

No. 16-865

---

IN THE  
**Supreme Court of the United States**

---

REPUBLICAN PARTY OF LOUISIANA, *ET AL.*,

*Appellants,*

v.

FEDERAL ELECTION COMMISSION,

*Appellee.*

---

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

---

**BRIEF OF AMICI CURIAE  
PUBLIC CITIZEN, INC., DEMOCRACY 21,  
AND CAMPAIGN LEGAL CENTER  
IN SUPPORT OF APPELLEE  
AND SUMMARY AFFIRMANCE**

---

SETH P. WAXMAN  
CATHERINE M.A. CARROLL  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue NW  
Washington, DC 20006  
(202) 663-6000

SCOTT L. NELSON  
*Counsel of Record*  
ALLISON M. ZIEVE  
PUBLIC CITIZEN  
LITIGATION GROUP  
1600 20th Street NW  
Washington, DC 20009  
(202) 588-1000  
snelson@citizen.org

*Attorneys for Amici Curiae*

February 2017

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

---

---

TREVOR POTTER  
PAUL M. SMITH  
TARA MALLOY  
CAMPAIGN LEGAL CENTER  
1411 K Street NW, Suite 1400  
Washington, DC 20005  
(202) 736-2200

DONALD J. SIMON  
SONOSKY, CHAMBERS,  
SACHSE, ENDRESON &  
PERRY, LLP  
1425 K Street NW  
Suite 600  
Washington, DC 20005  
(202) 682-0240

FRED WERTHEIMER  
DEMOCRACY 21  
2000 Massachusetts Ave. NW  
Washington, DC 20036  
(202) 355-9600

**QUESTION PRESENTED**

Whether the provisions of the Bipartisan Campaign Reform Act imposing contribution limits on funds used by state and local party committees for federal election activity, which this Court has twice upheld against constitutional challenge, are unconstitutional on their face or as applied to funds used for “independent” spending.

**TABLE OF CONTENTS**

QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT.....	6
I. <i>McConnell</i> and <i>RNC</i> control this case. ....	6
II. This Court’s decisions have not displaced the underpinnings of <i>McConnell</i> and <i>RNC</i> . ....	11
A. The provisions at issue limit contributions. ....	11
B. The Court’s statements about corruption in <i>Citizens United</i> and <i>McCutcheon</i> do not affect <i>McConnell</i> ’s and <i>RNC</i> ’s soft-money holdings. ....	14
C. The Louisiana Republicans’ focus on the “independence” of their spending reflects a fundamental misunderstanding of the interest served by the contribution limits. ....	18
III. The Louisiana Republicans’ arguments would have exceptionally far-reaching consequences. ....	21
CONCLUSION .....	23

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	10, 11, 12, 13, 14, 17
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010) .....	<i>passim</i>
<i>Colo. Repub. Fed. Campaign Comm. v. FEC</i> , 518 U.S. 604 (1996) .....	10, 19
<i>FEC v. Colo. Repub. Fed. Campaign Comm.</i> , 533 U.S. 431 (2001) .....	11, 19
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003) .....	<i>passim</i>
<i>McCutcheon v. FEC</i> , 134 S. Ct. 1434 (2014) .....	<i>passim</i>
<i>Republican Nat’l Comm. v. FEC</i> , 561 U.S. 1040 (2010), <i>summarily aff’g</i> 698 F. Supp. 2d 150 (D.D.C. 2010).....	<i>passim</i>
<b>Other:</b>	
<a href="https://www.opensecrets.org/outsidespending/index.php">https://www.opensecrets.org/outsidespending/ index.php</a> .....	22
<a href="https://www.opensecrets.org/parties/">https://www.opensecrets.org/parties/</a> .....	22

## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae Public Citizen, Inc., Democracy 21, and Campaign Legal Center are organizations dedicated to fighting the corrupting influence of money in our electoral politics. They have devoted years of effort to promoting campaign finance reform legislation, encouraging appropriate implementation of that legislation by the Federal Election Commission (FEC), and participating as parties, amici curiae and counsel in litigation over the construction and constitutionality of campaign finance laws and regulations at all levels of the federal court system and in state courts as well. Amici submitted a brief to the three-judge court supporting the constitutionality of the statutory provisions at issue in this case. They now submit this brief because they believe that the three-judge district court's ruling correctly applies dispositive precedents of this Court, and that a discussion of the applicable legal principles could assist this Court in determining that plenary consideration of this appeal is unnecessary.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case presents an issue this Court has already decided twice: Whether the provisions of the Bipartisan Campaign Reform Act (BCRA) that impose source and amount limits, as well as reporting requirements, on contributions used by state and local political party committees for federal election activity are constitutional. The

---

<sup>1</sup> This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for the parties received 10 days' notice of the filing of this brief, and written consents to its filing from counsel for the parties are on file with the Clerk.

