United States District Court
District of Columbia

Republican National Committee et al., *Plaintiffs*	
v.	**Civil Case No. 14-cv-00853**
Federal Election Commission, *Defendant*	THREE-JUDGE COURT REQUESTED

Amended Application for Three-Judge Court and Memorandum in Support

Plaintiffs move for the convening of a three-judge court to adjudicate the challenges in the *Verified Complaint* (Doc. 1), pursuant to § 403(a)(1) and (d)(2) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub. L. No. 107-155 (2002), 116 Stat. 81, 113-14. *See* LCvR 9.1; 28 U.S.C. § 2284. BCRA § 403 is set out below. *See infra* note 1.

Points and Authorities

I. Plaintiffs Meet the Two Criteria for BCRA § 403's Judicial-Review Provisions.

Pursuant to BCRA § 403(d)(2), Plaintiffs elect to have the provisions of § 403(a) apply to this case. 116 Stat. 113-14. BCRA § 403(a) provides that a constitutional challenge to any BCRA provision shall be filed in this Court, and "shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code." 116 Stat. 113-14.[1] The referenced stat

[1] In relevant part, BCRA § 403, 116 Stat. 113-14, provides as follows:

SEC. 403. JUDICIAL REVIEW.

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.—If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of

ute, section 2284(a), says that "[a] district court of three judges shall be convened when otherwise required by Act of Congress." Section 2284(b)(1) states:

> [T]he judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

BCRA § 403(a) permits plaintiffs to elect its special judicial-review provision in any "*challenge [to] the constitutionality* of any *provision* of [BCRA] or any *amendment* made by [BCRA]." 116 Stat. 113-14 (emphasis added). The criteria here are (a) a constitutional challenge to (b) a BCRA provision/amendment.[2]

Regarding (a), the *constitutional-challenge criterion*, Plaintiffs' challenges qualify: Counts

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> Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.
>
> (2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.
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> (3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.
>
> (4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.
>
> (b) . . . .
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> (c) . . . .
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> (d) APPLICABILITY.—
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> (1) INITIAL CLAIMS.— . . . .
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> (2) SUBSEQUENT ACTIONS.—With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

[2] "Provision/amendment" is employed because the two are interchangeable regarding the challenged provisions. For example, BCRA § 101 ("Soft Money of Political Parties"), a major *provision* adding the new "soft money" ban, is also an amendment because it states that "Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. § 441a(a)(1)) is *amended* by adding at the end the following . . . ." 116 Stat. 82 (emphasis added).

1-3 of the *Verified Complaint* are based on a violation of the First Amendment.

Regarding (b), the *BCRA provision/amendment criterion*, Plaintiffs' challenges in Counts 1-3 also qualify:

- Count 1 challenges non-federal-funds provisions/amendments of BCRA § 101 ("Soft Money of Political Parties"), 116 Stat. 82-86, as applied to political-party non-contribution accounts ("NCAs"). Count 1 also challenges, as so applied, the base limits on contributions to national- and state-party committees, which were the subject of BCRA provisions/amendments at BCRA §§ 102 ("Increased Contribution Limit for State Committees of Political Parties") and 307 ("Modification of Contribution Limits").[3]
- Count 2 also challenges non-federal-funds provisions/amendments of BCRA § 101 ("Soft Money of Political Parties"), 116 Stat. 82-86, as applied to soliciting funds for, or directing funds to, national-party committees' NCAs by national-party committees' officers.
- Count 3 also challenges non-federal-funds provisions/amendments of BCRA § 101 ("Soft Money of Political Parties"), 116 Stat. 82-86, as applied to independent federal

[3] BCRA § 102 amended FECA by adding an entirely new base contribution limit to 2 U.S.C. § 441a(a)(1): "'(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.'" 116 Stat. 86-86.

BCRA § 307 amended FECA (2 U.S.C. § 441a(a)(1)) by "striking" old, and "inserting" new, base contribution limits. 116 Stat. 102. In *McConnell v. FEC*, 540 U.S. 93 (2003), a case brought under BCRA § 403's judicial-review procedures, *id.* at 132, the Court acknowledged jurisdiction over the amendment of base contribution limits at BCRA § 307, 540 U.S. at 229 ("the Court has jurisdiction to hear a challenge to § 307"). *See* Part II.A. And in *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014), the Court acknowledged BCRA judicial-proceeding authority over BCRA § 307's aggregate-limit amendment and held it unconstitutional. 134 S.Ct. at 1443, 1462 (Roberts, C.J., joined by Scalia, Kennedy & Alito, JJ.) (This plurality opinion states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).) *See* Part II.B.

