No. 15-1241

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Republican Party of Louisiana, et al.,
Plaintiffs

v.

Federal Election Commission,
Defendant

The Honorable Judge Christopher R. Cooper, The Honorable Circuit Judge Sri Srinivasan, and the Honorable Judge Tanya S. Chutkan

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BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF DEFENDANT

Daniel I. Weiner
Ian Vandewalker
Douglas Keith
BRENNAN CENTER FOR JUSTICE AT
N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013

Daniel F. Kolb
Counsel of Record
Jonathan K. Chang
Julien du Vergier
450 Lexington Avenue
New York, New York 10017
Tel: (212) 450-4000

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for *amicus curiae*, the Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center"), hereby furnishes the following information in accordance with Rule 26.1 of the Local Rules of the United States District Court for the District of Columbia and Rule 7.1 of the Federal Rules of Civil Procedure. Counsel of record, who is appearing in his individual capacity in this matter, is senior counsel at Davis Polk & Wardwell LLP.[1] The Brennan Center is a non–profit entity, has no corporate parent and otherwise has nothing to disclose pursuant to these rules.

[1] Associates at Davis Polk & Wardwell LLP also assisted in the preparation of this brief.

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INTEREST OF THE *AMICUS CURIAE*[2]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non–partisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self–government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy.

The Brennan Center's interest in the instant case is especially strong. The Brennan Center's research was cited by members of Congress during the debate over the Bipartisan Campaign Reform Act ("BCRA").[3] The center then represented congressional sponsors who intervened to defend the law against the initial constitutional challenge.[4]

In 2015, the Brennan Center published a policy paper calling for certain changes to BCRA party committee fundraising rules it had previously

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[2] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund its preparation or submission. No one other than *amicus*, its members, and its counsel made a monetary contribution that was intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

[3] *See, e.g.*, 147 Cong. Rec. S3045 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe); 148 Cong. Rec. S2117-18 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords); 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[4] Brief for Intervenor-Defendants Sen. John McCain *et al.*, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674), 2003 WL 21999280.

defended.[5] The report was cited by the Plaintiffs in support of their constitutional arguments.[6]

SUMMARY OF ARGUMENT

We urge this Court to find that the challenged provisions of BCRA are constitutional for all the reasons offered by the Defendant and set forth herein. In making its determination, the court must afford significant deference to Congress, which sought to carefully balance the danger of *quid pro quo* corruption against the parties' need for resources. Not only is Congress directly accountable to the electorate, it also has significant institutional expertise in balancing competing policy considerations—especially with respect to campaign finance, as its members have all funded campaigns. And BCRA benefited from a voluminous legislative record demonstrating the corrupting danger of large, unregulated "soft money" contributions to parties.[7] Although we and others have proposed reforms that would allow party committees more flexibility in fundraising, these policy recommendations in no way imply that the current regime is unconstitutional. In fact, the core relief that Plaintiffs seek—permitting certain party committees to raise potentially unlimited funds for federal

[5] Ian Vandewalker & Daniel I. Weiner, Brennan Center for Justice, *Stronger Parties, Stronger Democracy: Rethinking Reform* (2015), https://www.brennancenter.org/publication/stronger-parties-stronger-democracy-rethinking-reforming.

[6] Pls.' Mem. Supp. Mot. Summ. J. ("Pls.' Mem.") 14; Pls.' Stmt. Material Facts ("Pls.' Stmt. Material Facts") ¶ 77, ECF No. 33.

[7] We use the term "soft money" to refer to funds raised outside the contribution limits and source prohibitions of federal law.

election activities—could undermine the very objective of broad political participation that led us to call for reform.

Sensible contribution limits for political parties remain legitimate and necessary. *Amicus* cannot agree with Plaintiffs' suggestion that contributions to political parties are not a cognizable source of *quid pro quo* corruption if used for independent spending. While parties and candidates are not mere alter-egos of each other, the parties' uniquely symbiotic relationships with their candidates and elected officials mean that large contributions to parties simply are not the same as those going to other types of organizations. Party committees are often run by elected officials and their staff or other close associates, and the party whose members hold executive office or a legislative majority has significant control over government policy, including the power to favor or harm narrow interests. Because party leaders, candidates, and officeholders are continually engaged in both electoral fundraising and substantive policymaking—and the party's role is often central to both—party fundraising, like candidate fundraising, can be and has been the nexus for corrupt exchanges.

Indeed, the country's history is replete with high-profile corruption scandals in which payments to a party played a central role—including many involving state parties like the Plaintiffs. Teapot Dome in the early 20th century, ITT's agreement to pay for the Republican convention that nominated President Nixon for reelection, the Keating Five, and fugitive

financier Marc Rich's pardon in 2001 on the heels of his wife's large contributions to the Democratic Party are but a few prominent examples. There are also well-publicized instances at the state level where business interests that were awarded seven– and eight–figure government contracts contributed to state party committees in circumstances giving the appearance of *quid pro quo* corruption.

