UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS RUFER, LIBERTARIAN PARTY OF INDIANA, and LIBERTARIAN NATIONAL CONGRESSIONAL COMMITTEE INC,	Civil Action No. 14-837 (CRC)
	THREE-JUDGE COURT REQUESTED
Plaintiffs,	
	ORAL ARGUMENT REQUESTED
v.	
FEDERAL ELECTION COMMISSION,	
Defendant.	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS

Plaintiffs are likely to succeed in demonstrating that the Government may not constitutionally prohibit political parties from establishing separate, segregated IE-only accounts that may accept unlimited contributions.

A. BCRA's Contribution Limits Substantially Restrict Plaintiffs' First Amendment Associational Rights

The FEC begins by presenting only a partial and materially incomplete explanation of the burdens that contribution limits impose on fundamental First Amendment rights. It emphasizes that contribution limits burden contributors' free speech rights in only minor ways, *see* FEC Opp. at 12, 39 (quoting *Buckley v. Valeo*, 424 U.S. 1, 20 (1976)), ignoring the Supreme Court's repeated holdings that such limits substantially restrict the associational rights of both contributors and parties.

"The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley*, 424 U.S. at 65-66 (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Moreover, "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate" and "enables like-minded persons to pool their resources in furtherance of common political goals." *Id*. at 22. And supporters of libertarian principles who do not live in states with Libertarian candidates for Congress face substantial "geographic problem[s]" in attempting to associate with the LNCC through alternate means. FEC Opp. at 39; *cf. McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014) (noting that the First Amendment burdens of contribution limits are exacerbated where "personal

volunteering is not a realistic alternative"). Contribution limits therefore substantially burden a person's right to associate with candidates and political parties of her choice. *Buckley*, 424 U.S. at 22.

B. Prohibiting Political Parties From Accepting Unlimited Contributions to Separate, Segregated IE-Only Accounts Does Not Prevent Actual or Apparent *Quid Pro Quo* Corruption

BCRA's contribution limits and other restrictions may not be constitutionally applied to prohibit political parties from establishing separate, segregated IE-only accounts to accept unlimited contributions, because such accounts do not pose a risk of actual or apparent *quid pro quo* corruption.

Both sides agree that contribution limits are subject to "close[]" scrutiny. FEC Opp. at 12. The Government must demonstrate that BCRA's contribution limits, 2 U.S.C. § 441a(a)(1)(B), (D), and other applicable restrictions on political parties, *id*. § 441i(a)-(c), further "important" interests and are "closely drawn to avoid unnecessary abridgement" of First Amendment rights, *McCutcheon*, 134 S. Ct. at 1444; *accord* FEC Opp. at 12. The FEC contends that applying BCRA to Plaintiffs' proposed IE-only accounts is necessary to prevent actual or apparent *quid pro quo* corruption.

The Supreme Court's recent ruling in *McCutcheon* clarifies that the definition of "corruption" in this context is extremely narrow. *Quid pro quo* corruption is "a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441 (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)); *see also FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial quid pro quo: dollars for political favors."). As demonstrated below, contributions to political parties' IE-only accounts do not raise a specter of actual or apparent corruption under that standard.

1. Political parties themselves cannot engage in *quid pro quo* corruption

The FEC completely fails to acknowledge that a political party itself cannot engage in *quid pro quo* corruption. A political party is an association of individuals that seeks "to promote the election of candidates who will implement [their] views." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 463-64 (2008) (Scalia, J., dissenting); *see also Storer v. Brown*, 415 U.S. 724, 745 (1974) (recognizing that a political party's "goal is typically to gain control of the machinery of . . . government by electing its candidates to public office"). A political party neither occupies a public office nor exercises any official legislative, executive, or judicial authority under the Constitution. Thus, it is unable to corruptly perform, or even appear to perform, any "official act" in exchange for a contribution. *McCutcheon*, 134 S. Ct. at 1441.