Since the BCRA § 307 amendments that strike prior contribution limits and insert new ones are subject to BCRA § 403's judicial-review provisions, then *a fortiori* BCRA § 102's provision adding an entirely new limit on contributions to state-party committees, where none existed before, is properly subject to BCRA § 403's judicial-review provisions.

election activity by state- and local-party committees.

II. BCRA § 403's Judicial-Review Procedures Have Been Employed in Similar Cases.

In both *McConnell*, 540 U.S. 93, and *McCutcheon*, 134 S.Ct. 1434, this Court convened three-judge courts and the Supreme Court recognized its authority to operate under BCRA § 403's judicial-review procedures in facial challenges like the present as-applied challenges.

A. *McConnell v. FEC* Addressed Challenges to BCRA §§ 101 and 307, at Issue Here.

In *McConnell*, the Supreme Court noted that the case was brought under the judicial-review provisions of BCRA § 403: "Section 403 of BCRA provides special rules for actions challenging the constitutionality of any of the Act's provisions." 540 U.S. at 132 (citation omitted). "As required by § 403, those actions were filed in the District Court for the District of Columbia and heard by a three-judge court. Section 403 directed the District Court to advance the cases on the docket and to expedite their disposition 'to the greatest possible extent.'" *Id.* "As authorized by § 403, all of the losing parties filed direct appeals to this Court within 10 days." *Id.* "[W]e noted probable jurisdiction," the Court continued, "and ordered the parties to comply with an expedited briefing schedule and present their oral arguments at a special hearing." *Id.*

McConnell addressed facial challenges to two BCRA provisions that are at issue here in as-applied challenges:

- One *McConnell* challenge was to BCRA § 101, titled "Soft Money of Political Parties," which barred political-party involvement with non-federal funds. *See McConnell*, 540 U.S. at 133-89 (Part III of the opinion).
- The other *McConnell* challenge was to BCRA § 307, titled "Modification of Contribution Limits."[4]

[4] Inter alia, BCRA § 307:

- "amended" the base limit on individual contributions to candidates by "striking

McConnell decided facial challenges to BCRA § 101 and recognized that, under BCRA 403's judicial-review provision, "the Court ha[d] jurisdiction to hear a challenge to § 307." 540 U.S. at 229.[5]

The present case presents as-applied challenges to BCRA § 101 and BCRA § 307, as well as to similar BCRA § 102, amending FECA by adding an entirely new $10,000 base limit on individual contributions to state-party committees, *see supra* note 3.

B. *McCutcheon v. FEC* Addressed a Challenge to BCRA § 307, at Issue Here.

In *McCutcheon*, this Court also convened a three-judge court under BCRA § 403 (12-1034: Doc. 10, 12) in response to an unopposed application to convene a three-judge court (12-1034: Doc. 3). *McCutcheon* involved a challenge to BCRA § 307, titled "Modification of Contribution Limits," in particular to BCRA § 307(b), titled "Increase in Annual Aggregate Limit on Individual Contributions."

The Supreme Court noted that a three-judge court had been convened under BCRA § 403, *McCutcheon*, 134 S.Ct. at 1443, and proceeded to declare unconstitutional the increased aggregate limits of BCRA § 307 (codified at 2 U.S.C. § 441a(a)(3)). 134 S.Ct. at 1462.

The present case also challenges a contribution limit amended in BCRA § 307, i.e., § 307(a)(2) (codified at 2 U.S.C. § 441a(a)(1)(B)), as well as BCRA § 102, which added an en-

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'$1,000' and inserting '$2,000'" (codified at 2 U.S.C. § 441a(a)(1)(A));

- "amended" the base limit on individual contributions to national-party committees by "striking '$20,000' and inserting '$25,000'") (codified at 2 U.S.C. § 441a(a)(1)(B));
- "amended" the biennial aggregate limit on an individual's total contributions by increasing the total limit (codified at 2 U.S.C. § 441a(a)(3)); and
- "amended" certain base and aggregate limits on contributions by indexing them for inflation (codified at 2 U.S.C. § 441a(c)).