Judicial restraint is especially warranted in this area because of the acute risk of unintended consequences—as evidenced by the legacy of the Supreme Court's most important recent campaign finance decision, *Citizens United*. *Citizens United* opened the door for super PACs and other outside groups to raise unlimited funds for ostensibly independent political expenditures. The Court assumed in its decision that all of the new outside spending it had permitted would be both transparent and fully independent from candidates' campaigns but neither assumption has been borne out. Transparency has plummeted and a great deal of outside spending is carefully choreographed with candidates' campaigns. If this Court expands *Citizens United*'s reasoning to once more displace the judgment of our nation's elected leaders, another round of unexpected consequences will be the likely result.

ARGUMENT

I. Congress's Long-Standing View of the Corrupting Potential of Large Contributions to Political Parties Warrants Significant Deference

When reviewing any legislative enactment, it is axiomatic that

"deference must be accorded to [congressional] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments."[8] The decision to limit direct political contributions warrants special "deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[9]

The imperative to defer to Congress here is unaffected by recent Supreme Court decisions limiting Congress's authority to regulate other types of electoral spending, such as independent expenditures and aggregate limits. Those cases repeatedly reaffirmed that base contribution limits and related safeguards, such as the provisions at issue in this case, remain constitutional.[10] Courts should therefore continue to afford significant deference to legislative judgments regarding their necessity.

Congress's views with respect to the necessity of effective party

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[8] *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15 (D.C. Cir. 2009) (quoting *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195-96 (1997)) (upholding lobbying disclosure requirements in face of First Amendment challenge).

[9] *McConnell v. FEC*, 540 U.S. 93, 137 (2003); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments . . . .").

[10] *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 n.6 (2014) (plurality opinion). As Defendant explains, the challenged provisions plainly are not expenditure limits, contrary to Plaintiffs' argument. The Supreme Court and lower courts in this circuit have repeatedly analyzed BCRA's soft money restrictions as contribution limits, and this Court is bound by those determinations. *See* FEC Mem. Supp. Mot. Summ. J. & Opp. Pls.' Mot. Summ. J. ("Def.'s Mem.") 22, ECF No. 43.

contribution limits could not be clearer. For almost a century (based in part on examples like those set out by Defendant and in Part II.B., *infra*), legislators have recognized that large contributions to political parties pose a substantial risk of *quid pro quo* corruption.[11] Because "state and local parties"—like the Plaintiffs—are "effective conduits for donors desiring to corrupt federal candidates and officeholders," they along with national parties have long been subject to limits with respect to their federal election activities.[12]

Before enacting the most recent round of reforms in BCRA, Congress amassed voluminous evidence of the danger of corruption associated with large, unregulated "soft money" contributions to parties.[13] Legislators relied on that evidence and also drew on their own experiences. One senator, Ernest "Fritz" Hollings of South Carolina, remarked only half–jokingly that political fundraising was in fact the first subject he had seen debated on the Senate floor that he and his fellow politicians actually "[knew] anything about."[14] The Supreme Court in *McConnell* relied on the legislators' professional

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[11] *See McConnell v. FEC*, 251 F. Supp. 2d 176, 432-33 (D.D.C. 2003) (Kollar-Kotelly, J.), *rev'd in part*, 540 U.S. 93 (2003) (collecting quotes); *Buckley v. Valeo*, 424 U.S. 1, 38 (1976); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 320, 90 Stat. 475; *RNC v. FEC*, 698 F. Supp. 2d 150, 154 (D.D.C. 2010) (three-judge court); FEC Stmt. Material Facts ("Def.'s Stmt. Material Facts") ¶¶ 11, 16-19, 106-07, 109-15, 118-20, 123-28, 130-34, ECF No. 41.

[12] *McConnell*, 540 U.S. at 156 n.51; *RNC*, 698 F. Supp. 2d at 154, 161-62; Def.'s Mem. 35-36.

[13] *E.g.*, Def.'s Mem. 37; Def.'s Stmt. Material Facts ¶ 103.

