

**United States District Court
District of Columbia**

Republican National Committee,
310 First Street, SE
Washington, D.C. 20003,

California Republican Party,
1201 K. Street #740
Sacramento, CA 95814,

Robert M. (Mike) Duncan,
Chairman, Republican National Committee
310 First Street, SE
Washington, D.C. 20003,

Republican Party of San Diego County,
5703 Oberlin Dr., Suite 107
San Diego, CA 92121

Plaintiffs,

v.

Federal Election Commission,
999 E Street, NW
Washington, DC 20463,

Defendant.

Case No. _____

THREE-JUDGE COURT

Complaint for Declaratory and Injunctive Relief

Republican National Committee (“RNC”), Robert M. (Mike) Duncan, California
Republican Party, and Republican Party of San Diego County complain as follows:

Introduction

1. This is an as-applied challenge to the constitutionality of portions of § 101 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81, 82-86, which added a new § 323 (entitled “Soft Money of Political Parties”) to the Federal

Election Campaign Act (“FECA”). The challenged provisions are codified at 2 U.S.C. § 441i.

2. Plaintiffs challenge 2 U.S.C. § 441i’s prohibition on soliciting, receiving and spending funds not subject to the source and amount limitations of FECA, as applied to their intended activities. This prohibition will herein be called the “Federal Funds Restriction” for ease of identification. Plaintiffs do not challenge 2 U.S.C. § 441i’s prohibition on soliciting, receiving and spending funds not subject to the reporting requirements of FECA.

3. The Federal Funds Restriction bans state, local and district committees of a political party and their officials from using funds subject only to state source and amount limitations (“state funds”) to engage in “federal election activity.” 2 U.S.C. § 441i(b)(1). State political parties may only use funds subject to FECA’s source and amount restrictions (“federal funds”) for this activity. *Id.* “Federal election activity” is defined to include (1) voter registration activity in the 120 days leading up to a federal election, (2) “voter identification, get-out-the-vote activity or generic campaign activity” in connection with elections for federal office, and (3) public communications that identify and “promote,” “attack,” “support,” or “oppose” (“PASO”) a federal candidate. 2 U.S.C. § 431(20). “Generic campaign activity” is further defined as “campaign activity that promotes a political party and does not promote a candidate or non-federal candidate.” 2 U.S.C. § 431(21). The “PASO” terms are undefined.

4. The Federal Funds Restriction bans *national* committees of a political party and their officials from soliciting or using “state funds” or any type of “non-federal funds,” *i.e.* funds not subject to federal source and amount limitations, regardless of the purpose to which the funds will be put. National parties are restricted to soliciting and using only federal funds.

2 U.S.C. § 441i(a).

5. The Supreme Court requires that federal campaign finance laws be “unambiguously related to the campaign of a particular federal candidate.” *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). This threshold requirement assures that the law’s “relation . . . to the purposes of [FECA]” (i.e., to regulate elections), is not “too remote,” making the provision “impermissibly broad.” *Id.* The sole authority that permits restriction of First Amendment activity in this area is Congress’ authority to regulate federal elections. *Id.* at 13-14 & n.16 (citing, inter alia, U.S. Const. art. I, § 4). So all federal campaign laws must limit only those First Amendment activities that are “unambiguously [federal] campaign related,” *id.* at 81, to assure that the laws are not too remotely related to their authority.

6. This threshold unambiguously-campaign-related requirement was recognized in *McConnell v. FEC*, in its analysis upholding the Federal Funds Restriction facially, where it required that the activity restricted by the Restriction must “benefit *directly* federal candidates.” 540 U.S. 93, 170 (2003) (emphasis added). It was reaffirmed in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) (“*WRTL II*”) (“an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”), 2672-73 (corporate-form corruption interest does not “extend[] beyond campaign speech” to issue advocacy). *WRTL II* also said that all doubts or ties in applying its no-other-reasonable-interpretation test must be resolved in favor of the speaker. *Id.* at 2666, 2669 n.7, 2674.

7. The unambiguously-campaign-related requirement has recently been recognized and applied by the Fourth Circuit Court of Appeals and three district courts. *See North*

Carolina Right to Life v. Leake, 525 F.3d 274, 282 (4th Cir. 2008) (“Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related”); *Nat’l Right to Work Legal Def. and Educ. Found., Inc. v. Herbert*, No. 2:07-cv-809, 2008 WL 4181336, *10 (D. Utah Sept. 8, 2008) (“[T]he government possesses a substantial interest in the regulation of political speech only when that political speech is unambiguously campaign related”); *Center for Individual Freedom v. Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268 (S.D. W. Va. Oct. 17, 2008) (same); *Broward Coalition of Condos., Homeowners Ass’ns and Cmty. Orgs. v. Browning*, No. 08-445, slip op. (N.D. Fla. Oct. 29, 2008) (same).