Court upheld those provisions, which prevent state and local party committees from using “soft money” to benefit federal candidates, against a facial challenge in *McConnell v. FEC*, 540 U.S. 93 (2003). *McConnell* sustained the soft-money ban because it “is narrowly focused on regulating contributions that pose the greatest risk of ... corruption [of federal candidates]: those contributions to state and local parties that can be used to benefit federal candidates directly.” *Id.* at 167. In 2010, the Court upheld the soft-money ban against a challenge seeking to invalidate it as applied to particular types of federal election activity that assertedly posed no risk of corrupting federal candidates. *Republican Nat’l Comm. v. FEC*, 561 U.S. 1040 (2010), *summarily aff’g* 698 F. Supp. 2d 150 (D.D.C. 2010) (*RNC*).

In this case, the Republican Party of Louisiana and two local Louisiana Republican Party committees (collectively, the “Louisiana Republicans”) mount a facial challenge to the state- and local-party soft-money ban that is directly foreclosed by *McConnell*, and an as-applied challenge that is not meaningfully distinguishable from the one the Court summarily rejected in *RNC*. The three-judge district court correctly held that this Court’s controlling authority requires rejection of those challenges and that the Louisiana Republicans’ arguments that more recent decisions of this Court support the challenges are meritless. In their jurisdictional statement, the Louisiana Republicans rehash the arguments that the three-judge court’s opinion thoroughly considered and correctly rejected. Because those arguments fail to demonstrate the existence of issues substantial enough to require plenary consideration of this case, the Court should summarily affirm the decision of the district court.

The Louisiana Republicans' arguments boil down to one basic, and erroneous, proposition: that the First Amendment forbids Congress to limit contributions used by state and local political parties for federal election activities that are conducted independently of the candidates for federal office whose candidacies they benefit. That proposition underlies their claimed as-applied and facial challenges, both of which assert that BCRA's soft-money ban cannot be applied to funds used for any activity by state and local parties that is not coordinated with federal candidates.

Those challenges cannot be squared with the holding of *McConnell*, which found the soft-money ban facially constitutional for reasons that had nothing to do with whether state and local party spending on federal election activity was independent or coordinated. And in *RNC*, this Court upheld the application of the soft-money ban to independent spending by state and local parties, rejecting the same argument advanced here: that donations to parties for independent expenditures cannot be regulated.

The Louisiana Republicans' suggestions that *McConnell*'s and *RNC*'s soft-money holdings have been undermined by the Court's subsequent decisions are insubstantial. First, they contend that this Court's decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), requires that the soft-money provisions be treated as expenditure limits rather than contribution limits and thus subjected to strict scrutiny rather than the intermediate scrutiny applied to contribution limits. That argument reflects a fundamental misunderstanding of the difference between contribution and spending limits. The BCRA provisions at issue do not limit how much state and local parties can spend on federal election activity. Rather,



they provide that the funds used for such spending must be raised in limited amounts, and only from sources permissible under the Federal Election Campaign Act (FECA). Those features define what a contribution limit is. As the three-judge court correctly held, nothing in *McCutcheon* suggests otherwise. Indeed, *McCutcheon* itself not only applied intermediate scrutiny in striking down the contribution limits at issue in that case, but went out of its way to state that its holding “clearly does not overrule *McConnell*’s holding about ‘soft money.’” 134 S. Ct. at 1451 n.6.

Second, the Louisiana Republicans wrongly contend that the soft-money holdings of *McConnell* and *RNC* have been superseded by a narrower conception of the government’s anti-corruption interest exemplified in the Court’s opinion in *Citizens United v. FEC*, 558 U.S. 310 (2010), and repeated in the plurality opinion in *McCutcheon*. But this Court in *RNC* has already rejected the proposition that the soft-money ban cannot be squared with *Citizens United*’s view of the anti-corruption interest. The soft money restrictions are fully compatible with that view of corruption because they rest on a record demonstrating that large contributions to party organizations present opportunities for the reality or appearance of prearranged, corrupt bargains involving the candidates who benefit.

Finally, the Louisiana Republicans contend that because the spending in which they wish to engage using contributions not subject to FECA limits will be “independent,” the party spending cannot pose a risk of corrupting or appearing to corrupt candidates. As the three-judge court held, that argument “misunderstand[s] the way in which large soft-money contributions to political parties create a risk of *quid pro quo* corruption.” J.S.