[14] 147 Cong. Rec. S2852-53 (daily ed. Mar. 26, 2001).

judgments and on the "ample record" assembled in subsequent litigation to affirm Congress's conclusion that soft money could give rise to corruption and its appearance and should thus be limited.[15]

Of course, BCRA's passage did not mark the end of the conversation about political party fundraising. In the years since, a robust debate has developed about the role that campaign finance regulation can and should play in fostering stronger, more democratically accountable political parties. Most participants in this debate agree that the parties play an important role in our democracy. Some have gone on to argue that, particularly in light of the explosion in nonparty outside spending resulting from recent court decisions like *Citizens United*, the time has come to substantially lift or eliminate party contribution limits and other restrictions.[16] But others counter that such changes will greatly increase the risk of corruption without significantly improving the American political process.[17]

In fact, some—including the undersigned *Amicus*—worry that

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[15] 540 U.S. at 145. We note that while the parties have conducted some discovery, this case is devoid of anything like the "ample record" created in *McConnell* (now more than a decade old). At a minimum, a new comprehensive record ought to be created before the court strikes down any part of the law that *McConnell* examined in such exhaustive detail.

[16] *See, e.g.*, Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 Harv. L. Rev. F. 380 (2014); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804, 839 (2014).

[17] *See, e.g.*, Thomas E. Mann & E.J. Dionne, Jr., Brookings Institution, *The Futility of Nostalgia and the Romanticism of the New Political Realists* 15-19 (2015), http://www.brookings.edu/~/media/Research/Files/Reports/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne/new_political_realists_mann_dionne.pdf.

significantly deregulating political party fundraising would serve to undermine the very attributes that make organized parties attractive as political actors, like their relatively democratic organizational structures, broad-based financial support, and transparency.[18] For that reason, and because of the risk of corruption, while we agree that financially strong parties benefit democracy, we *do not support* the core relief that Plaintiffs seek—the wholesale lifting of contribution limits.[19] Instead, we have recommended other targeted reforms, including public financing, higher disclosure thresholds for individual donors, more freedom for parties to coordinate with their candidates, and some narrowing of the statutory definition of "federal election activity."[20] These recommendations were directed to Congress and other policymakers, *not* the courts. They were not intended in any way to suggest a view that BCRA's current provisions run afoul of the First Amendment.

Threading the needle to strengthen parties and boost democratic

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[18] *See* Vandewalker & Weiner, *supra* at 1-2.

[19] *Id.* at 9-11. Plaintiffs represent that their planned spending will be "compliant with state law," Pls.' Mem. at 13, 41. but other state parties have argued that state law cannot be applied to state parties' federal committees. *See Court Battle Looming over Malloy Campaign Spending*, Connecticut Law Tribune, Oct. 27, 2015, http://www.ctlawtribune.com/id=1202740891620/Court-Battle-Coming-Over-Malloy-Campaign-Spending?mcode=0&curindex=0 (last visited Mar. 23, 2016). In any event, many states impose no individual limits on contributions to party committees. *See* Nat'l Conference of State Legislatures, *Limits on Contributions to Political Parties*, http://www.ncsl.org/research/elections-and-campaigns/limits-on-contributions-to-political-parties.aspx (last visited Mar. 23, 2016).

[20] *Id.* at 12-17.

accountability without exacerbating the risk of corruption requires policymakers to maintain a delicate balance. "Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations."[21] A rich debate is already underway about what new reforms, if any, Congress ought to adopt to strengthen traditional party organizations. That debate will continue, and this Court should not short-circuit it by substituting its own judgment for that of the country's elected representatives.

II. There Is Substantial Support for Congress' View That Contributions to Parties Should Be Limited to Reduce the Threat of Actual or Apparent Quid Pro Quo Corruption

There can be no doubt that large contributions to parties can result in *quid pro quo* corruption. The parties' symbiotic relationships with their candidates and officeholders make them central players in both the electoral and governmental processes, which in turn makes the potential for *quid pro quo* arrangements a consistent threat that Congress was justified in trying to prevent.

A. Candidates and Elected Officials Have Symbiotic Relationships with Their Political Parties, Making Large Contributions to Parties a Significant Vehicle for Quid Pro Quo Corruption

The Supreme Court has long recognized the corruption risk of large contributions to political party organizations. Candidates are party members and often active in party leadership; upon nomination they bear the party's

[21] *Salazar v. Buono*, 559 U.S. 700, 717 (2010).

brand, use the party's place on the ballot, and benefit from the party's support.[22] That candidates and elected officials value contributions to their parties is amply evidenced by, *inter alia*, the fact that they enthusiastically solicit them.[23] Since state parties can form federal committees—and receive unlimited transfers of funds from the national party committees—they are integral to this system.[24]

With resources provided by the same contributors, parties usually pursue the election of their candidates as their primary goal. As BCRA sponsor Senator John McCain observed, "[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected."[25] In keeping with this role, both major parties deploy whatever political resources they have available to increase the

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[22] See *McConnell*, 540 U.S. at 155 ("The national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates."); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 630 (1996) (*Colorado Republican I*) (Kennedy, J., concurring in the judgment and dissenting in part) (noting "a practical identity of interests between [candidates and parties] during an election").