8. Plaintiffs plan to use state funds and non-federal funds to engage in First Amendment activities that are not “unambiguously related to the campaign of a particular federal candidate,” *Buckley*, 424 U.S. at 80, but they are prohibited by the Federal Funds Restriction. Plaintiffs will not proceed as planned without the relief herein requested. The Federal Funds Restriction is unconstitutional as applied to these activities.

Jurisdiction and Venue

9. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 2201, as well as BCRA § 403, 116 Stat. at 113-14, because Plaintiffs “elect[] such provisions to apply to this action.” BCRA § 403(d)(2), 116 Stat. at 114.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and BCRA § 403, 116 Stat. at 113-14.

Parties

11. Plaintiff Republican National Committee “ha[s] the general management of the

Republican Party, subject to direction from the national convention.” Rule 1, *Rules of the Republican Party* (2004). It is “[a] national committee of a political party” under 2 U.S.C. § 441i(a).

12. Plaintiff California Republican Party is the state Republican Party of California. It is “a State . . . committee of a political party” under 2 U.S.C. § 441i(b)(1).

13. Plaintiff Republican Party of San Diego County is a “local committee of a political party” under 2 U.S.C. § 441i(b)(1).

14. Plaintiff Robert M. (Mike) Duncan is the National Committeeman of the Kentucky Republican Party and the RNC Chairman, in which capacity he is RNC’s chief executive officer.

15. Defendant Federal Election Commission (“FEC”) is the government agency with enforcement authority over FECA.

Facts

16. RNC intends to (a) create a **New Jersey Account** for state funds subject to New Jersey state law, (b) solicit funds into the account under New Jersey state law, and (c) use those state funds to support state Republican candidates in the November 10, 2009 election. There are no federal candidates on the 2009 ballot in New Jersey. RNC intends to support the Republican gubernatorial candidate as well as Republican candidates for the State Assembly and Senate. This support would include, among other activities, communications expressly advocating the election and defeat of state candidates, contributions to the campaigns of state candidates, and contributions to the political parties involved. RNC is ready and able to do this activity, and it would do this activity but for the fact that the Federal Funds Restriction

makes it a crime. This activity, however, is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Unless RNC is able to obtain the timely judicial relief requested herein, it will not do this activity. RNC intends to solicit and use state funds in materially similar situations in the future, if permitted.

17. RNC intends to (a) create a **Virginia Account**, for state funds subject to Virginia state law, (b) solicit funds into the account under Virginia state law, and (c) use those state funds to support Republican candidates for the November 10, 2009 election. There are no federal candidates on the 2009 ballot in Virginia. RNC intends to support the Republican gubernatorial candidate as well as Republican candidates for the State Assembly. This support would include, among other activities, communications expressly advocating the election and defeat of state candidates, contributions to the campaigns of state candidates, and contributions to the political parties involved. RNC is ready and able to do this activity, and it would do this activity but for the fact that the Federal Funds Restriction makes it a crime. This activity, however, is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Unless RNC is able to obtain the timely judicial relief requested herein, it will not do this activity. RNC intends to solicit and use state funds in materially similar situations in the future, if permitted.

18. RNC intends to (a) create a **Redistricting Account**, for non-federal funds and state funds subject to state law, (b) solicit funds into the account under applicable state laws, and (c) use those state funds to support the redistricting efforts of various states Republican parties following the 2010 census. RNC intends to provide logistical support to the parties and state legislators involved in redistricting, e.g., computer redistricting software, litigation

support, as well as direct support or opposition to related state initiatives and litigation support, if necessary. This activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. RNC is ready and able to do this activity, and it would do this activity but for the fact that the Federal Funds Restriction makes it a crime. Unless RNC is able to obtain the timely judicial relief requested herein, it will not do this activity. RNC intends to solicit and use non-federal funds and state funds in materially similar situations in the future, if permitted.

19. RNC intends to (a) create a **Grassroots Lobbying Account**, for non-federal funds, (b) solicit non-federal funds into the account and (c) use those funds to support grassroots lobbying efforts for federal legislation and issues important to the Republican Party’s platform. This activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. RNC is ready and able to do this activity, and it would do this activity but for the fact that the Federal Funds Restriction makes it a crime. Unless RNC is able to obtain the timely judicial relief requested herein, it will not do this activity. RNC intends to solicit and use non-federal funds in materially similar situations in the future, if permitted.