App. 18a. The threat of actual or apparent corruption at which the state-party soft-money provisions are directed comes not from the party *spending*, but “from the *contribution* of soft money to the party in the first place.” *Id.* at 18a. The close and unique relationship between parties and their candidates, which differentiates parties from other campaign spenders, creates the threat. In light of that relationship, the possibility of corruption (and of circumvention of other anticorruption measures) inheres in unlimited contributions to parties and exists regardless of whether the party proceeds to spend those funds independently or in coordination with the candidate. The harm the statute targets is not that parties will corrupt candidates by spending to support their candidates, but that contributors will corrupt candidates, or appear to corrupt them, by contributing to the common political enterprise made up of parties and candidates.

The consequence of the Louisiana Republicans’ argument would be the invalidation of any limits on amounts contributed to political parties, other than contributions of funds used for the smaller amounts of coordinated spending in which the parties engage. Nothing in this Court’s decisions supports such a holding. The Court has uniformly upheld laws imposing reasonable limits on contributions to political parties, and has repeatedly disclaimed any intention to back away from its holdings sustaining the soft-money ban. The Louisiana Republicans’ effort to overturn settled law presents no issue meriting plenary consideration, and the Court should therefore summarily affirm the three-judge court’s well-reasoned decision.

## ARGUMENT

### I. *McConnell* and *RNC* control this case.

This Court has twice affirmed the constitutionality of BCRA’s state-party soft-money provisions, in *McConnell*, 540 U.S. at 161–73, and *RNC*, 561 U.S. 1040. In neither case did the Court’s holding that Congress may limit the contributions that state and local parties use for federal election activity rest in any way on the premise that federal election activity expenditures were coordinated with federal candidates. As the three-judge court recognized, the Louisiana Republicans’ assertion that the soft money provisions cannot be applied to contributions used for “independent” federal election activity cannot be squared with either ruling.

A. *McConnell*’s holding that the soft-money provisions are facially constitutional rested on a number of bases. First, the record substantiated the view that the close relationship between political parties and their federal candidates made contributions to the parties a source of potential corruption, or its appearance, regardless of how the funds were ultimately used. *See* 540 U.S. at 143–56. Second, the Court found reasonable Congress’s conclusion that “state [party] committees function as an alternative avenue [to national party committees] for precisely the same corrupting forces,” *id.* at 164, and that failing to restrict contributions used by state parties for activities affecting federal elections would thus allow ready circumvention of regulation of contributions to national parties, *id.* at 165–66. And third, the Court determined that the soft money provisions were not overbroad because their limitation to funding of federal election activity was “narrowly focused on regulating contributions that pose the greatest risk of ... corruption: those contributions to state and lo-

cal parties that can be used to benefit federal candidates directly.” *Id.* at 167.

As the three-judge court recognized, “*McConnell*’s holding forecloses plaintiffs’ facial challenge.” J.S. App. 13a. It also forecloses the Louisiana Republicans’ as-applied challenge to any application of the soft-money ban to spending that is not coordinated with candidates. *McConnell* specifically rejected the contention that the state-party soft-money ban encompassed “activities that cannot possibly corrupt or appear to corrupt federal officeholders.” 540 U.S. at 166. As the three-judge court pointed out, *McConnell* “canvassed the full range of activity constituting [federal election activity]” and concluded that the soft-money ban’s application to all federal election activity was narrowly tailored because all of that activity substantially benefits federal candidates. J.S. App. 16a. None of the Court’s reasoning in upholding limits on contributions used for such activity was premised on the idea that the state and local parties’ federal election activity was coordinated with independent of federal candidates. *See McConnell*, 540 U.S. at 167–71. Thus, the three-judge court correctly concluded that the Louisiana Republicans’ as-applied challenge, like its facial attack, “is incompatible with *McConnell*’s approach in rejecting the facial challenge.” J.S. App. 16a.

**B.** In *RNC*, state and local Republican party committees joined in an as-applied challenge to BCRA’s state-party soft money provisions, contending that they were unconstitutional as applied to the parties’ independent federal election activity that did not “target” the campaigns of specific federal candidates. A three-judge district court rejected that argument, reasoning that *McConnell*, in holding that the state-party soft money provisions were not overbroad, had considered and

“squarely rejected” the argument that the provisions were unconstitutional as applied to activities that ostensibly “pose[d] no conceivable risk of corrupting or appearing to corrupt federal officeholders.” 698 F. Supp. 2d at 161 (quoting *McConnell*, 540 U.S. at 166). The *RNC* three-judge court concluded that because *McConnell*’s holding that the provisions were facially constitutional rested on the view that the soft-money provisions could constitutionally be applied to “all” federal election activity as defined in BCRA, the as-applied challenge was inconsistent with *McConnell*’s reasoning. *Id.*

The *RNC* three-judge court also rejected the plaintiffs’ argument that *McConnell*’s soft-money holding had been undermined by *Citizens United*. The court pointed out that “*Citizens United* did not disturb *McConnell*’s holding with respect to the constitutionality of BCRA’s limits on contributions to political parties.” 698 F. Supp. 2d at 153 (citing *Citizens United*, 558 U.S. at 361).