[23] *McConnell*, 540 U.S. at 125 ("Candidates often directed potential donors to party committees . . . ."); *Colo. Republican Fed. Campaign Comm. v. FEC*, 533 U.S. 431, 458-59 (2001) (*Colorado Republican II*); see also Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 Ariz. St. L.J. 1025, 1040-41 (2002) (explaining how candidates raised millions for party committees in 2000).

[24] *See* Def.'s Stmt. Material Facts ¶ 67.

[25] *Cao v. FEC*, 688 F. Supp. 2d 498, 527 (E.D. La. 2010) (quoting Senator McCain's declaration in *McConnell*); *see also* Raymon J. La Raja & Brian F. Schaffner, *Campaign Finance and Political Polarization: When Purists Prevail* ch. 3 (2015) ("[T]he overriding goal of the party organization is to win as many elections as possible and accrue power.").

likelihood of electoral success for their candidates. They assist candidates "by providing them with campaign contributions, coordinated expenditures, and assistance in areas of campaigning that require expertise and in-depth research."[26]

Parties are integral not only to electoral politics, but also to the process of governing. Traditionally, a candidate's party affiliation has been an important cue for voters precisely because party affiliation serves as a proxy for a particular policy program.[27] When the party and its program are victorious, its officeholders benefit not only with respect to their own campaigns, but also from the greater power that accompanies control of a legislative body or executive office.[28] This is true now more than ever at the legislative level, given that party–line voting in Congress has reached historic highs.[29]

Despite the challenges they face today, parties still wield a degree of "influence and power" that "vastly exceeds that of any interest group."[30] That is as it should be, for the parties are integral to representative democracy. But a by–product of their role is that party fundraising poses unique risks of

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[26] *Cao*, 688 F. Supp. 2d at 519 (quoting McCain declaration).
[27] *See* Robert Post, *Citizens Divided* 21-23 (2014).
[28] *See* Woodrow Wilson, *Constitutional Government in the United States* 205 (1908) (noting the parties' "systematic control of the *personnel* of all branches of the government").
[29] *See* Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in Jane Mansbridge & Cathie Jo Martin, Eds., *Report of the Task Force on Negotiating Agreement in Politics* 34 (2013).
[30] *McConnell*, 540 U.S. at 188.

quid pro quo corruption, because shared party membership facilitates coordination among elected officials on both matters of substantive policy and political fundraising.[31] As one scholar has explained:

> Instead of donors having to reach out to multiple individual members of Congress, contributions to party campaign committees place donors in direct contact with the legislators who dominate the legislative process. There is now the potential for large donors to 'corrupt' not just individual candidates but the parties, and, thus, to 'corrupt' the government itself since the party leaders for election fundraising purposes are increasingly the same as the leaders of the parties in government.[32]

B. Contrary to Suggestions That Contributions to Parties Cannot Properly Be Seen as a Source of *Quid Pro Quo* Corruption, the History of the United States Is Replete with High-Profile Examples of Such Corruption or Its Appearance in Which Contributions to Parties Played a Central Role

History teaches that *quid pro quo* corruption involving the political parties is not merely theoretical but very real. Examples of such *quid pro quo* corruption or its appearance involving the parties—including state parties—are to be found throughout the country's history; and the fact that many of those examples have been widely known and heavily publicized serves to

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[31] *See id.* (noting that party members "serve on legislative committees, elect congressional leadership, [and] organize legislative caucuses").

[32] Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 651-52 (2000); see also Michael Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 NW. U. L. Rev. Online 240, 252 (2014) ("Parties are inextricably connected to candidates and officeholders. These officeholders that constitute the core of the parties do wield lawmaking authority, and hard-money contributions to the parties they control and constitute may pose a similar worry of actual or apparent quid pro quo corruption as contributions to candidates and officeholders themselves.").

emphasize their significant impact on the public's perception of government. Such examples belie any notion that there may be no need to combat *quid pro quo* corruption involving party committees like the Plaintiffs.

Expanding on the Defendant's brief and Statement of Material Facts,[33] the following are just a few of the prominent examples.

1. The Teapot Dome Scandal

Following the 1920 campaign, the Republican Party had an unpaid debt of $1.5 million. That debt was paid off over the next three years in large part due to contributions made by oilmen E.L. Doheny and Harry Sinclair. Those contributions were widely reported to have been funneled through a number of middlemen in order to disguise the fact that Doheny and Sinclair were the original donors. The disguise was important because at least Sinclair received a *quid* for the contributions: the decision by the Interior Department to lease the Teapot Dome oil reserve to his company.[34]

2. The ITT Affair

In 1969, the United States government initiated three separate antitrust lawsuits against International Telephone & Telegraph Corporation ("ITT") to undo or prevent mergers of ITT with other corporations.[35] Those