The FEC, relying heavily on *McConnell*, claims that the threat of both actual and apparent *quid pro quo* corruption is heightened with respect to political parties because they are "inextricably intertwined" and share a "unity of interest" with their candidates. FEC Opp. at 19. Although some of a political party's members may occupy public office, however, the Supreme Court has already recognized that a party is not an alter ego for its candidates or other members. It has refused to "assume" that "a party and its candidates are identical, *i.e.*, the party, in a sense, 'is' its candidates." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 623 (1996). ("*Colorado I*"). Thus, the FEC's reasoning fails. A contribution to a political party may not be deemed to be the same as a contribution to a candidate, and a political party simply cannot exercise its members' official authority.

2. Contributions to a political party's IE-only account are at least two steps removed from the only type of corruption that may serve as a basis for restricting First Amendment freedoms.

The FEC has failed to establish that permitting unlimited contributions to a political party's IE-only account creates a risk of actual or apparent corruption. As an initial matter, the risk of corruption is substantially reduced because such contributions are made to political parties, rather than to candidates. *McCutcheon* rejects the notion that, when a contributor provides funds to a political party that supports a particular officeholder, a risk of corruption thereby arises between that contributor and officeholder. The *McCutcheon* Court explained:

> [T]here is ***not the same risk of quid pro quo corruption or its appearance*** when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. ***When an individual contributes to a . . . party committee*** . . . the individual must by law cede control over the funds. . . . [I]f the funds are subsequently rerouted to a particular candidate, such action occurs at the [party's] discretion—not the donor's. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of quid pro quo corruption is generally applicable ***only*** to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder."

McCutcheon, 134 S. Ct. at 1452 (emphasis added and internal citations omitted; quoting *McConnell v. FEC*, 540 U. S. 93, 310 (2003) (opinion of Kennedy, J)).

In *RNC v. FEC*, 698 F. Supp. 2d 150, 159 (D.D.C. 2010), *aff'd without opinion* 130 S. Ct. 3543 (2010), this Court—relying on *McConnell*—upheld BCRA's contribution limits on the grounds that, due to the "close relationship" between parties and their candidates, a candidate "may value contributions to their national parties—regardless of how those contributions ultimately may be used—in much the same way they value contributions to their own campaigns." *See* FEC Opp. at 19-21; *see also McConnell*, 540 U.S. at 154-55.[1] *McCutcheon*,

[1] The FEC repeatedly insists that *McConnell* and *RNC* foreclose Plaintiffs' claims, *see, e.g.*, FEC Opp. at 10, 21-22. *McConnell*, however, expressly left the door open to as-applied challenges such as this, *see McConnell*, 540 U.S. at 157 n.52, 159, 173, and neither case purported to

however, reaffirms a much narrower conception of corruption, which arises only from "gifts that are directed, in some manner, to a candidate or officeholder," and not contributions to intermediaries such as "party committees," *McCutcheon*, 134 S. Ct. at 1452 (quotation marks omitted)," and thus rejects *RNC*'s (and *McConnell*'s) key doctrinal underpinning.

In any event, Plaintiffs here seek to establish separate, segregated ***IE-only*** accounts that would be used solely to subsidize their independent expenditures. The Supreme Court has held that independent expenditures—including independent expenditures by political parties—do not give rise to the same threat of corruption as contributions to candidates, in large part because they do not benefit candidates to the same extent as contributions. *Colorado I*, 518 U.S. at 616. The "absence of prearrangement and coordination of an [independent] expenditure with [a] candidate . . . ***undermines the value of the expenditure to the candidate***, [and] . . . ***alleviates the danger*** that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47 (emphasis added); *see also Colorado I*, 518 U.S. at 616 ("[T]he absence of prearrangement and coordination . . . help[s] to alleviate any danger that a candidate will understand the expenditure as an effort to obtain a quid pro quo."); *McCutcheon*, 134 S. Ct. at 1452 ("[T]here is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly."); *accord NCPAC*, 470 U.S. at 498; *Citizens United v. FEC*, 558 U.S. 345, 357 (2010).