The parties in *RNC* appealed the three-judge court’s ruling to this Court and argued, as the Louisiana Republicans do here, that “the government must demonstrate that each application of BCRA’s prohibition on nonfederal money targets an activity that, if funded by nonfederal money, would create an appreciable risk of actual or apparent *quid pro quo* corruption of federal officeholders.” *RNC v. FEC*, No. 09-1287, Jurisdictional Statement, at 10 (U.S. filed April 23, 2010) (“*RNC J.S.*”). The appellants, much like the Louisiana Republicans, invoked *Citizens United*’s holding that independent expenditures by corporations cannot be limited on an anti-corruption rationale, arguing that contribution limits accordingly could not be applied to state and local parties’ federal election activities that were independent and not “targeted” at specific federal candidates:

*Citizens United* makes clear that independent expenditures—no matter their size—do not create a risk of *quid pro quo* corruption. It follows, *a fortiori*, that parties’ solicitation and expenditure of donations of nonfederal money do not have sufficient *quid pro quo* potential to warrant stifling the speech and associational rights of parties and their members.

*Id.* at 19. This Court rejected those arguments and summarily affirmed the three-judge court’s decision. 561 U.S. 1040.

The Louisiana Republicans seek to avoid *RNC* on the theory that the as-applied challenge in that case was different from the one here. The challenge to the state-party soft-money provisions in *RNC* sought to hold the statute unconstitutional as applied to funds raised for independent spending that was not “targeted” at federal elections or candidates. The challenge here seeks a ruling that the soft-money ban is unconstitutional as applied to *all* independent spending on federal election activity. But as the language of the *RNC* jurisdictional statement quoted above makes clear, the claim that the spending at issue in *RNC* was *independent* as well as “non-targeted” was an essential part of the challengers’ argument in this Court. The activity that the *RNC* plaintiffs sought to immunize from the soft-money ban (fundraising for “non-targeted” independent spending) was a wholly included subset of the activity the Louisiana Republicans seek to immunize here (fundraising for *all* independent spending). This Court’s rejection of the narrower as-applied challenge in *RNC* thus applies, *a fortiori*, to the broader as-applied and facial challenges presented here. The three-judge court was therefore correct in concluding that the outcome in *RNC* “fully” supports the same

result “with regard to the independent [federal election activity] sought to be conducted by plaintiffs in this case.” J.S. App. 16a.

C. This Court’s holdings in *McConnell* and *RNC* concerning BCRA’s soft-money provisions are fully consistent with the body of the Court’s campaign finance jurisprudence. The Court has long recognized the legitimacy of base contribution limits applicable both to candidates, see *Buckley v. Valeo*, 424 U.S. 1, 26–29 (1976), and to political parties, see *Colo. Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616–17 (1996) (controlling opinion of Breyer, J.) (*Colorado I*); *McConnell*, 540 U.S. at 144; *McCutcheon*, 134 S. Ct. at 1446.

Moreover, each time the Court has addressed BCRA’s soft-money provisions, it has either upheld them (in *McConnell* and *RNC*) or specifically disclaimed any intent to call them into question. In *Citizens United*, for example, the Court took note of the legislative record supporting BCRA’s soft-money provisions and pointedly observed that the case before it was not about soft money. 558 U.S. at 360–61. As Judge Kavanaugh, writing for the three-judge court in *RNC*, put it, “*Citizens United* expressly left this aspect of *McConnell* intact,” 698 F. Supp. 2d at 157, and “did not disturb *McConnell*’s holding with respect to the constitutionality of BCRA’s limits on contributions to political parties.” *Id.* at 153. This Court’s post-*Citizens United* decision in *RNC* rejecting the challenge to the soft-money provisions confirmed Judge Kavanaugh’s view. The subsequent plurality opinion in *McCutcheon* likewise explicitly stated that it did not affect *McConnell*’s soft-money holding. 134 S. Ct. at 1446, n.6.

This Court’s directly controlling decisions thus validate the three-judge court’s ruling. The decision below should be summarily affirmed.

**II. This Court’s decisions have not displaced the underpinnings of *McConnell* and *RNC*.**

**A. The provisions at issue limit contributions.**

In urging this Court to disregard *McConnell* and *RNC* and strike down BCRA’s soft-money provisions as applied to the funding of “independent” federal election activity, the Louisiana Republicans posit that the provisions are actually spending limits subject to strict scrutiny, not contribution limits subject to less demanding First Amendment scrutiny. *See Buckley*, 424 U.S. at 20–25. The opinion of the three-judge court thoroughly addresses that argument and demonstrates its lack of merit. J.S. App. 12a–15a.