[5] The Court declined to consider the challenge to BCRA § 307 for Article III standing reasons unrelated to BCRA's judicial-review criteria. The reasons are inapplicable here but are discussed in Part III.

tirely new limit on contributions to state-party committees (codified at 2 U.S.C. § 441a(a)(1)(D)).

III. Plaintiffs' Claims Qualify for BCRA § 403's Procedures Under *McConnell*.

Because (1) plaintiffs' claims qualify under BCRA § 403's judicial-review criteria, *see supra* Part I, and (2) this Court has convened three-judge courts in cases challenging the same and similar sections of BCRA, *see supra* Part II, this case qualifies for BCRA § 403's judicial-review provisions and a three-judge court should be convened. However, plaintiffs also address the Article III standing problem with the "[Ron] Paul plaintiffs" in *McConnell* to demonstrate that the problem there does not apply here.

In *McConnell*, a three-judge court had been convened under BCRA § 403(a) to address a challenge to BCRA § 307 for increasing certain contribution limits and indexing them for inflation. 540 U.S. at 226. The claims of two groups of plaintiffs—the "Adams plaintiffs" and the "Paul plaintiffs"—to BCRA § 307 had been dismissed by the three-judge court below because they lacked standing. *See id.* at 229. The Paul plaintiffs' challenge is relevant here.

The Paul plaintiffs asserted a First Amendment "Freedom of Press Clause" violation because they were subject to contribution limits but the institutional media were not, and, they claimed, "their political campaigns and public interest advocacy involve[d] traditional press activities and that, therefore, they [we]re protected by [the free-press right]." *Id.* at 228. The reason the Court found that the Paul plaintiffs lacked Article III standing was that Congress had increased the limits they challenged in BCRA § 307 and left the media-exemption provisions in place, so that if the Paul plaintiffs succeeded in striking the BCRA limits "both the limitations imposed by FECA and the exemption for news media would remain unchanged." *Id.* at 229.[6]

[6] BCRA § 401 provides that "[i]f any provision . . . or amendment made by [BCRA], or the application of a provision or amendment to any person or circumstances, is held to be unconsti-

Thus, a victory would not redress their complaint. *Id.* So "although the Court *ha[d] jurisdiction to hear a challenge to § 307*," *id.* (emphasis added), the Paul plaintiffs lacked standing to challenge the increase in, and inflation-indexing of, contribution limits in BCRA, as they had done. Without Article III standing, there was no more the Court could do, and it dismissed the challenge. *Id.*

As part of its analysis, the *McConnell* Court indicated that any challenge to the FECA provisions (which it seemed to suggest might apply if the BCRA changed limits were held unconstitutional) would have to be brought under the judicial-review provisions of FECA, not BCRA:

> The Paul plaintiffs cannot show the "'substantial likelihood' that the requested relief will remedy [their] alleged injury in fact," [*Vermont Agency of Natural Resources v. United States ex rel.*] *Stevens*, 529 U.S. [765,] 771 [(2000)]. The relief the Paul plaintiffs seek is for this Court to strike down the contribution limits, removing the alleged disparate editorial controls and economic burdens imposed on them. But § 307 merely increased and indexed for inflation certain FECA contribution limits. This Court has no power to adjudicate a challenge to the FECA limits in this case because challenges to the constitutionality of FECA provisions are subject to direct review before an appropriate en banc court of appeals, as provided in 2 USC § 437h, not in the three-judge District Court convened pursuant to BCRA § 403(a). Although the Court has jurisdiction to hear a challenge to § 307, *if the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the Paul plaintiffs' alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged*. A ruling in the Paul plaintiffs' favor, therefore, would not redress their alleged injury, and they

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tutional, the remainder . . . shall not be affected . . . ." 116 Stat. 112.

One possible reading of *McConnell* here is that, if there is a preexisting FECA statute for which the amount of a contribution limit has been altered by BCRA, if the raised (and inflation-indexed) limit is held unconstitutional facially, the preexisting FECA statute would spring into effect. That does not seem to be what BCRA § 401 provides, *supra*, but it is not necessary to decide whether such springing actually occurs. In this *as-applied* challenge, the base contribution limits at BCRA §§ 102 and 307 would not be held unconstitutional facially, leaving them in place for contributions other than to an NCA. So there could be no springing FECA provision in any event. And anyway, BCRA § 102 imposes an entirely new base limit on contributions to state-party committees, so even striking it facially (though plaintiffs seek only an as-applied holding) could not trigger a prior FECA provision to spring into effect. *See supra* note 3.