Thus, even assuming—contrary to *McCutcheon*, 134 S. Ct. at 1452—that a candidate might value a contribution to her party the same as a contribution to her own campaign, *RNC*,

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adjudicate BCRA's constitutionality specifically as applied to IE-only accounts of political parties. To the extent the FEC instead relies on the rationales of those cases, they either have been repudiated by subsequent Supreme Court rulings or are inapplicable in the context of parties' IE-only accounts, as discussed above.

698 F. Supp. 2d at 159, the "value" to a candidate of a contribution that her party may use exclusively to subsidize independent expenditures is "undermine[d]." *Buckley*, 424 U.S. at 47; *Colorado I*, 518 U.S. at 616; *McCutcheon*, 134 S. Ct. at 1452; *NCPAC*, 470 U.S. at 498. Such contributions do not present a cognizable risk of actual or apparent *quid pro quo* corruption. *Cf. Carey v. FEC*, 791 F. Supp. 2d 121, 131, 135 (D.D.C. 2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 695-96 (D.C. Cir. 2010) (en banc) ("[T]he government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."). *RNC*, in contrast, addresses only contributions that candidates "may value . . . in much the same way they value contributions to their own campaigns," *RNC*, 698 F. Supp. 2d at 159, and therefore does not speak to contributions to an IE-only account.

Contributions to political parties' IE-only accounts therefore are twice removed from the type of *quid pro quo* corruption Congress may prohibit: (i) they are made to parties that cannot themselves engage in *quid pro quo* corruption, rather than officeholders; and (ii) parties may use such contributions exclusively to subsidize independent expenditures, which do not give rise to a constitutionally cognizable risk of corruption.

The FEC's remaining explanations for why political parties should be prohibited from establishing IE-only accounts are based on conduct that, while potentially distasteful, does not amount to actual or apparent *quid pro quo* corruption as defined by the Supreme Court. *Citizens United*, 558 U.S. at 359-61; *McCutcheon*, 134 S. Ct. at 1450-51; *see also NCPAC*, 470 U.S. at 497; *Buckley*, 424 U.S. at 27. The FEC hypothesizes that someone other than a federal officeholder may encourage people to contribute to a party's IE-only account, and then "an

officeholder intent on rewarding contributors can easily determine the identities of those contributors from a wide variety of other sources." FEC Opp. at 34.[2]

As discussed above, the risk of such corruption is attenuated by the facts that the contributions are made to a political party, rather than a candidate, *McCutcheon*, 134 S. Ct. at 1452; *McConnell*, 540 U. S., at 310 (opinion of Kennedy, J), and the party may use them solely for independent expenditures, which may not be prearranged or coordinated with a candidate and therefore may not be understood "as an effort to obtain a *quid pro quo*," *Colorado I*, 518 U.S. at 616 (quotation marks omitted); *see also Buckley*, 424 U.S. at 27 (holding that independent expenditures do not "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions").

Moreover, a candidate's unilateral, *ex post* decision to act in a manner that is favorable to a contributor (which the FEC terms a "reward[]," FEC Opp. at 34) does not constitute actual or apparent *quid pro quo* corruption as defined by the Supreme Court:

[2] The FEC offers a few examples of corruption by the major political parties to bolster its claims, but most of them are largely irrelevant to this case. The FEC begins by explaining how, in the mid-1970s, certain contributors established hundreds of political committees which, along with political parties, were used to "funnel[]" "excessive contributions" to President Nixon's re-election campaign. FEC Opp. at 14-15. Several other cited examples involve activity that similarly is now illegal under other, much more reasonably tailored laws. *See, e.g.*, 2 U.S.C. § 441a(a)(5) (anti-proliferation statute requiring all contributions made from committees formed by, or under the control of, the same entity must be "considered to have been made by a single political committee"); *id.* § 441a(a)(8) (anti-earmarking statute, providing that contributions "which are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate" are "treated as contributions . . . to such candidate"); 2 U.S.C. § 441f (prohibiting contributors from making a contribution in the name of another person or with the funds of another person). *See McCutcheon*, 134 S. Ct. at 1446-47 (discussing post-*Buckley* modifications to federal law and new FEC regulations). Many of the FEC's remaining examples involve large contributions to candidates or non-connected political action committees ("PACs"), rather than party committees. *See* FEC Opp. at 16-18. Notably, the FEC fails to cite even a single instance of corruption or alleged corruption by third-party candidates or officeholders, or in connection with political parties' independent expenditures in the wake of *Colorado I*.