20. RNC intends to (a) create several **State Elections Accounts**, for state funds, (b) solicit state funds into the account and (c) use those funds exclusively to support state candidates in various states. The funds would be solicited and spent in accordance with the any applicable state law. Support for state candidates from the Fund would include, among other activities, communications expressly advocating the election and defeat of state candidates, contributions to the campaigns of state candidates, and contributions to the state

and local political parties involved. RNC intends to support state candidates from this Fund in elections where only state candidates appear on the ballot and in elections where both federal and state candidates appear on the ballot. This activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. RNC is ready and able to do this activity, and it would do this activity but for the fact that the Federal Funds Restriction makes it a crime. Unless RNC is able to obtain the timely judicial relief requested herein, it will not do this activity. RNC intends to solicit and use non-federal funds in materially similar situations in the future, if permitted.

21. RNC intends to solicit non-federal funds to pay for the present litigation, which activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. RNC wants to solicit non-federal funds into a **Litigation Account** to be used solely for paying the fees and expenses attributable to this case. RNC is ready and able to do this activity, and it would do this activity but for the fact that the Federal Funds Restriction makes it a crime. Unless RNC is able to obtain the timely judicial relief requested herein, it will not do this activity. RNC intends to solicit and use non-federal funds in materially similar situations in the future, if permitted.

22. RNC Chairman Duncan intends to **(1)** solicit people to contribute state funds and non-federal funds to RNC’s New Jersey Account, Virginia Account, Redistricting Account, Grassroots Lobbying Account, State Elections Accounts and Litigation Account, **(2)** solicit people to contribute state funds to the California Republican Party, and **(3)** solicit people to contribute state funds to the campaigns of Republican candidates for state office appearing on the November 2009 ballot in New Jersey and Virginia. Chairman Duncan intends to make the

described solicitations in his official capacity as RNC Chairman on behalf of RNC, i.e., as an “officer or agent acting on behalf of such a national committee.” 2 U.S.C. § 441i(a)(2). Mr. Duncan’s solicitation of funds for the RNC accounts described above, state parties, and state candidates’ campaigns is not “unambiguously related to the campaign of a particular *federal* candidate.” *Buckley*, 424 U.S. at 80 (emphasis added). He is ready and able to do this activity, and he would do this activity but for the fact that the Federal Funds Restriction makes it a crime. Unless he is able to obtain the timely judicial relief requested herein, he will not do this activity. Chairman Duncan intends to solicit state funds and non-federal funds in materially similar situations in the future, if permitted.

23. California Republican Party and Republican Party of San Diego County (collectively “CRP”) intend to use state funds for public communications, 2 U.S.C. § 431(22) (“public communication” definition), to support or oppose the passage of California ballot initiatives appearing on the June 8, 2010 ballot, which involve the issues of property taxes, budget reform, and campaign finance.

24. In past ballot initiative campaigns in California candidates for federal office have publically supported or opposed ballot initiatives. CRP expects this to happen again and intends to mention such federal candidates in its public communications. Although “attack” and “oppose” are undefined in the definition of “federal election activity,” 2 U.S.C. § 431(20)(A)(iii), CRP believes that its public communications will “attack” or “oppose” federal candidates, as these terms are used in the definition of “federal election activity,” and so its communications must be funded with federal funds. 2 U.S.C. § 441i(b)(1). However, CRP’s public communications supporting or opposing state ballot initiatives are not

“unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. CRP is ready and able to do this activity, and it would do so but for the fact that the Federal Funds Restriction makes it a crime. CRP intends to use state funds in materially similar situations in the future, if permitted.

25. CRP also intends to use state funds for voter registration, voter identification, and get-out-the-vote activities, as well as “generic campaign activity,” 2 U.S.C. § 431(21), in future elections where both state and federal candidates appear on the ballot. None of these activities will be targeted to any federal race or federal candidate. Thus, these activities are not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. CRP is ready and able to do these activities, and it would do so but for the fact that the Federal Funds Restriction makes them a crime because they qualify as “Federal election activity” under 2 U.S.C. § 441i(b)(1). Unless it is able to obtain the judicial relief requested herein, CRP will not do these activities. CRP intends to use state funds in materially similar situations in the future, if permitted.

26. In accordance with 2 U.S.C. § 441i(e) no federal candidate or officeholder will solicit, receive, or spend funds in connection with any of the Plaintiffs’ activities described above.