At this time, plaintiffs express no opinion on whether, or in what circumstances, judicial invalidation of a BCRA provision would resurrect a preexisting FECA provision or, instead, would render the code provision "a legal nullity in all its iterations, as assumed by *Bluman v. FEC*, 766 F.Supp.2d 1, 4 (D.D.C. 2011) (mem. op.).

> accordingly lack standing. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 105-110 (1998).

Id. (emphasis added).

The *McConnell* Court did *not* say that if BCRA "merely increased . . . FECA contribution limits," *id.*, then a BCRA amendment was not *really* a BCRA amendment that could be reviewed by a three-judge court. This is clear because the Court clearly said that "the Court *has jurisdiction* [on appeal under the BCRA judicial-review provision] *to hear a challenge to § 307*." *Id.* (emphasis added). Section 307 was about raising and inflation-adjusting contribution limits. And it is also clear from BCRA § 403 itself, which provides the BCRA judicial-review provision for a "challenge [to] the constitutionality of . . . *any amendment* made by [BCRA]." 116 Stat. 113-14 (emphasis added). Thus, saying that BCRA "amendments" to FECA are not "amendments" reviewable under BCRA § 403 would be contrary to the plain statutory words.[7]

So what the *McConnell* Court apparently meant, *see* 540 U.S. at 229, was that, *if* striking BCRA contribution limits would leave FECA provisions in place, a challenge to the underlying FECA limits would *also* be required to redress the Paul plaintiffs' harm, and that could not be done under BCRA's judicial-review provisions. In short, the Paul plaintiffs' problem was that they lacked Article III standing due to redressability problems, not that BCRA § 307 can't be challenged under BCRA 403's judicial-review provisions.[8]

Thus, for the present plaintiffs who *have* Article III standing to challenge a provision of BCRA § 307 as applied, BCRA § 403's judicial-review provision is properly employed. So

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[7] In any event, the base limit on contributions to state-party committees, challenged here as applied to a state-party committee's NCA, was established by BCRA § 102, which did not merely raise an existing base limit but rather created a new one. *See supra* note 3.

[8] The Court was clear that it had BCRA jurisdiction over § 307 and that the Paul plaintiffs' lacked Article III standing, so it is unnecessary to determine anything else about this part of its *McConnell* opinion.

McConnell's analysis does not deprive the present plaintiffs of standing or make BCRA's judicial-review provision inapplicable.

Plaintiffs' claim here is similar to the *McConnell* claim in one respect only: the three-judge district court "has jurisdiction to hear a challenge to § 307." *McConnell*, 540 U.S. at 229. Otherwise, it is distinguishable because, "[u]nlike *McConnell*, if a three-judge court were to strike down [2 U.S.C. § 441a(a)(1)(B) and (D) as applied] . . . then no other [statutory] law . . . would prohibit the plaintiffs from . . . their desired conduct," *Bluman*, 766 F.Supp.2d at 4, other than the soft-money ban at BCRA § 101, which is unquestionably subject to BCRA § 403's judicial-review provisions. In other words, plaintiffs have standing to assert their claims because "if the court were to strike down" the challenged soft-money ban and base contribution limits, as applied, that would redress Plaintiffs' injury without requiring consideration of the preexisting FECA language. *Cf. McConnell*, 540 U.S. at 229; *Schonberg v. FEC*, 792 F.Supp.2d 14, 19 (D.D.C. 2011) (three-judge court) (per curiam). And as noted above, *see supra* note 6, in this *as-applied* challenge the base contribution limits at BCRA §§ 102 and 307 would not be held unconstitutional facially, leaving them in place for contributions to political-party committees for purposes other than for independent communications through NCAs. Thus, there could be no FECA base contribution limits coming into effect if the BCRA base contribution limits are held unconstitutional as applied to political-party committees' NCAs.