> It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that ***a substantial and legitimate reason***, if not the only reason, to cast a vote for, or ***to make a contribution*** to, one candidate over another ***is that the candidate will respond by producing those political outcomes the supporter favors.*** Democracy is premised on responsiveness.

Citizens United, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297) (opinion of Kennedy, J.).

Citizens United rejected the notion that the Government may limit constitutionally protected activity simply because a federal officeholder may be "grateful" for it. "Ingratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. *McCutcheon* elaborated that simply "[s]pending large sums of money in connection with elections . . . does not give rise to . . . quid pro quo corruption." *McCutcheon*, 134 S. Ct. at 1450-51. "Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." *Id*. (citations omitted).

To the extent that officeholders vote for legislation out of a generalized sense of "gratitude" over the fact that a contributor made a large contribution to a political party's IE-only account, or to attempt to encourage further such support, such actions appear to be outside the realm of *quid pro quo* corruption as defined by *Citizens United*, 558 U.S. at 359-61, and *McCutcheon*, 134 S. Ct. at 1450-51, and instead constitute "general influence" by the contributor or "responsiveness" to her, *McCutcheon*, 134 S. Ct. at 1451, 1462—which are constitutionally insufficient grounds for restricting First Amendment rights.

As *McCutcheon* explained:

> The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."

134 S. Ct. at 1451 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (opinion of Roberts, C. J.)). Thus, contributions to political parties may not be limited on the grounds that they purportedly allow lobbyists and others to exercise greater "'influence,'" FEC Opp. at 17 (quoting *McConnell v. FEC*, 251 F. Supp. at 869), or federal officeholder may be especially grateful for them.

3. Political parties have the same constitutional right as PACs to create segregated IE-only accounts that may accept unlimited contributions.

Courts across the country have held that PACs which engage exclusively in independent expenditures ("SuperPACs") have the fundamental First Amendment right to accept unlimited contributions to subsidize those expenditures, because independent expenditures do not give rise to a threat of actual or apparent corruption. *See* Memo. of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, D.I. #3-1, at 10 n.6-7. This jurisdiction has not only embraced this principle, *SpeechNow.org*, 599 F.3d at 689, but has gone further, holding that even PACs which contribute to candidates may accept unlimited contributions in segregated accounts that are used exclusively to fund independent expenditures, *Carey*, 791 F. Supp. 2d at 126-27, 131, or other election-related activities such as get-out-the-vote drives, *Emily's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir 2009); *see also Republican Party v. King*, 741 F.3d 1089, 1096-97 (10th Cir. 2013) (holding that "no anti-corruption interest is furthered" by applying contribution limits to PACs' segregated IE-only accounts); *Thalheimer v. City of San Diego*, No. 09-CV-2862-IEG, 2012 U.S. Dist. LEXIS 6563, at *38-49 (S.D. Cal. Jan. 20, 2012) (enjoining the application of contribution limits to PACs that make independent expenditures, "regardless of whether independent expenditures are the only expenditures that those committees make").

The central issue of this case is whether contributions to a political party's segregated IE-only account would raise a constitutionally cognizable risk of actual or apparent corruption that

is absent from contributions to a PAC's account. As the FEC emphasizes, many courts which recognized the fundamental right of PAC's IE-only accounts or SuperPACs to receive unlimited contributions expressly distinguished those entities from political parties. FEC Opp. at 27-29 & n.12. Most of the statements upon which the FEC relies, however, directly or indirectly (through intervening precedents) trace back to *McConnell*'s holding that contributions to political parties raise special corruption concerns because of the "close relationship" between parties and candidates. *See id*. (citing, *inter alia*, *Emily's List*, 581 F.3d at 6, 14; *Carey*, 791 F. Supp. 2d at 125, 131; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696, 698 (9th Cir. 2010); *Stay the Course W. Va. v. Tennant*, No. 12-CV-01658, 2012 U.S. Dist. LEXIS 112147, at *16-17 (S.D. W. Va. Aug. 9, 2012)).[3]