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[33] *See* Def.'s Stmt. Material Facts, ¶¶ 5-23, 106-134.
[34] *See* John A. Morello, *Selling the President, 1920: Albert D. Lasker, Advertising, and the Election of Warren G. Harding* 95-96 (2001); Robert E. Mutch, *Buying the Vote: A History of Campaign Finance Reform* 93 (2014).
[35] *See United States v. Int'l Tel. & Tel. Corp.*, 349 F. Supp. 22, 24 (D. Conn. 1972), *aff'd sub nom., Nader v. United States*, 410 U.S. 919 (1973).

cases were settled in 1971.[36] President Nixon's White House tapes showed that Nixon personally intervened, directing the Attorney General's office to "stay the hell out" of "[t]he ITT thing."[37]

According to a highly confidential memorandum prepared by ITT's lobbyist, the resolution of the cases was the result of a *quid pro quo*: "the fix [for the antitrust cases] was a payoff for ITT's pledge of up to $400,000 for the upcoming Republican convention."[38]

3. The Keating Five

Charles Keating, Jr., the former head of Lincoln Savings and Loan ("Lincoln"), made $1.3 million in contributions and gifts in 1986 and 1987 to five senators and their causes, including the California State Democratic Party, which received $85,000.[39] The five senators intervened on behalf of Keating and Lincoln to successfully delay the government's takeover of the savings and loan by almost two years.[40] Keating candidly admitted that his

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[36] *Id.* at 25.
[37] J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* 132 (1999).
[38] Jack Anderson, *Secret Memo Bares Mitchell-ITT Move*, Wash. Post, Feb. 29, 1972, at B11; *see also International Tel. & Tel. Corp.*, 349 F. Supp. at 29 n.8 (a series of March 1972 newspaper articles suggested that Congress investigate whether the Justice Department had agreed to settle one of the ITT cases in return for a promise by ITT of financial support for the 1972 Republican National Convention).
[39] *Lincoln Savings and Loan Investigation: Who Is Involved*, N.Y. Times, Nov. 22, 1989, *available at* http://www.nytimes.com/1989/11/22/business/the-lincoln-savings-and-loan-investigation-who-is-involved.html.
[40] Nathaniel C. Nash, *Man of Influence: Political Cash and Regulation – A Special Report; In Savings Debacle, Many Fingers Point Here*, N.Y. Times (Nov. 8, 1989), *available at*
(….continued)

contributions—including party contributions—were intended to be part of a *quid pro quo*:

> One question, among many raised in recent weeks, had to do with whether my financial support in any way influenced several political figures to take up my cause . . . . I want to say in the most forceful way I can: I certainly hope so.[41]

4. Intervention on Behalf of Native American Tribes

As reported by the Senate Committee on Governmental Affairs, in 1994-95, the DNC intervened on behalf of Native American tribes in Minnesota to block the approval of a new Native American casino in nearby Hudson, Wisconsin.[42] In late 1994, after the Minneapolis office of the Interior Department's Bureau of Indian Affairs ("BIA") had approved the development of the new casino in Hudson, representatives of the opposing Minnesota tribes approached the DNC's national chairman, Don Fowler, who promised he would have White House Chief of Staff Harold Ickes speak with the Secretary of the Interior, Bruce Babbitt, which he did a few days later. In June 1995, a member of Babbitt's staff informed the White House that upon the final review of the application "it was 95% certain that [it] would be turned down."[43] Two days later, a career BIA employee recommended approval of the Hudson casino but despite that recommendation, in

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(continued....)

http://www.nytimes.com/1989/11/09/business/man-influence-political-cash-regulation-special-report-savings-debacle-many.html?pagewanted=1.

[41] *Id.* (quotation marks omitted).

[42] S. Rep. No. 105-167, at 44-45 (1998).

[43] *Id.*

July 1995, the Interior Department did in fact deny the application. In 1995 and 1996, the tribes that approached the DNC chairman contributed $333,000 to the DNC, the Democratic Senatorial Campaign Committee, and the Minnesota Democratic–Farmer–Labor Party. One witness testified that, in explaining his refusal to make a decision favoring the Hudson casino, Babbitt asked, "Do you have any idea how much these Indians, Indians with gaming contracts . . . have given to Democrats?"[44] Babbitt denied making that statement, but the *appearance* of *quid pro quo* corruption resulting from the political contributions was considered by many to be unmistakable.[45]

5. Intervention on Behalf of Loral Corp.

For the 1996 presidential campaign, the chief executive officer of Loral Corp. ("Loral," now known as Loral Space & Communications), Bernard L. Schwartz, donated $632,000 to the DNC, making him the single largest donor to the Democratic party that year.[46] In February 1996, a Chinese rocket carrying a satellite manufactured by Schwartz's company, Loral, had crashed upon launch in China. Following the crash, scientists from Loral, among others, were accused of advising the Chinese on how to improve their guidance systems by sharing U.S. technology that had not been cleared by the United States government for export.[47] Export had not been approved because the technology could be used to improve the accuracy of Chinese