The challenged provisions do not limit the amount state and local parties may spend on federal election activity. State and local parties are free to spend as much as they want as long as the spending is not coordinated with federal candidates. (Coordinated spending is generally treated as a contribution to the candidate and is subject to limits that are not challenged here. *See FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*.) BCRA limits the sources and amounts of contributions that the parties may accept and use for federal election purposes, not the total amount of funds that the parties may accumulate and spend.

If words are to retain their meaning, such provisions are contribution limits, not spending limits. Of course, the statute applies those contribution limits only to funds used for certain purposes—that is, federal election activity, as well as express advocacy involving federal candi-



dates and contributions to federal candidates. But from FECA's very beginnings, contribution limits have applied only to funds raised for purposes related to federal elections: Even the limits on contributions to federal candidates apply only to contributions to be used to influence federal elections, not gifts intended for other purposes. That does not mean that those limits are not contribution limits.

Not surprisingly, then, this Court has repeatedly rejected the exact argument the Louisiana Republicans press here. In *McConnell*, the Court addressed the contention that the state-party soft-money provisions should be treated as spending limits subject to strict scrutiny, and concluded that although BCRA's state-party soft-money ban "prohibits state party committees from spending nonfederal money on federal election activities," it does not "in any way limit[] the total amount of money parties can spend. ... Rather, [it] simply limit[s] the source and individual amount of donations. That [it] do[es] so by prohibiting the spending of soft money does not render [it an] expenditure limitation[]." 540 U.S. at 139. *McConnell* therefore sustained the statute under the level of scrutiny applicable to contribution limits under *Buckley*.

*RNC* presented a rehash of the same argument. Like the Louisiana Republicans here, the plaintiffs in *RNC* argued that, as applied to their proposed spending on federal election activity that was not "targeted" at federal candidates, the contribution limits imposed by BCRA would "function as expenditure limits." 698 F. Supp. 2d at 156. The three-judge court held that the *RNC* plaintiffs' "argument flies in the face of *McConnell*, which squarely held that the level of scrutiny for regulations of contributions to candidates and parties does not depend

on how the candidate or party chooses to spend the money or to structure its finances.” *Id.* The *RNC* three-judge court further noted that the majority opinion in *Citizens United* “expressly left intact this portion of *McConnell*.” *Id.* The *RNC* court therefore applied the “less rigorous scrutiny” applicable to “limits on *contributions*.” *Id.*

In the jurisdictional statement in *RNC*, the appellants, like the Louisiana Republicans here, urged that strict scrutiny applied because, in their view, the soft-money ban functions as “an expenditure limit.” *RNC* J.S. 12 n.2. This Court’s summary affirmance reflects the Court’s conclusion that that argument was not substantial enough to warrant plenary consideration.

The Louisiana Republicans ask this Court to repudiate these precedents and treat the contribution limits applicable to state and local party committees as spending limits because, in *McCutcheon*, the plurality opinion described the contribution limits at issue there as implicating rights to engage in “speech.” *See, e.g.*, 134 S. Ct. at 1449. But the *McCutcheon* plurality’s use of the term “speech” did not purport to change the standard of scrutiny applicable to contribution limits; it merely reflected the Court’s longstanding view that contribution limits affect speech sufficiently to call for scrutiny under the intermediate standard applied in *Buckley*. *See* 424 U.S. at 15–22.

Thus, the *McCutcheon* plurality opinion expressly declined to “revisit *Buckley*’s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review,” 134 S. Ct. at 1445, and it concluded that the aggregate limits at issue failed the less rigorous standard of scrutiny applicable to contribution limits under *Buckley*. *See id.* at 1446. And the opinion stated explicitly that its holding “clearly does not

overrule *McConnell*'s holding about soft money." *Id.* at 1451 n.6. Justice Thomas's concurring opinion therefore criticized the plurality for *adhering* to *Buckley*'s standard of scrutiny for contribution limits. *See id.* at 1464 (Thomas, J., concurring in the judgment).

The three-judge court thus was correct in concluding that "the approach of the *McCutcheon* plurality is consistent with *McConnell*'s treatment of [the state-party soft-money ban] as a contribution limit subject to less demanding scrutiny." J.S. App. 14a. The Louisiana Republicans' assertion that *McCutcheon* actually stands for a proposition the Court expressly disavowed does nothing to establish the existence of an issue substantial enough to avoid summary affirmance here.