As discussed earlier, this aspect of *McConnell* is no longer good law in light of *McCutcheon*. *McCutcheon* reaffirmed the potentially corrupting nature of "'gifts that are directed, in some manner, to a candidate or officeholder,'" but further held that "there is not the same risk of quid pro quo corruption or its appearance . . . [w]hen an individual contributes to a . . . party committee." *McCutcheon*, 134 S. Ct. at 1452 (emphasis added and internal citations omitted; quoting *McConnell*, 540 U. S., at 310 (opinion of Kennedy, J)). Moreover, *McConnell* did not purport to address whether the purported risk of corruption associated with contributions to political parties is less for contributions to a party's IE-only committee, which may not subsequently be transferred to, or spent in coordination with, officeholders.

[3] The FEC also quotes *Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 43 (D.D.C. 2012), *see* FEC Opp. at 28-39, which cites *Buckley*, 424 U.S. at 26-27, and *California Medical Association v. FEC*, 453 U.S. 182, 183-84 (1981), for the proposition that the Government's interest in fighting corruption is "at its zenith" concerning contributions to candidates and political parties. The plaintiffs in that case were not challenging limits on contributions to political parties, however, and it does not appear that the court was ruling on a contested point of law.

Finally, it is critical to recall that *McConnell*'s characterization of the purported risk of corruption associated with political parties was based on an extremely broad definition of corruption that the Supreme Court subsequently has rejected. *See Citizens United*, 558 U.S. at 360; *McCutcheon*, 134 S. Ct. at 1450-51. *McConnell* held that the Government may seek to eliminate ***not only*** "cash-for-votes exchanges," but also ***other*** types of "improper influence and opportunities for abuse ***in addition to*** quid pro quo arrangements." *McConnell*, 540 U.S. at 143 (emphasis added and quotation marks omitted); *see also id*. (holding that the Government has a valid interest in preventing ***both*** "bribery of public officials," ***as well as*** "the broader threat from politicians too compliant with the wishes of large contributors") (quotation marks omitted). *McConnell* concluded that the need to prevent contributors from "gaining influence," and candidates from becoming "indebted," warranted restrictions on contributions to both national and state parties. *Id*. at 165. As this Court recognized in *RNC*, *McConnell*'s holding that "large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access, or generate influence" no longer remains "viable" under *Citizens United*. *RNC*, 698 F. Supp. 2d at 158.

For the foregoing reasons, the FEC has failed to establish that prohibiting political parties from establishing segregated IE-only accounts that may accept unlimited contributions will further the Government's interest in preventing actual or apparent *quid pro quo* corruption.

C. BCRA's Restrictions Are Impermissibly Overbroad as Applied to IE-Only Accounts

The FEC also fails to offer a persuasive basis for concluding that BCRA's contribution limits and other restrictions on political parties' fundraising and spending, 2 U.S.C. §§ 441a(a)(1)(B), (D), 441i(a)-(c), as applied to Plaintiffs' proposed IE-only accounts, are reasonably tailored. This lawsuit focuses specifically on contributions to political parties, which

McCutcheon, 134 S. Ct. at 1452, held do not raise the same threat of corruption as contributions directly to candidates. And within that universe of contributions, this lawsuit exclusively concerns contributions made for the sole purpose of funding independent expenditures, which the Supreme Court categorically has held do not give rise to a risk of corruption. *See McCutcheon*, 134 S. Ct. at 1452; *Colorado I*, 518 U.S. at 616; *NCPAC*, 470 U.S. at 498; *Buckley*, 424 U.S. at 47. The FEC provides no basis for concluding that BCRA's general limits should be applied to contributions to political parties IE-only accounts, which are twice removed from the type of *quid pro quo* corruption Congress may prohibit.