[44] *Id.* (alterations in original).
[45] *Id.*
[46] 106 Cong. Rec. 14535 (1999) (statement of Sen. Arlen Specter).
[47] *Id.* (citing a May 17, 1998 Washington Post article).

long-range missiles aimed at the United States.[48] A criminal investigation into the alleged disclosure to the Chinese was initiated by the Justice Department, but in February 1998, while that investigation was still pending, Loral petitioned the White House directly for a waiver to launch another satellite from China.[49] The Justice Department objected to the petition, arguing that the requested waiver would effectively moot the ongoing criminal investigation, but was overruled by the White House. Following the grant of the waivers, concerns were raised that the White House had granted the waivers as part of a *quid pro quo* exchange for Schwartz's very large campaign contributions to the DNC.[50] The Washington Post ran an editorial entitled "Quid pro quo? A China chronology," which opined that the chronology of events "strongly suggests" that *quid pro quos* were a factor in granting the waivers.[51]

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[48] *Id.* (citing an April 13, 1998 Chicago Tribune article).
[49] *Id.* Permission was required pursuant to the sanctions imposed on China following the 1989 Tiananmen Square massacre. *See* Eric Pooley, *Red Face Over China*, Time, June 1, 1998, *available at* http://www.cnn.com/ALLPOLITICS/1998/05/25/time/china.missles.html (last visited Mar. 23, 2016).
[50] *See, e.g.*, Pooly, *Red Face Over China*, Time, June 1, 1998 (questioning whether campaign contributions influenced the waivers); Robert Suro, *Justice Dept. Investigates Satellite Exports*, The Wash. Post (May 17, 1998) at A1, *available at* http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/cf051798.htm (last visited Mar. 23, 2016) (describing investigation concerning whether waivers were influenced by contributions to the DNC during the 1996 presidential campaign).
[51] Editorial, *Quid pro quo? A China chronology*, Wash. Post (May 22, 1998), *available at* http://fas.org/news/china/1998/980522-wted1.html (last visited Mar. 23, 2016).

6. Marc Rich Pardon

On his last day in office in January 2001, President Clinton pardoned Marc Rich, who had fled the country after being indicted "on more than 50 counts of fraud, racketeering, trading with Iran during the U.S. Embassy hostage crisis and evading more than $48 million in income taxes."[52] Mr. Rich's ex-wife had contributed $201,000 to the Democratic Party in 2000.[53] The timing of the pardon and the contributions made by Mr. Rich's ex-wife led to investigations as to whether the pardon was the result of *quid pro quo* corruption based on the appearance of impropriety.[54]

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Examples of actual or apparent *quid pro quo* corruption involving political parties can also be found at the state level, most commonly involving "pay to play" allegations. The following are just some more recent examples of such corruption.

1. Managing Connecticut Pension Funds

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[52] *Pardoned Financier Marc Rich Dead at 78*, Associated Press (June 26, 2013), *available at* http://www.cbsnews.com/news/pardoned-financier-marc-rich-dead-at-78/ (last visited Mar. 23, 2016).

[53] *Id.* President Clinton spoke at a fundraiser for Senate candidates that hosted Denise Rich in 2000, and Rich gave $15,000 to the Delaware state party that day. John Dunbar *et al.*, *State parties collected nearly $570 million in contributions, soft money transfers in 2000*, Center for Public Integrity, May 19, 2014, http://www.publicintegrity.org/2002/06/25/5872/state-parties-collected-nearly-570-million-contributions-soft-money-transfers-2000.

[54] *See* Jessica Reaves, *The Marc Rich Case: A Primer*, Time, Feb. 13, 2001, *available at* http://content.time.com/time/nation/article/0,8599,99302,00.html (reporting that federal prosecutors initiated a criminal investigation into "whether Rich did indeed buy his pardon with his ex-wife Denise's pointed largesse to the First Couple and the Democratic party").