**B. The Court's statements about corruption in *Citizens United* and *McCutcheon* do not affect *McConnell*'s and *RNC*'s soft-money holdings.**

The Louisiana Republicans also assert that *Citizens United* and *McCutcheon* adopted a narrow view of the compelling governmental interest in combatting corruption and the appearance of corruption—a view that they claim supersedes the rationale offered in *McConnell* for upholding BCRA's soft-money provisions. As the three-judge court pointed out (J.S. App. 22a–23a), the Louisiana Republicans' argument does not account for this Court's rejection of exactly the same argument in *RNC*, and does not establish the existence of a substantial question with respect to the constitutionality of the state-court soft-money ban.

Like the Louisiana Republicans, the plaintiffs in the *RNC* case argued that the Court's discussion of corruption in *Citizens United* effectively overruled *McConnell*'s soft-money ruling, despite the Court's express disavowal

of any such intent. As the opinion below notes, Judge Kavanaugh’s opinion in *RNC* “explained in detail why the showing of *quid pro quo* corruption in *McConnell* meets the standard set forth in *Citizens United*.” J.S. App. 22a–23a (citing 698 F. Supp. 2d at 158–60).

In particular, the *RNC* three-judge court pointed out that, although *Citizens United* stated that mere access and ingratiation resulting from independent spending by unaffiliated persons and groups is not corruption, *Citizens United* had not validated what the *McConnell* record showed to have occurred in the soft-money era: “the selling of preferential access to federal officeholders and candidates in exchange for soft-money contributions.” 698 F. Supp. 2d at 158. Nor, *RNC* concluded, did *Citizens United*’s discussion of corruption undermine the *McConnell* Court’s conclusion that candidates and parties are so closely connected that candidates value contributions to the parties nearly as much as they value contributions to their own candidacies. Thus, the same obvious anticorruption interest that unquestionably justifies candidate contribution limits validates party limits as well. *See id.* at 159.

The central argument pervading the jurisdictional statement in *RNC* was that *McConnell*’s holding that BCRA’s soft-money provisions are constitutional was “no longer tenable” in light of *Citizens United*’s discussion of corruption. *RNC* J.S. 9; *see also id.* at 2–3, 8–15. In summarily affirming, the Court apparently found the plaintiffs’ reliance on *Citizens United*’s statements about corruption insufficient to create a substantial issue about the constitutionality of BCRA’s soft-money provisions. Rather, the affirmance in *RNC* strongly indicates that, as the three-judge court had found, *Citizens United*’s

discussion of corruption left *McConnell*'s soft-money holdings unscathed.

The Louisiana Republicans' recycling of the argument rejected in *RNC* adds nothing to the substantiality of their appeal. Nor does the intervening decision in *McCutcheon* add substance to the argument. The plurality opinion in *McCutcheon* briefly referenced *Citizens United*'s discussion of corruption, but did not alter or add to it in any way that could make a difference with respect to the constitutionality of BCRA's soft-money provisions. See 134 S. Ct. at 1441, 1450–51. Nor did the *McCutcheon* plurality purport to disavow either *McConnell* or *RNC*'s holding that *McConnell*'s soft-money ruling remains valid after *Citizens United*. Rather, the plurality emphasized that *McCutcheon* “clearly” did not overrule *McConnell*. *Id.* at 1446 n.6. If, as this Court's summary affirmance in *RNC* indicates, *Citizens United*'s comments on corruption left *McConnell*'s anticorruption rationale for soft-money limits intact, the *McCutcheon* plurality's citation of *Citizens United* could not require a different result.

Moreover, the discussion of corruption in *Citizens United* and *McCutcheon* provides no substantive basis for casting aside *McConnell*'s anticorruption rationale for approving BCRA's soft money provisions. *Citizens United*, echoed by *McCutcheon*, stated that, in the absence of the opportunity for prearrangement and quid pro quo deals that contributions afford, any apparent ingratiation or preferential access that may result from purely independent spending by persons or groups unaffiliated with a candidate is not actual or apparent corruption that can justify a limit on such spending. *Citizens United*, 558 U.S. at 357–60; see *McCutcheon*, 134 S. Ct. at 1450–51. Neither *Citizens United* nor *McCutcheon*

purported to validate preferential access or other forms of favoritism that result not from merely “[s]pending large sums,” *id.* at 1450, but from prearrangements or understandings reached in exchange for contributions. The Court acknowledged in *Citizens United* that the *McConnell* record established that such transactions had occurred in the soft money era. *See Citizens United*, 558 U.S. at 360–61. *Citizens United* also recognized that the Court owed deference to congressional findings of such abuses. *Id.* at 361. And nothing in the *McCutcheon* plurality opinion’s citations of *Citizens United* suggests a retraction of those points.