In determining whether BCRA's restrictions are sufficiently tailored, the court must consider whether they "avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 21). The only issue is whether a "substantial mismatch" exists between "the Government's stated objective and the means selected to achieve it." *Id*. The facts that the major political parties may be "thriv[ing]" under the current system, Fec. Opp. at 36-37, parties enjoy certain advantages over PACs, *id*. at 37-38, and that alternative means often exist of associating with parties, *id*. at 39, are of limited (if any) relevance in determining whether prohibiting parties from forming segregated IE-only accounts to accept unlimited contributions is a sufficiently tailored means of attempting to prevent actual or apparent *quid pro quo* corruption. *See Carey*, 791 F. Supp. 2d at 132 ("The fact that Plaintiffs may have another outlet to exercise their First Amendment rights to free speech . . . as suggested by the Commission in its opposition does not answer this constitutional challenge").

Moreover, while the major parties may be awash in billions of dollars, *id*. at 37, the opposite is true of political party committees such as Plaintiffs. In 2013, for example, the LNCC received only $45,160 in federal contributions; at the end of the year, it had only $6,348.49 cash

on hand in its federal account. *See* LNCC, *Report of Receipts and Disbursements*, Form 3X, §§ 8, 11 (Jan. 31, 2014), *available at* http://docquery.fec.gov/cgi-bin/dcdev/forms/C00418103/904371/. The LPIN receives $37,331 in federal contributions, and ended the year with $15,422.26 in its federal account. *See* LPIN, *Report of Receipts and Disbursements*, Form 3X, §§ 8, 11 (Jan. 31, 2014), *available at* http://docquery.fec.gov/cgi-bin/dcdev/forms/C00426320/906391/. These figures belie the FEC's contention that the LNCC and LPIN are not "'struggling minor part[ies],'" *McConnell*, 540 U.S. at 158-59 (quoted in FEC Opp. at 31), or that these Plaintiffs are currently able to amass the funds for "'effective advocacy,'" *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoted in FEC Opp. at 31).[4]

Thus, regardless of whether the current system is serving the major parties well, it is exacerbating the challenges that most third parties face in attempting to raise their profiles, spread their message, and generate awareness of their federal candidates. To the extent that supporters such as Plaintiff Rufer wish to make contributions to a third party's proposed IE-only account in excess of BCRA's limits, that third party cannot realistically replace those foregone funds from other sources. *Cf.* FEC Opp. at 38-39.

In short, BCRA's restrictions are overbroad as applied to third parties' proposed IE-only accounts, because the Court's rationale for upholding contribution limits does not extend to contributions: (i) to political parties (rather than candidates), *McCutcheon*, 134 S. Ct. at 1452, (ii) which may be used exclusively to fund independent expenditures, *Buckley*, 424 U.S. at 47; *Colorado I*, 518 U.S. at 616. There is even less constitutional justification for applying the law

[4] *McConnell* held contributions to political parties raise special concerns because political parties "determine who will serve on legislative committees, elect congressional leadership, . . . organize legislative caucuses[,] . . . have influence and power in the legislature," and "have special access to and relationships with federal officeholders." *McConnell*, 540 U.S. at 188. None of those things are true about Plaintiffs LPIN or LNCC, or most other third-party political party committees.

to a third party that has ***not*** yet "manage[d] to elect . . . one of its members to federal office" who might be tempted to engage in *quid pro quo* corruption. *McConnell*, 540 U.S. at 159.

BCRA's overbreadth is the same for political parties as it is for PACs. In both cases, the Government has a valid anti-circumvention interest in limiting contributions, because the recipient may choose to contribute those funds to a federal candidate. In the context of PACs, however, this Court has recognized that contributions to a segregated IE-only account which the PAC may ***not*** use to directly or indirectly fund contributions to candidates do not raise the same concerns, and therefore may not be limited. In *Carey*, 791 F. Supp. 2d at 131, this Court held that "maintaining two separate accounts is a perfectly legitimate and narrowly tailored means to ensure no cross-over" between the PAC's IE-only funds and its funds for campaign contributions." It concluded, "As long as Plaintiff[] strictly segregate[s] these funds and maintain[s] the statutory limits on soliciting and spending hard money, [it is] free to seek and expend unlimited . . . funds geared toward independent expenditures." *Id*. at 135; *see also Emily's List*, 581 F.3d at 12 (holding that a "non-profit" that contributes to candidates nevertheless may accept unlimited funds to subsidize its independent expenditures so long as, "to avoid circumvention of individual contribution limits by its donors . . . its contributions to parties or candidates come from a hard-money account"). Thus, BCRA is not sufficiently tailored to furthering the Government's important interests, and should be held unconstitutional as applied to IE-only accounts of either political parties in general, or third parties in particular.