In 2000, Paul Silvester, the former treasurer of Connecticut, pled guilty to federal corruption charges, admitting to investing state pension funds with certain firms who helped get jobs for his former staff members and who made campaign donations.[55] One such firm was Triumph Capital ("Triumph"), which was charged with bribing Mr. Silvester by agreeing to donate $100,000 to the state Republican Party in exchange for a contract to manage $200 million of the state's pension funds.[56] While Triumph was not convicted on that charge, Mr. Silvester admitted during Triumph's trial that "he entered or tried to enter into illegal *quid pro quo* arrangements with Triumph and four other private investment companies seeking business with the state."[57]

2. Receiving Grants from JobsOhio

In February 2011, Ohio authorized the state to replace the Ohio Department of Development with a private entity called JobsOhio, which would use a private sector approach to help the state attract jobs and expand local companies.[58] An analysis revealed that the organizations that would be

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[55] *Closing Arguments Offered In Connecticut Bribery Case*, N.Y. Times, July 10, 2003, *available at* http://www.nytimes.com/2003/07/10/nyregion/closing-arguments-offered-in-connecticut-bribery-case.html (last visited Mar. 23, 2016).
[56] *Id.*
[57] Stacey Stowe, *Firm Found Guilty of Bribing Ex-State Official*, N.Y. Times, July 17, 2003, *available at* http://www.nytimes.com/2003/07/17/nyregion/firm-found-guilty-of-bribing-ex-state-official.html (last visited Mar. 23, 2016).
[58] Sarah Osmer, *Faster. Cheaper. Unconstitutional: Why the Public's Subsidy of JobsOhio Violates Article VIII, Sections 4 & 6 of the Ohio Constitution*, 62 Case W. Res. L. Rev. 919, 919-20 (2012).

receiving grants from JobsOhio had contributed nearly $500,000 to the Governor's and the state Republican Party's campaign committees,[59] raising the specter of *quid pro quo* corruption.

3. Managing State Pension Funds in New Jersey

In New Jersey, financial advisory firms obtained mandates from the state to manage pension funds shortly after their employees contributed substantially to, among other groups, the New Jersey Republican State Committee. In May 2011, an executive at General Catalyst Partners, a venture capital firm, contributed $10,000 to the New Jersey Republican State Committee.[60] Then, in December 2011, the Republican administration of the state outlined a plan to commit up to $25 million of state pension funds to General Catalyst Partners, and placed over $8 million in such funds with General Catalyst as of May 2014,[61] again creating the appearance of a *quid pro quo*.

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Such examples and the many others that can be found in the nation's history belie Plaintiffs' assertion that contributions to party committees do not present a threat of actual or apparent *quid pro quo* corruption.

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[59] *Id.* at 932 (citation omitted).
[60] David Sirota, *Exclusive: Christie officials gave millions in public funds to VC firm, despite "pay to play" rules*, Pando, May 8, 2014, *available at* https://pando.com/2014/05/08/exclusive-christie-officials-gave-millions-in-taxpayer-funds-to-major-tech-vc-in-apparent-violation-of-pay-to-play-rules/ (last visited Mar. 23, 2016).
[61] *Id.*

III. Judicial Intervention Likely Will Have Unintended Consequences

If the Court does choose to second-guess Congress, that decision is very likely to have unintended consequences—as evidenced by the legacy of the Supreme Court's most noteworthy recent campaign finance ruling, *Citizens United v. FEC*. There, the court held that corporations (and implicitly unions) have the right to engage in unlimited independent electoral spending, because such spending does not pose a sufficient risk of *quid pro quo* corruption to justify its being limited.[62] Based on this reasoning, the D.C. Circuit subsequently struck down virtually all federal contribution and spending limits for purportedly independent groups.[63]

Two empirical assumptions were critical to these decisions: that independent spending would be fully disclosed and that it would be truly independent. Neither assumption was correct.

First, the *Citizens United* Court made clear that it expected disclosure requirements to safeguard political accountability notwithstanding the new influx of money into the political system. The Supreme Court explained that "prompt disclosure" would allow citizens to "see whether elected officials are 'in the pocket' of so-called moneyed interests," and proclaimed that "a campaign finance system that pairs corporate independent expenditures with

[62] 558 U.S. 310, 356-61 (2010).
[63] *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010).

effective disclosure has not existed *before today*."[64] But in fact *such a system still does not exist*, because the Supreme Court's own decisions opened gaping loopholes in the federal disclosure regime.

While transparency was the norm in federal elections a decade ago, between 2010 and 2014 opaque entities hiding the sources of all their funds poured $600 million in secret money into federal races.[65] At the congressional level, much of that spending was concentrated in a few of the most competitive races, where it often rivaled the amounts candidates themselves spent.[66] Thanks to these developments, even Justice Anthony Kennedy, the author of the *Citizens United* ruling, recently acknowledged that campaign finance disclosure has not been "working the way it should."[67]

Second, the holdings in *Citizens United* and *SpeechNow* were premised

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[64] *Citizens United*, 558 U.S. at 370 (internal quotations omitted) (emphasis added).

[65] *Outside Spending by Disclosure*, Center for Responsive Politics, *available at* https://www.opensecrets.org/outsidespending/disclosure.php (last accessed Mar. 23, 2016). Early data for the 2016 cycle indicates that secret spending will significantly exceed previous cycles. Robert Maguire & Will Tucker, *Five-fold Upsurge*, Center for Responsive Politics (Sept. 21, 2015), *available at* http://www.opensecrets.org/news/2015/09/five-fold-upsurge-super-pacs-dark-money-groups-spending-far-more-than-in-12-cycle-at-same-point-in-campaign (last accessed Mar. 23, 2016).