IV. *Schonberg v. FEC* Is Distinguishable and Incorrect, if Wrongly Interpreted.

Schonberg involved a pro se challenge to BCRA § 301, which "set forth the permissible and impermissible uses of campaign contributions accepted by successful candidates for federal office." *Schonberg*, 792 F.Supp.2d at 18. BCRA § 301 amended FECA § 313 by striking the

FECA language in its entirety and replacing it. 116 Stat. 95.[9] However, the new section was "essentially the same" as the prior FECA language. 792 F.Supp.2d at 18. The court stressed this point in its opinion, noting that the amendment had merely codified the extant FEC regulations on the use of campaign funds for personal expenses. *Id.*

The plaintiff, who litigated pro se, was a non-incumbent congressional candidate who brought constitutional challenges against provisions of FECA and BCRA, alleging facial violations of the Due Process, Equal Protection, Emoluments, Appointments, and Congressional Compensation Clauses of the U.S. Constitution. *Id.* at 15-16. The plaintiff's alleged injury stemmed from "the purported competitive advantages BCRA and FECA afforded" the incumbent Congressman who had defeated plaintiff previously and who plaintiff planned to challenge again. *Id.* at 15. While he originally challenged multiple BCRA sections, the plaintiff abandoned all BCRA challenges except to § 301, which he alleged provided incumbents with an unconstitutional advantage in federal elections because they could use certain official perks to the practical benefit of their reelection campaigns. *Id.* at 19.

The three-judge panel granted FEC's motion to dissolve the three-judge court, holding that it "lack[ed] jurisdiction to consider Schonberg's BCRA claim." *Id.* at 14. The panel provided "twin rationales," *id.* at 18, for its decision: (1) that Schonberg failed to state a claim under BCRA § 403's judicial-review procedures, *id.* at 18-19, and (2) that he had "not shown the injuries he alleges . . . would be redressed by a favorable decision of this court holding BCRA 301 unconstitutional," *id.* at 19.

[9] BCRA § 301, titled "Use of Contributed Amounts for Certain Purposes," codified at 2 U.S.C. § 439a, permits federal candidates to use campaign contributions for various expenditures, expenses, contributions, transfers, and "any other lawful purpose" not prohibited. The prohibitions includes "any . . . personal use," including expenses "that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." *Id.*

(1) Regarding qualification for a three-judge court under BCRA § 403, the *Schonberg* decision is distinguishable from plaintiffs' present claims. The panel said BCRA § 301 had merely codified FEC's extant regulations and was "essentially the same" as the FECA section it replaced. *Id.* at 18. As discussed above, *McConnell* said the Supreme "Court has jurisdiction to hear a challenge to § 307," 540 U.S. at 229, so the Court was merely saying that *if* prior FECA provisions sprang into effect if BCRA amendments were overturned, the FECA challenges would be required. *See supra* at 7-8. But there could be no springing FECA provisions here for two reasons. First, BCRA §§ 101 and 102 were brand new provisions, i.e., there would be no older FECA provision that could spring into effect if a later amendment were held unconstitutional. Second, the present challenges to BCRA §§ 101, 102, and 307 are *as-applied* challenges, under which all three provisions would remain in place but be unconstitutional as applied to political-party committees' NCAs. So the analytical underpinning of a possible interpretation of *McConnell* as positing springing FECA provisions is simply absent, leaving only its holding that the Supreme Court and (consequently) this Court, "ha[ve] jurisdiction to hear a challenge to § 307, 540 U.S. at 229, under BCRA § 403's judicial procedures.

(2) Regarding the redressability necessary for Article III standing, the *Schonberg* decision is distinguishable from plaintiffs' present claims. The scope of a plaintiff's alleged injury in fact determines what is necessary to redress the injury. *See McConnell*, 540 U.S. at 227 (noting that standing "often turns on the nature and source of the claim asserted"). Schonberg filed an incredibly broad pro se complaint. Alleging that he suffered a competitive disadvantage *vis-a-vis* incumbents, he leveled claims against numerous FECA provisions and even the statute governing the "Representational Allowance for Members of House of Representatives" (2 U.S.C. § 57(b)), in addition to requesting invalidation of BCRA § 301. *Schonberg*, 792 F.Supp.2d at 15-18.

As discussed above, *Schonberg* decided that if there were a springing FECA provision then the case would not qualify for BCRA § 403's judicial-review provisions. But in deciding Article III standing, *Schonberg* considered the other alternative: that invalidation of the BCRA provision would not give renewed effect to the language it had replaced, but would simply nullify the corresponding code provision. *Schonberg*, 792 F.Supp.2d at 19. This option would not redress Schonberg's claimed injuries:

> Alternatively, assuming that holding BCRA § 301 unconstitutional would render 2 U.S.C. § 439a a legal nullity in all its iterations, this result would not further Schonberg's goal of more stringent regulation of the federal campaign finance system and elimination of the alleged competitive advantages for incumbent federal candidates… . Schonberg has made no showing that federal candidates, free from the constraints imposed by 2 U.S.C. § 439a, would be *more* restricted in their use of campaign funds or that the Constitution itself forbids the pecuniary evils of the federal campaign finance system that he alleges persist. To the contrary, removing these limits would exacerbate, rather than remedy, the perceived ills.