II. THIS COURT SHOULD REJECT THE FEC'S REMAINING ARGUMENTS

A. The FEC Misstates the Framers' Views Toward Political Parties

The FEC opens its brief with an unwarranted broadside against political parties, bizarrely contending that, the Framers designed the Constitution "to restrain the power of political parties

because they viewed parties as a potential threat to representative governance" and a "special" source of "corruption." FEC Opp. at 4. The FEC contends that the Framers agreed "about the baneful effects of the spirit of party," *id*. (quoting Richard Hofstadter, *The Idea of a Party System* 3 (1970)). "When the Framers expressed hostility to political parties," however, "they were voicing opposition to factionalism along the lines of quasi-permanent interest groups such as religions, classes, and states. They did not anticipate the ideological umbrella parties that would eventually come into being . . . ." Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 848 (2004); John Harrison, *Originalism and Historical Truth: Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 88 (2003) ("The framers knew nothing of parties as we know them and mainly disliked the proto-parties with which they were familiar.").

The FEC also discusses Alexander Hamilton's opposition to "factions." FEC Opp. at 4. "Although the framers thought deeply about the vices of 'faction,' the modern political party so greatly increases the formality and operative power of the eighteenth century faction as to amount to a different kind of institution." Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 384 (2004); *see also* Dean McSweeney & John Zvesper, *American Political Parties* 7 (1991) (recognizing that modern political parties are "parties of principle," while Hamiltonian "factions" are "parties of interest"); Donald E. Daybell, Note, *Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections?* 80 B.U. L. REV. 289, 321 (2000) ("The Founding Fathers were greatly concerned about the dangers of unrestrained factionalism. The factions they envisioned, however, bear

little resemblance to current political parties."). Thus, the FEC's arguments are based largely on anachronism, and do not suggest any constitutional hostility to political parties or their influence.

"The formation of national political parties was almost concurrent with the formation of the Republic itself." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). George Washington—who the FEC cites as an ardent opponent of political parties—was a Federalist. Steven G. Calabresi, Book Review, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 477 (2006) (discussing "Federalist President[] George Washington"); John C. Yoo, *War Powers: War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1657 (2002). And the very composition of the FEC itself is expressly based on political party. 2 U.S.C. § 437c(a)(1).

In any event, the Supreme Court has broadly recognized that people have the fundamental First Amendment right "to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1996); *see also Tashjian v. Republican Party*, 479 U.S. 208, 215 (1986) (affirming "the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals."). And political parties themselves have a "core" First Amendment right to engage in independent expression in connection with federal elections. *Colorado I*, 518 U.S. at 616. Thus, the FEC's hostility toward political parties is not a basis for rejecting Plaintiff's claims, but rather precisely the type of anti-associational spirit from which this Court must protect Plaintiffs' rights.

B. This Court Should Not Decline to Grant Injunctive Relief Based on *Winter*'s "Non-Merits" Factors

The FEC concludes its brief by suggesting that, even if this Court concludes that BCRA's restrictions are unconstitutional (or likely unconstitutional) as applied to Plaintiffs' IE-only

accounts, it nevertheless should be permitted to continue enforcing those unconstitutional requirements based on the "non-merits" requirements for injunctive relief set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). *See* FEC Opp. at 40-44. The FEC fails to cite even a single case to support the disquieting proposition that a federal agency may continue to enforce a statute against certain plaintiffs even if it is unconstitutional as applied to them.

