content like the "Get Registered" article exhorting registering/voting formerly on LAGOP's website, but OPGOP is chilled:

> **87.** JPGOP and OPGOP want to *email* a nonpartisan article substantially similar to the nonpartisan article described in ¶ 85, with links of the sort excluded from "federal election activity" if done on a *party committee's website*, 11 C.F.R. 100.24(c)(7), <u>if they may do so without complying with challenged provisions</u>. Such an email will be VR beginning November 6, 2015, and GOTV beginning December 2, 2015.

(Compl. ¶ 87 (underlining added).) The foregoing verified statements readily establish that OPGOP has actual First Amendment injury: (i) it intends to engage in independent-communication FEA using nonfederal funds, (ii) that activity is banned or burdened by challenged provisions, and (iii) OPGOP is chilled from such activity. Based on these First Amendment harms, OPGOP has actual injury.

That suffices for actual injury, and for the same reasons that FEC's arguments failed as to JPGOP they fail as to OPGOP. *See* Part III.B. For example, it too wants to email the independent nonpartisan "Get Registered" communication exhorting registering/voting, which is a specific example of intended activity and from which it is chilled, which alone gives it actual injury. That email remains FEC's most difficult as-applied challenge for reasons set out above. OPGOP has not eschewed using qualifying funds for FEA, nor is it barred by statute from doing so, including sending its email. And FEC's just-do-something-else arguments work no better for OPGOP than they did for JPGOP, LAGOP, McCutcheon, Citizens United, and WRTL.

So FEC's Motion (premised on no actual harm) should be denied as to OPGOP.

IV. FEC's Disclosure-Injury Argument Is Without Merit.

FEC argues that being required to maintain a federal account is "a *disclosure*- based injury" that "has nothing to do with freeing plaintiffs from limits on the contributions they may receive, or what they can do with such contributions." (Mem. 20.) But accepting FEC's argument that the *local committees* need not establish federal accounts to do sub-$5,000 FEA, FEC's argument yet fails for at least four reasons.

First, whether *local committees* must have federal accounts to do their presently planned FEA has nothing to do with *LAGOP*, which is not a local committee and has a federal account as required, which is subject to the Reporting Requirement from the burdens of which LAGOP wants to be free. That is First Amendment burden, i.e., actual injury. *See, e.g.*, *Davis*, 554 U.S. 724 (candidate who complies with a law (i.e., is not chilled) but is burdened by it has standing to challenge it). It is no answer to say that LAGOP must have a federal account anyway, given its other federal activity, because the constitutional challenge is to the Reporting Requirement, which attaches precisely to such entities *with* federal accounts. Such federal accounts, which al-

ready must register as federal political committees and report *as PACs on PAC activity*, are then required to comply with the Reporting Requirement's additional burdens by doing *monthly* reporting and also reporting on *activities related to FEA*. That is a burden on LAGOP's First Amendment expression rights, i.e., actual injury.

Second, FEC is trying to promote the Reporting Requirement to a dominant place that it has already conceded it does not have. (FEC's Opp'n to Three-Judge-Court Mot. 41 n.12 (Doc. 15).) Rather, the Fundraising Requirement and Reporting Requirement were little discussed in *McConnell* because all analysis was focused on the Ban, of which the other two requirements are derivative. So if FEC cannot justify the Ban, as applied and facially, by proving proper tailoring to the interest in preventing quid-pro-quo corruption, then the Ban falls as unconstitutional, and with it the fall the Fundraising Requirement and the Reporting Requirement. FEC earlier recognized the dominant role of the Ban in this respect as follows:

> [A]fter upholding section 30125(a) facially, the Supreme Court in *McConnell* explained that "[t]he remaining provisions of [section 30125] largely reenforce the restrictions in § [30125](a)." 540 U.S. at 133. The constitutionality of section 30125(c) thus follows from the constitutionality of sections 30125(a) and (b). Indeed, one of the district court opinions in *McConnell* also viewed the analysis of section 30125(c) as deriving from the analysis of section 30124(b)'s restrictions on FEA. *See* 251 F. Supp. 2d at 412 (explaining that section 30125(c) demanded "only passing attention and should have been invalidated on the basis that the definition of FEA was unconstitutional and section 30125(c) was "inseverable") (Henderson, J. concurring in the judgment in part and dissenting in part.)

(FEC's Opp'n to Three-Judge-Court Mot. 41 n.12 (Doc. 15).) FEC understood then that the other requirements are derivative to the Ban and rise or fall with it, which remains true.

Third, Plaintiffs do not claim "exclusively a *disclosure*-based injury." (Mem. 20.) In fact, as repeated many times, Plaintiffs have standard First Amendment injuries as outlined in the Introduction and elsewhere herein. They want to do independent-communication FEA using

nonfederal funds in their state accounts, even with funds on hand and even at the level of $1, but cannot because of the Ban. That is a First Amendment free-expression injury, akin to the ban on corporate electioneering communications at issue in *WRTL-II* and *Citizens United*, not a disclosure-based injury. They want to do such communications with funds that did not have to be raised using federal funds. that is a free-expression injury. They want to do their communications free of the challenged provisions but are chilled, which is First Amendment free-expression injury. So FEC's premise is flawed here and the argument collapses.

Fourth, this Court has already recognized Plaintiffs' injuries, which are not limited to whether local committees must open federal accounts as LAGOP must do. This Court recognized that Plaintiffs seek to do a wide range of FEA with nonfederal funds:

> They seek to use nonfederal funds to engage in a wide variety of non-coordinated 'federal election activity,' including conducting mass mailings exhorting voter registration and voting; performing voter identification; undertaking other generic campaign activity, and paying some portion of the salaries of employees who spend a significant amount of their time on federal election activity.