Id. at 19 (emphasis supplied by the Court). The ineluctable conclusion was that Schonberg lacked standing because, regardless of the consequence of invalidating the BCRA provision at issue, neither alternative would redress his alleged injury in fact by setting him on par with incumbents.

By contrast, plaintiffs' injuries here are readily redressed by holding that the soft-money ban provisions at BCRA § 101 and the base contribution limits at BCRA §§ 102 and 307 are unconstitutional as applied. Therefore, plaintiffs have Article III standing to assert their challenges.

In sum, *Schonberg* is readily distinguishable from the present case as to both jurisdiction under BCRA § 403 and standing under Article III.

However, though *Schonberg* is distinguishable, it is helpful to further examine the decision's analysis. *Schonberg* addressed alternative theories of the effect of overturning a BCRA provision. The possible alternatives are that, where a BCRA provision replaces a substantially

similar FECA provision:

(1) a challenge to the BCRA decision is really just a challenge to a FECA provision;

(2) holding the BCRA provision unconstitutional causes (or might cause) the FECA provision to spring back into effect; or

(3) holding the BCRA provision unconstitutional also leaves the FECA provision a nullity and presumably unconstitutional to the extent it is like the BCRA provision.

Because alternative (3) is clear from the *Schonberg* block quote above, i.e., "holding BCRA § 301 unconstitutional would render 2 U.S.C. § 439a a legal nullity in all its iterations," 792 F.Supp.2d at 19, we shall consider it first. In other words, this alternative says that striking a BCRA provision that is substantially like a preceding FECA provision is not really striking a FECA provision and does not resurrect the prior FECA provision. *Schonberg* held that even under this alternative Schonberg lacked Article III standing. Given that holding, the court's position on any other alternative was unnecessary to the court's decision because, in any event, Schonberg lacked Article III standing due to a lack of redressability.

Thus, any opinion of the court on the other alternatives was obiter dictum because it was unnecessary to the court's decision. However, we shall briefly consider alternatives (1) and (2) above to complete the analysis.

Under alternative (1), if *Schonberg* is interpreted as saying challenges to BCRA provisions substantially like FECA provisions are really *FECA* challenges (and so not subject to BCRA § 403's judicial-review provisions), there are two problems. First *McConnell* stated expressly that the Supreme Court had statutory jurisdiction to consider the Paul plaintiffs' BCRA challenge. *Id.* ("*Although the Court has jurisdiction to hear a challenge to § 307,* if the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the . . .

alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged." (emphasis added)). Second, in *McCutcheon*, this Court convened a three-judge court to consider a provision of BCRA § 307 that substituted an increased aggregate limit for a FECA aggregate limit that had been in place for years and had been upheld in *Buckley v. Valeo*, 424 U.S. 1, 38 (1976). The Supreme Court in *McCutcheon* noted its jurisdiction under BCRA § 403 and held the aggregate limits unconstitutional. 134 S.Ct. at 1443, 1462. If *Schonberg* were interpreted as requiring that BCRA provisions that are substantially similar to FECA provisions may not be considered under BCRA § 403's judicial-review provisions, that interpretation would conflict with *McConnell* and *McCutcheon*. It would also be contrary to the language of BCRA itself, § 403(a) of which provides jurisdiction to adjudicate constitutional challenges to "any provision" of BCRA or "any amendment made by" BCRA, and to this court's earlier holding in *Bluman*, 766 F.Supp.2d 1.

Under alternative (2), if *Schonberg* were interpreted as saying that where a substantially similar BCRA provision is held unconstitutional then the FECA provision would (or might) spring into effect, that would be a problematic interpretation, but at least it would partake of the same problem as interpreting *McConnell* in this way. *See supra* at 7-8. In any event, as already shown, the present case is distinguishable from *Schonberg* and alternatives (1) and (2) were unnecessary to *Schonberg* and so neither is controlling here.