Critically, just as the majority in *Citizens United* stressed that its decision did not overturn limits on soft money contributions, the *McCutcheon* plurality emphasized that the base limits on contributions—including the limits on contributions to party committees at issue here—remained in effect. *Id.* at 1451 & nn.6–7. The *McCutcheon* plurality strongly reaffirmed *Buckley*’s analysis of the anticorruption interests served by base limits. *See, e.g., id.* at 1441, 1450. The plurality’s explicit statement that it was not overruling *McConnell* only emphasizes the point.

The *McConnell* record remains adequate to demonstrate a threat of actual or apparent corruption justifying party contribution limits under any standard. The *McCutcheon* plurality reaffirmed that “Congress may permissibly limit ‘the appearance of corruption stemming from public awareness of the *opportunities* for abuse inherent in a regime of large individual financial contributions.’” 134 S. Ct. at 1450 (quoting *Buckley*, 424 U.S. at 27) (emphasis added). Even if a sale of access in exchange for a contribution to a party were not itself “corruption,” the existence of such transactions demon-

strates that party contributions present the *opportunity* for prearrangement and quid pro quo transactions: If such contributions can buy access, they surely also create the opportunity and, at least, the very real potential for even more sinister transactions and the appearance that such deals may be occurring.

**C. The Louisiana Republicans’ focus on the “independence” of their spending reflects a fundamental misunderstanding of the interest served by the contribution limits.**

The Louisiana Republicans rely heavily on the assertion that because the Court has held that independent expenditures themselves do not pose a sufficient risk of corruption to justify restricting them, the contribution limits imposed by BCRA must be unconstitutional as applied to funds to be used for the party committees’ independent spending on federal election activity. Again, however, the three-judge court thoroughly addressed the argument and explained that it fundamentally misperceives the rationale for the contribution limits. J.S. App. 18a. That rationale is not that a political party’s *spending* will corrupt its own candidates, but that large *contributions* to the party create the threat of quid pro quo corruption of the party’s candidates. *Id.* As the three-judge court put it, the Louisiana Republicans’ “effort to avoid *McConnell* based on the independent nature of their planned spending misconceives of the relevant *quid* as the spending by the party rather than the contribution to the party.” *Id.* at 21a.

The three-judge court’s ruling recognizes that one reason that a party’s independent spending by itself may pose a lesser risk of corruption than spending by outside individuals or groups is that the party and its candidates already have a close relationship and conjunction of in-

terests. *See Colorado I*, 518 U.S. at 615–18; *see also id.* at 623. For that very reason, however, *contributions* to party committees present much the same threat of corruption as contributions to the candidates those party committees support and with whom they are intimately connected. Thus, as this Court has put it, parties, “whether they like it or not, ... act as agents for spending on behalf of those who seek to produce obligated officeholders.” *Colorado II*, 533 U.S. at 452.

The Court has therefore held that limits on contributions to parties are constitutional even if limits on independent party spending are not, because it is the large contributions, not the party’s spending, that present the relevant threat of corruption. Thus, the controlling opinion in *Colorado I* emphasized that, although parties could *spend* in unlimited amounts if they did so independently, corruption could be held in check by adequate limits on the amounts donors could contribute to the parties. *See* 518 U.S. at 617. The opinion therefore suggested that “Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute’s limitations on contributions to political parties.” *Id.* And when Congress in fact did so in BCRA by imposing new contribution limits that eliminated the parties’ ability to use soft money in connection with federal elections, the Court upheld those limits in *McConnell*—not because it found that party *spending* was inherently corrupting, but because the large *contributions* that fueled that spending posed the same risk of corrupting candidates as large contributions to the candidates themselves. *See* 540 U.S. at 143–56; 161–71.

In particular, *McConnell* pointed to the “close connection and alignment of interests” between national



parties and federal candidates, *id.* at 155, and the similarly “close ties between federal candidates and state party committees,” *id.* at 161. That intimate relationship leads candidates to place enough value on large contributions to the parties to justify viewing such contributions as posing a threat of corruption similar to that of contributions to the candidates themselves, regardless of the particular way in which the money is ultimately spent in connection with federal elections. *See id.* at 156, 164–71.<sup>2</sup>

The record in *McConnell*, moreover, amply demonstrated that regardless of the independence with which the parties may expend these funds in support of their electoral efforts and those of their candidates, the manner in which large contributions were raised by the parties presented ample opportunities for the reality or appearance of prearrangement and corrupt bargains between contributors and candidates. *See* 540 U.S. at 145–56, 161–62. As the three-judge court noted below, this Court in *Citizens United* acknowledged that record in distinguishing the corporate expenditure prohibition at issue there from the soft-money provisions upheld in *McConnell*. *See* J.S. App. 18a (citing *Citizens United*, 558 U.S. at 360–61). And the Court’s subsequent summary affirmance in *RNC* provides further confirmation