(Mem. Op. 5-6 (footnote omitted).) Then this Court recognized that "Plaintiffs ask the Court to invalidate three BCRA provisions that they contend *stand in the way*," listing the Ban, Fundraising Requirement, and Reporting Requirement. (Mem. Op. 6-7 (emphasis added).) This Court then listed Plaintiffs' challenges summarized in four counts. (Mem. Op. 7.) There are all the First Amendment injuries in a brief space, i.e., Plaintiffs desire to independent FEA with nonfederal funds but cannot because of the challenged provisions that either ban or burden the desire, i.e., "stand in the way."

This Court expressly recognized the core injury involved by stating that striking the challenged provisions would allow Plaintiffs to use nonfederal funds for FEA: "[I]n a state with no contribution limits ..., striking down the provisions of BCRA that Plaintiffs challenge would al-

low for unlimited contributions to a state party for the purpose of conducting federal election activity." (Mem. Op. 7-8.) In other words, the injury is that the challenged provisions ban and burden Plaintiffs' right to free expression and association through using nonfederal funds for FEA.

This Court elsewhere reiterated the injury thus: "Plaintiffs appear to claim that their injury derives from being forced to spend only federal funds, contained in a federal account and subject to federal regulations, on federal election activity." (Mem. Op. 11.) Now, the "contained in a federal account" language may not apply to the local committees (though it does to LAGOP), but the rest of the sentence states clear First Amendment injuries that apply to all Plaintiffs, i.e., they are "forced to spend only federal funds, ... subject to federal regulations, on federal election activity." That is a straightforward First Amendment harm—intended expressive activity is banned or burdened without constitutional justification in violation of Plaintiffs' First Amendment free speech and free association rights—and does not turn on whether a federal account is required for local committees doing sub-$5,000 activity.[33]

In sum, FEC's argument that this case is all about a disclosure interest fails because Plaintiffs have injuries to free-speech and free-association rights under clear, standard First Amendment analysis, as this Court has recognized, that do not turn on whether local committees must have a federal account to do their desired (but banned and burdened) FEA using nonfederal funds.

[33] Though courts have upheld disclosure requirements as FEC recites (Mem. 20-21), this case turns on whether FEA bans and burdens are justified now that gratitude-style corruption on which they were justified has been replaced by narrow quid-pro-quo corruption. If no quid-pro-quo corruption justifies the challenged provisions, particularly as applied to the independent-communication FEA that is the focus and core of this case, then things should return to the way they were before BCRA's FEA provisions with no justification for any ban or burden, including disclosure. So just to recite "disclosure" as some talisman that allows most anything is erroneous, as recently recognized in *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016) ("Disclosure chills speech. "), which rejected a broadened disclosure requirement regarding donations used for electioneering communications. "BCRA does *not* require disclosure at all costs; it limits disclosure in a number of ways." *Id.* at 495 (emphasis in original). "By tailoring the disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate." *Id.* at 499.

V. FEC Attempts to Evade the Simple Basis of this Case: No Cognizable Anti-Corruption Interest Justifies the Challenged Provisions.

FEC's efforts to avoid a decision on the merits have been robust (though erroneous), but they are evidence of FEC's apparent recognition of the weakness of its defense on the merits, i.e., that no cognizable anti-corruption interest justifies the challenged provisions, especially as applied to the independent-communication FEA that is the focus and core of this case. The foregoing analysis has shown that FEC's "no injury" arguments here are erroneous, but it will be helpful to end with examination of a very concrete injury that all Plaintiffs share.

All Plaintiffs want to do a version of the non-partisan "Get Registered" article, which is set out in the Complaint (¶ 85) and in text above. *See supra* at 5-6. That article—a patriotic paean to political participation—is FEA solely because it exhorts people to register and vote. LAGOP wants to keep it on its website during FEA periods (it had to revise it when the FEA periods began), and it wants to email it. The local committees want to email it, adapted to show it is from them but otherwise substantially similar. All Plaintiffs want to use nonfederal funds, including funds in their state accounts even at the level of $1, to fund that online and email independent communication. All Plaintiffs want to use funds that were not raised subject to the Fundraising Requirement and Reporting Requirement for that FEA. But they cannot because of the challenged provisions. They are banned, burdened, and chilled by the challenged provisions. That is actual First Amendment injury. Indeed, FEC never tries to dispute that indisputable fact.

So FEC must justify the challenged provisions by proving proper tailoring to narrow quid-pro-quo corruption, the only governmental interest that could now justify them, as to Get Registered. But if an independent expenditure (an *express-advocacy* communication) cannot cause quid-pro-quo corruption because of its independence, *Citizens United*, 558 U.S. at 357, *a fortiori*

an independent online article or email like Get Registered (which only exhorts registering/voting in a nonpartisan fashion with inexpensive means) cannot cause quid-pro-quo corruption. If unlimited contributions, including corporate/union contributions, may be used for funding independent expenditures, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), there is no constitutional reason that state and local committees cannot use nonfederal funds for their independent-communication FEA. Whether FEC can carry its heavy burden is the actual issue here, not whether there is actual injury.

Conclusion

For the reasons shown, this Court should deny FEC's Motion to Dissolve Three-Judge Court with Instructions to Dismiss or, Alternatively, to Dismiss Action (Doc. 40).

Respectfully submitted,

/s/ James Bopp, Jr.

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Certificate of Service

I certify that on April 19, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will notify:

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