V. Supplemental Jurisdiction, 28 U.S.C. § 1367, Is Invoked if Required.

As set out above, all challenged provisions are BCRA provisions/amendments and so qualify for BCRA § 403's judicial-review provisions. But if this Court concludes that any challenged provision does not so qualify, then plaintiffs invoke supplemental jurisdiction under 28 U.S.C. § 1367, under which the three-judge court may consider all related challenges. Section 1367(a)

provides that "in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III . . . ."[10]

In *Lake Carriers Association v. Macmullan*, 406 U.S. 498 (1972), the Supreme Court recognized such supplemental jurisdiction for a three-judge court where it has jurisdiction of related claims:

> The District Court also noted that "(w)ith regard to pre-emption, the Supreme Court in Swift & Co. v. Wickham, 382 U.S. 111 (1965), held that Supremacy Clause cases are not within the purview of a three judge court." 336 F.Supp., at 253. Appellants correctly point out that in reinstating that rule, *Wickham made clear that a three-judge court is the proper forum for all claims against the challenged statute so long as there is a nonfrivolous constitutional claim that constitutes a justiciable controversy* and warrants, on allegations of irreparable harm, consideration for injunctive relief. See 382 U.S., at 122 n. 17, 125, 86 S.Ct., at 264, 266. Indeed, that was the explicit holding in Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80-81 (1960), reaffirming prior cases. *It is clear that appellants' complaint satisfies this test if the constitutional issues raised are justiciable controversies. Since we hold, infra, that they are, three-judge court jurisdiction exists over all of appellants' claims, including the Supremacy Clause issues.*

Id. at 504 n.5 (emphasis added).[11]

In *Schonberg*, the three-judge BCRA court cited this footnote in acknowledging that if the plaintiff in that case had standing, so that the three-judge court had jurisdiction, it could have addressed his other claims under supplemental jurisdiction:

> The . . . complaint fails to identify a constitutional BCRA claim over which this court has jurisdiction under BCRA § 403(a); nor has Schonberg shown the injuries he alleges in the second amended complaint would be redressed by a favorable decision of this court hold-

[10] "The supplemental-jurisdiction statute, which became law in 1990, . . . codified pendent and much of ancillary jurisdiction[.]" *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 454 (6th Cir. 1996) (internal citations omitted).

[11] Supplementary jurisdiction for three-judge courts has been recognized by several courts where a three-judge court is properly convened. *See, e.g.*, *Adams v. Clinton*, 40 Fed.Supp.2d 1, 4 (D.D.C. 1999).

> ing BCRA § 301 unconstitutional. *In the absence of jurisdiction, this court cannot address Schonberg's MRA claim concurrently with his BCRA claim* because, as he asserts, they are inextricably intertwined. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n. 5 (1972) (holding that ancillary claims are properly before three-judge district court "so long as there is a nonfrivolous constitutional claim that constitutes a justiciable controversy"). *See generally* Wright & Miller § 4235, at 222–23.

792 F.Supp.2d at 19-20 (emphasis added).

In the present case, any claims that are arguably not BCRA claims are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III," 28 U.S.C § 1367, i.e., they involve "a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). For example, if the challenged BCRA base limit on contributions to national-party committees, codified at 2 U.S.C. § 441a(a)(1)(B), were deemed a non-BCRA provision, a three-judge BCRA court would have supplementary jurisdiction over the challenge to it because the challenge to that base limit is part of plaintiffs' challenge to provisions preventing political-party committees from having an NCA.

In sum, if this Court deems any challenged provision not to be a BCRA provision, then a three-judge court should yet be convened because the three-judge court would have supplementary jurisdiction to consider a constitutional challenge to that provision.

As required by local rule, a draft *Order Granting Application for Three-Judge Court* accompanies this motion. However, in *McCutcheon*, this Court instead issued a *Notification of Request for a Three-Judge Court*, which is available as Document 10 in Civil Action No. 12-1034.

Plaintiffs have conferred with opposing counsel regarding this motion, and they oppose this motion. LCvR 7(m).

Respectfully submitted,

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Certificate of Service

I hereby certify that two extra copies of the foregoing document were sent to the clerk's office by mail on May 30, 2014, *cf.* Doc. 3 at 16, and that the foregoing document was served on May 30, 2014, on the following by this Court's electronic case filing service ("ECF") (as applicable), and by mail and email to:

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/s/ James Bopp, Jr.
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