1. Plaintiffs are Suffering Immediate and Irreparable Injury

In any event, Plaintiffs are suffering imminent injury because BCRA is preventing Plaintiffs LNCC and LPIN from establishing separate, segregated IE-only accounts, and Plaintiff Rufer from being able to make contributions to any such accounts (as he already has contributed the maximum legal amount to LNCC and LPIN for 2014). The Supreme Court has held that a plaintiff suffers constitutionally cognizable injury when he has the "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

The FEC points out that it has graciously refrained from threatening Plaintiffs in any way, FEC Opp. at 41, yet the lack of such threats is irrelevant. BCRA is not a desuetudinal law that has long gone unenforced. *Cf. Poe v. Ullman*, 367 U.S. 497, 501 (1961) (dismissing challenge to state law where, "[d]uring the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated"). To the contrary, the FEC vigorously enforces federal election laws, including BCRA. In 2013 alone, it closed 134 enforcement cases and collected $730,390 in civil penalties. FEC, Performance and Accountability Report, Fiscal Year 23 (2013), *available at*

http://www.fec.gov/pages/budget/fy2013/FEC_Final_PAR_2013_121613.pdf. The FEC does not claim that, should Rufer make such a statutorily prohibited contribution in excess of BCRA's limits to a political party's IE-only account, it would refrain from enforcing the statute against him or the party that established it. This threat of enforcement "amounts to an Article III injury in fact." *Susan B. Anthony List v. Driehaus*, No. 13-193, 2014 U.S. LEXIS 4169, at *20 (June 16, 2014).

This injury literally is irreparable because Plaintiffs cannot sue the FEC for damages due to sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see, e.g.*, *Beverly v. FEC*, No. 1:08-CV-1538 (AWI) (GSA), 2009 U.S. Dist. LEXIS 5699, at *2-3 (E.D. Cal. Jan, 28, 2009) (dismissing damages claims against FEC due to sovereign immunity). The Federal Tort Claims Act does not waive sovereign immunity for acts performed "in the execution of a statute . . . whether or not such statute . . . is valid." 28 U.S.C. § 2680(a). When sovereign immunity prevents a plaintiff from recovering damages against an agency, even otherwise compensable harms are deemed irreparable. *R.J. Reynolds Tobacco Co. v. United States FDA*, 823 F. Supp. 2d 36, 38 (D.D.C. 2011). Furthermore, it would be difficult to assign a monetary value to the harm Plaintiffs suffered from having to wait to engage in constitutionally protected conduct, *see Carey v. Piphus*, 435 U.S. 247, 264 (1978) (holding that plaintiffs must present proof of damages to recover compensatory damages for Due Process violations). Violations of such intangible rights therefore also give rise to irreparable harm. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 707-10 (1990); *cf.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1055 (4th Cir. 1985) (holding that harm can be irreparable due to "the impossibility of ascertaining with any accuracy the extent of the loss").

2. The Balance of Harms Falls Entirely on Plaintiffs and the Public Interest Supports Granting an Injunction

Turning to the remaining *Winter* factors, because BCRA's restrictions are unconstitutional as applied to Plaintiffs, the balance of harms falls solely on them. *See Carey*, 791 F. Supp.2d at 135. The FEC cannot suffer hardship from being enjoined from applying the law in an unconstitutional manner. *Cf. id*. ("The 'First Amendment requires [courts] to err on the side of protecting political speech rather than suppressing it'") (quoting *Wisc. Right to Life*, 551 U.S. at 357).

Additionally, granting the injunction is in the public interest. The D.C. Circuit has held that "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 652 (D.C. Cir. 2013). Indeed, the public interest requires the enforcement of constitutional rights. *See, e.g., Carey*, 791 F. Supp. 2d at 136 ("The public interest is supported by protecting the right to speak, both individually and collectively. Here, to protect Plaintiffs' right to engage in political speech through independent expenditure campaigning is fully in accord with the public's interest in free speech and association."). Thus, if this Court holds that BCRA is unconstitutional (or likely unconstitutional) as applied to Plaintiffs, it should grant Plaintiffs' requested injunction.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction.

Respectfully submitted,

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