---

<sup>2</sup> *Cf. RNC*, 698 F. Supp. 2d at 159 (“In relying in part on the inherently close relationship between parties and their officeholders and candidates, the Court suggested that federal officeholders and candidates may value contributions to *their national parties*—regardless of how those contributions ultimately may be used—in much the same way they value contributions to *their own campaigns*. As a result, the reasoning goes, contributions to national parties have much the same tendency as contributions to federal candidates to result in *quid pro quo* corruption or at least the appearance of *quid pro quo* corruption.”).

that the independence of party expenditures does not immunize parties from contribution limits.

In short, the three-judge court was correct in concluding that “*Citizens United*’s holding about independent expenditures did not displace *McConnell*’s recognition of the inherent capacity of soft-money contributions to create a risk of *quid pro quo* corruption or its appearance, regardless of whether political parties ultimately spend those contributions independently of—or instead in coordination with—federal candidates and campaigns.” J.S. App. 19a–20a. The Louisiana Republicans’ repetition of the arguments thoroughly considered and convincingly rejected below does not suffice to avoid summary affirmance.

### **III. The Louisiana Republicans’ arguments would have exceptionally far-reaching consequences.**

The Louisiana Republicans posit that funds used for any independent spending by a party committee—even independent spending for express candidate advocacy, and even independent spending by a national rather than a state party committee—cannot be subject to the source and amount limitations imposed by federal law. If their argument were accepted, the only party fundraising that could be subjected to contribution limits would be funds used for direct cash contributions to federal candidates and funds used for coordinated expenditures (which are treated as contributions under federal law). Because such contributions and coordinated spending are themselves limited, they amount to a smaller proportion of the parties’ overall spending. The remainder, accounting for the bulk of party spending, could not be subjected to federal contribution limits at all under the Louisiana Republicans’ theory. The return to the soft-money era would be complete.

Indeed, although the Louisiana Republicans purport not to challenge pre-BCRA laws and regulations requiring allocation of spending between hard-money and soft-money accounts for certain state-party activities affecting federal elections, those rules, too, would be unconstitutional under their theory. If contributions to fund parties' federal election activities cannot be limited, there can be no basis for subjecting even *part* of the money used for them to federal contribution limits.

Nor can any comfort be found in the Louisiana Republicans' assertion below that they would raise funds for federal election activity subject to the (very high) contribution limits imposed by Louisiana law for contributions to the state parties. If federal limits on the funds used for such "independent" federal election activity cannot be justified under the First Amendment, state contribution limits applicable to fundraising for the same activity would be equally suspect. The natural consequence of the Louisiana Republicans' theories is the eradication of all limits on contributions to parties for "independent" campaign activity.

As the three-judge court recognized, that result has no support in this Court's precedents. Upsetting this Court's jurisprudence is not necessary to preserve the viability of parties or correct a "grave inequity" that denies them needed funds. J.S. 1. In the 2016 elections, the major parties raised well over \$2 billion, including hundreds of millions of dollars raised by state parties—significantly more than total spending by all outside groups combined.<sup>3</sup> This Court need not jettison decades of precedent to protect the parties.

---

<sup>3</sup> See <https://www.opensecrets.org/parties/>; <https://www.opensecrets.org/outsidespending/index.php>.

## CONCLUSION

The Court should summarily affirm the judgment of the three-judge court.

<p>SETH P. WAXMAN          CATHERINE M.A. CARROLL          WILMER CUTLER          PICKERING HALE          AND DORR LLP          1875 Pennsylvania Ave. NW          Washington, DC 20006          (202) 663-6000</p>	<p>Respectfully submitted,          SCOTT L. NELSON  <i>Counsel of Record</i>          ALLISON M. ZIEVE          PUBLIC CITIZEN          LITIGATION GROUP          1600 20th Street          Washington, DC 20009          (202) 588-1000          snelson@citizen.org</p>
---	--

<p>TREVOR POTTER          PAUL M. SMITH          TARA MALLOY          CAMPAIGN LEGAL CENTER          1411 K Street NW          Suite 1400          Washington, DC 20005          (202) 736-2200</p>	<p>DONALD J. SIMON          SONOSKY, CHAMBERS,          SACHSE, ENDRESON &amp;          PERRY, LLP          1425 K Street NW          Suite 600          Washington, DC 20005          (202) 682-0240</p>
---	---

FRED WERTHEIMER  
 DEMOCRACY 21  
 2000 Massachusetts Ave. NW  
 Washington, DC 20036  
 (202) 355-9600

*Attorneys for Amici Curiae*

February 2017