[66] Ian Vandewalker, Brennan Center for Justice, *Election Spending 2014: Outside Spending in Senate Races Since* Citizens United 14 (2015), *available at* https://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united (last accessed Mar. 23, 2016).

[67] Marcia Coyle, *Justice Anthony Kennedy Loathes the Term 'Swing Vote*,' Nat'l L. J. (Oct. 27, 2015), *available at* http://www.nationallawjournal.com/id=1202740827841/Justice-Anthony-Kennedy-Loathes-the-Term-Swing-Vote?slreturn=20160112093749 (last accessed Mar. 23, 2016).

on the newly deregulated spending actually being independent of candidates. Independent expenditures, the Supreme Court reasoned, cannot corrupt because "[t]he absence of prearrangement and coordination . . . undermines the value of the expenditure to the candidate."[68] What the Supreme Court did not anticipate is that much of the new spending it enabled would be anything but independent.

Today, super PACs and other outside groups subject to no contribution limits frequently devote all their resources to electing a single candidate. Prospective candidates raise money for these single-candidate groups, tap trusted advisors to lead them, and collaborate on strategy.[69] Some have even filmed campaign ads for supportive groups before officially declaring their bids.[70] Once campaigns are under way, moreover, many subtler forms of collaboration continue. One of the most common tactics is for campaigns to post videos, strategy documents, and event schedules online to direct

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[68] *Citizens United*, 558 U.S. at 357 (quoting *Buckley*, 424 U.S. at 47).
[69] Michael C. Bender, *Jeb Bush Tries to Win Without Speaking to His Favorite Strategists*, Bloomberg (June 26, 2015), *available at* http://www.bloomberg.com/politics/articles/2015-06-26/does-anyone-believe-jeb-bush-isn-t-talking-to-his-super-pac-chief- (last accessed Mar. 23, 2016); Daniel P. Tokaji & Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections* 65-68 (2014), *available at* http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf (last accessed Mar. 23, 2016).
[70] *E.g.,* Fredreka Schouten, *Experts: John Kasich Political Ads Chart New Territory*, USA Today (Oct. 7, 2015), *available at* http://www.usatoday.com/story/news/politics/elections/2015/10/07/john-kasich-presidential-campaign-ads-super-pac/73505108/ (last accessed Mar. 23, 2016).

supportive groups' activities.[71]

Such results are not compelled by the Court's jurisprudence, but they do show how important it is for judges to fully consider the "practical consequences" of constitutional rulings that second guess the judgment of elected leaders.[72] This is no easy task: *Citizens United* and its progeny have generated profound changes in the political landscape that run contrary to stated expectations that the Supreme Court had when it reached its decisions. Such unpredictability is also present here, given the potentially far-reaching consequences of lifting party contribution limits.[73] This Court should bear that in mind when considering whether to strike down another set of duly enacted laws.

CONCLUSION

The relief sought by Plaintiffs would open the door to unlimited contributions to party committees that engage in substantial federal election activity. Logic, history, and the ample record of evidence collected by Congress all counsel that large party contributions pose an acute risk of *quid pro quo* corruption. Moreover, the Constitution demands deference to Congress's exercise of its legislative expertise to carefully balance policy

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[71] *E.g.,* Paul Blumenthal, *How Super PACs and Campaigns Are Coordinating in 2016*, Huffington Post (Nov. 14, 2015), *available at* http://www.huffingtonpost.com/entry/super-pac-coordination_us_56463f85e4b045bf3def0273 (last accessed Mar. 23, 2016).
[72] *Cf.* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 6 (2005).
[73] *See* Vandewalker & Weiner, *supra*, at 11.

considerations. For these reasons, Plaintiffs' motion should be denied in its entirety and Defendant's motion should be granted.

Respectfully submitted,

/s/ Daniel F. Kolb

Daniel F. Kolb (*pro hac vice*)
Counsel of Record

Jonathan K. Chang
Julien du Vergier
450 Lexington Avenue
New York, NY 10017
daniel.kolb@davispolk.com
(212) 450-4000

Daniel I. Weiner
Ian Vandewalker
Douglas Keith
BRENNAN CENTER FOR JUSTICE AT
N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, New York 10013

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Local Rule 7(o)(4) because it contains 25 pages or fewer, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: March 24, 2016

/s/ Daniel F. Kolb
Daniel F. Kolb (*pro hac vice*)
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel F. Kolb
Daniel F. Kolb (*pro hac vice*)
Attorney for *Amicus Curiae*