27. As noted after the descriptions of each planned activity, Plaintiffs intend to solicit and use state funds and non-federal funds in materially similar situations in the future, if permitted. There is a strong likelihood that similar situations will recur, given the facts that Plaintiffs have engaged in similar activity in the past and that such activity relating to state candidate elections, ballot initiatives, redistricting, grassroots lobbying and litigation is

common, and regularly recurring.

28. If Plaintiffs do not obtain the requested injunctive relief, they will not proceed with their planned activities. In such an event, they will be deprived of their constitutional rights under the First Amendment to the United State Constitution and will suffer irreparable harm. There is no adequate remedy at law.

Count 1

RNC & Duncan—New Jersey Account

29. Plaintiffs RNC and Duncan reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

30. As applied to the activities that RNC and Chairman Duncan intend to do in connection with the “New Jersey Account,” *supra*, the Federal Funds Restriction is unconstitutional because the activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without authority.

31. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 2

RNC & Duncan—Virginia Account

32. Plaintiffs RNC and Duncan reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

33. As applied to the activities that RNC and Chairman Duncan intend to do in connection with the “Virginia Account,” *supra*, the Federal Funding Restriction is unconsti-

tutional because the activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

34. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 3

RNC & Duncan—Redistricting Account

35. Plaintiffs RNC and Duncan reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

36. As applied to the activities that RNC and Chairman Duncan intend to do in connection with the “Redistricting Account,” *supra*, the prohibition on soliciting and using state funds is unconstitutional because the activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

37. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 4

RNC & Duncan—Grassroots Lobbying Account

38. Plaintiffs RNC and Duncan reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

39. As applied to the activities that RNC and Chairman Duncan intend to do in connection with the “Grassroots Lobbying Account,” *supra*, the Federal Funds Restriction is unconstitutional because the activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

40. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 5

RNC & Duncan—State Elections Accounts

41. As applied to the activities that RNC and Chairman Duncan intend to do in connection with the several “State Elections Accounts,” *supra*, the Federal Funds Restriction is unconstitutional because the activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

42. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 6

RNC & Duncan—Litigation Account

43. Plaintiffs RNC and Duncan reallege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

44. As applied to the activities that RNC and Chairman Duncan intend to do in

connection with the “Litigation Account,” *supra*, the Federal Funds Restriction is unconstitutional because the activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

45. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 7

Duncan—Solicitation for State Candidates and Parties

46. Plaintiff Duncan realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

47. As applied to Chairman Duncan’s intended solicitation of contributions to state parties and state candidates, *supra*, the Federal Funds Restriction is unconstitutional because the activity is not “unambiguously related to the campaign of a particular federal candidate.” *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

48. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 8

CRP—PASO Activities for California Initiatives

49. Plaintiff CRP realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

50. As applied to CRP's intended public communications supporting or opposing California ballot initiatives, *supra*, the Federal Funds Restriction is unconstitutional because the activity is not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

51. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Count 9

CRP —Non-targeted "Federal Election Activity"

52. Plaintiff CRP realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

53. As applied to CRP's intended "Federal election activity" in future elections, which will not targeted at any federal candidate or race, *supra*, the Federal Funds Restriction is unconstitutional because the activity is not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Federal Funds Restriction does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without constitutional authority.

54. As applied to the proposed activities, the Federal Funds Restriction is unconstitutional under the First Amendment guarantees of free speech and association.

Prayer for Relief

Wherefore, Plaintiffs pray for the following relief:

1. a declaratory judgment declaring 2 U.S.C. § 441i unconstitutional in all the as-applied situations in Counts 1-9;
2. a permanent injunction enjoining defendant FEC from enforcing 2 U.S.C. § 441i against Plaintiffs in all the as-applied situations in Counts 1-9;
3. costs and attorneys fees pursuant to any applicable statute or authority; and
4. any other relief this Court in its discretion deems just and appropriate.

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr., Bar #CO0041

/s/ Richard E. Coleson

Richard E. Coleson*

/s/ Clayton J. Callen

Clayton J. Callen*

/s/ Kaylan L. Phillips

Kaylan L. Phillips*

Charles H. Bell, Jr.,
Bell, McAndrews & Hiltachk, LLP
455 Capitol Mall, Suite 801
Sacramento, CA 95814
Tel: (916) 442-7757
Fax: (916) 442-7759
cbell@bmhlaw.com
*Counsel for California Republican Party
and San Diego Republican Party*

BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for all Plaintiffs
*Pro Hac Vice Motion pending